

**REPORTS**  
**OF THE**  
**PUBLIC SERVICE COMMISSION**  
**OF**  
**THE STATE OF MISSOURI**

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**Volume 22 MPSC 3d**

**January 4, 2012 – December 31, 2012**

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**Morris Woodruff**  
Reporter of Opinions

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**JEFFERSON CITY, MISSOURI**  
**(2017)**

## PREFACE

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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 January 4, 2012 through December 31, 2012. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 2016, as amended.

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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**REPORTS OF  
THE PUBLIC SERVICE COMMISSION  
OF THE  
STATE OF MISSOURI**

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**In the Matter of the Application of Union Electric Company, d/b/a Ameren Missouri, for a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Natural Gas Service in Boone County, Missouri.**

**File No. GA-2012-0096**

**Gas. §3. Certificate of convenience and necessity.** The Commission granted the utility a certificate of convenience and necessity to expand its service area based on the unanimous stipulation and agreement of the parties.

**ORDER APPROVING UNANIMOUS STIPULATION  
AND AGREEMENT AND GRANTING CERTIFICATE  
OF PUBLIC CONVENIENCE AND NECESSITY**

Issue Date: January 4, 2012

Effective Date: February 3, 2012

**Syllabus**

This order approves the parties' Unanimous Stipulation and Agreement, and grants Union Electric Company, d/b/a/ Ameren Missouri, a certificate of convenience and necessity to provide natural gas service in a portion of Boone County, Missouri.

**Procedural History**

On September 30, 2011<sup>1</sup>, Ameren Missouri applied to the Missouri Public Service Commission for a certificate of public convenience and necessity to construct, install, own, operate, control, manage and maintain a natural gas distribution system in a portion of Boone County, Missouri. Ameren Missouri asked to serve certain sections in Township 47 North, Range 12 West and Township 46 North, Range 12 West, in Boone County. Ameren Missouri asked to serve that territory because it wishes to strengthen the reliability of the service provided to its natural gas customers in Ashland.

On September 30, the Commission issued an Order and Notice. In that Order and Notice, the Commission directed interested parties to ask to intervene no later than October 20. The Commission received no intervention requests.

<sup>1</sup> Calendar references are to 2011 unless otherwise noted.

On December 14, Ameren Missouri and Staff filed a Unanimous Stipulation and Agreement.<sup>2</sup> Thus, this case may be decided on the basis of a stipulation and agreement without convening a hearing.<sup>3</sup> Because of this stipulation, the Commission need not separately state its findings of fact or conclusions of law.<sup>4</sup>

### Decision

The Commission may grant a certificate of convenience and necessity after determining that the construction and operation are either “necessary or convenient for the public service.”<sup>5</sup> The Commission has stated five criteria that it will use:

- 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.<sup>6</sup>

Based on the pleadings and the Unanimous Stipulation and Agreement, the Commission finds that Ameren Missouri’s application for a certificate of convenience and necessity meets the above listed criteria.<sup>7</sup> The application will be granted.

### THE COMMISSION ORDERS THAT:

1. Union Electric Company, d/b/a Ameren Missouri, is granted a certificate of public convenience and necessity to construct, install, own, operate, control, manage and maintain a natural gas distribution system in the service territory described in Appendix B of the Application.
2. The Commission approves the Unanimous Stipulation and Agreement.
3. The signatories of the Unanimous Stipulation and Agreement shall comply with its terms.
4. This order shall become effective on February 3, 2012.
5. This case may be closed on February 4, 2012.

Gunn, Chm., Jarrett, Kenney, and Stoll, CC., concur.  
Davis, C., abstains.

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.

<sup>2</sup> Curiously, the Office of Public Counsel (“OPC”) has not signed the document entitled Unanimous Stipulation and Agreement. However, Staff states that it has been told that OPC does not oppose the stipulation, and that it will not request a hearing. Furthermore, seven days have elapsed since the agreement was filed, and OPC has not objected, making the stipulation unanimous per Commission Rule 4 CSR 240-2.115(2)(C).

<sup>3</sup> Section 536.060 RSMo Cum. Supp. 2010.

<sup>4</sup> Section 536.090 RSMo Cum Supp. 2010.

<sup>5</sup> Section 393.170, RSMo 2000.

<sup>6</sup> *In re Tartan Energy Company*, 3 Mo.P.S.C. 173, 177 (1994).

<sup>7</sup> The requirement for a hearing is met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. No party requested a hearing in this matter; thus, no hearing is necessary. *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm’n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

**In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Authority to Exchange SO<sub>2</sub> Emissions Allowances for NO<sub>x</sub> Emissions Allowances**

**File No. EO-2012-0158**

**Public Utilities. §7. Jurisdiction and powers of the State Commission** Because Ameren Missouri's application involved a transfer of assets, it is within the Commission's jurisdiction to decide pursuant to Section 393.190, RSMo 2000.

**Accounting. §9. Methods of accounting generally.** Ameren Missouri sought authority for a one-time trade or exchange of the company's excess 2012 SO<sub>2</sub> allowances for some 2012 annual NO<sub>x</sub> allowances. Additionally, Ameren Missouri sought authority to defer to Account 254, Other Regulatory Liabilities, all revenues associated with the SO<sub>2</sub> allowances portion of the exchange and to amortize the amounts deferred to that account concurrently with the company's utilization of the acquired NO<sub>x</sub> allowances. The Commission determined that Ameren Missouri's proposed exchange was not detrimental to the public interest and approved it subject to certain conditions.

**ORDER CONDITIONALLY APPROVING APPLICATION**

Issue Date: January 4, 2012

Effective Date: January 14, 2012

**Background**

On November 22, 2011,<sup>1</sup> Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") submitted an application seeking authority from the Commission for:

- (1) a one-time exchange of 1,050 surplus sulfur dioxide ("SO<sub>2</sub>") emission allowances for 500 annual nitrogen oxide ("NO<sub>x</sub>") emission allowances; an amount sufficient to comply with the requirements of the United States Environmental Protection Agency's ("EPA") Cross-State Air Pollution Rule ("CSAPR"), which takes effect January 1, 2012; and
- (2) authorization to defer to Account 254, Other Regulatory Liabilities, the revenues associated with the SO<sub>2</sub> portion of the proposed exchange of emissions allowances and to amortize the deferred amounts concurrently with the Company's use of the acquired NO<sub>x</sub> allowances.

The Commission directed notice, set a deadline for responses and a deadline for a recommendation from its Staff. On December 23, Staff filed its recommendation. Staff recommended approval of the application subject to certain conditions. No party opposed Staff's recommendation and Ameren Missouri agreed to Staff's proposed conditions.

<sup>1</sup> All calendar dates throughout this order refer to the year 2011 unless otherwise noted.

### **Jurisdiction and Discretionary Authority**

Because Ameren Missouri's application involves a transfer of assets, it is within the Commission's jurisdiction to decide pursuant to Section 393.190, RSMo 2000. Because no law requires a hearing on this application this is a non-contested case.<sup>2</sup> Non-contested cases do not require formal proceedings or hearings before the Commission,<sup>3</sup> and as such, there is no contested case evidentiary record.<sup>4</sup> Being a non-contested case, the Commission "acts on discretion or on evidence not formally adduced and preserved."<sup>5</sup> The competent and substantial evidence standard of Article V, Section 18, Mo. Const., does not apply to administrative cases in which a hearing is not required by law.<sup>6</sup> Consequently, the Commission will exercise its discretion based upon the verified pleadings. There is no requirement for the Commission to make findings of fact when it exercises its discretion in a non-contested case.<sup>7</sup>

<sup>2</sup> Section 536.010(4), RSMo Supp. 2010, defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."

<sup>3</sup> "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.*

<sup>4</sup> *Sapp v. City of St. Louis*, 320 S.W.3d 159, 163 (Mo. App. 2010). "The key to the classification of a case as contested or noncontested is the requirement of a hearing. The term "hearing," as used in section 536.010(4) means a proceeding at which a 'measure of procedural formality' is followed. Procedural formalities in contested cases generally include: notice of the issues (section 536.067); oral evidence taken upon oath or affirmation and the cross-examination of witnesses (section 536.070); the making of a record (section 536.070); adherence to evidentiary rules (section 536.070); and written decisions including findings of fact and conclusions of law (section 536.090)." (Internal citations omitted). *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 507 (Mo. banc 2009). Being a non-contested case, there is no evidence, no record, and no written and separately stated findings of fact. *State ex rel. Public Counsel v. Public Service Comm'n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006); Section 536.090. The decision reached by the Commission is totally a matter of the exercise of its discretion. *Id.* In a non-contested case, judicial review is restricted to determining only whether or not the Commission abused its discretion in denying a hearing (if a hearing was denied) and whether or not the commission's order was lawful. *Id.*

<sup>5</sup> *Public Counsel*, 210 S.W.3d at 353.

<sup>6</sup> *Id.* Moreover, Ameren Missouri is the only party holding a substantive right that could be affected by this decision. Thus, no other party has a substantive due process right requiring a pre-deprivation evidentiary hearing. Utility customers have no vested property rights in utility rates that are protected by the Fifth and Fourteenth Amendments. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 -32 (Mo. banc 1975).

<sup>7</sup> *Id.* at 355.

### **Legal Standard for Approval**

Section 393.190.1 provides, in pertinent part:

No . . . , electrical 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.

Section 393.190.1 does not set a standard for the approval of a proposed transfer of assets; however, the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 395 (Mo. 1934) determined the standard for the PSC's approval was whether the transfer "would be detrimental to the public."<sup>8</sup> This standard does not require the demonstration of the transaction benefiting the public, only that the transaction is not a detriment to the public.<sup>9</sup> This standard is also codified in Commission Rule 4 CSR 240-3.310(1)(D), which requires that applicants seeking approval to transfer assets include in their applications "[t]he reasons the proposed sale of assets is not detrimental to the public interest."

### **Analysis**

Under the EPA's Cross-State Air Pollution Rule ("CSAPR") Ameren Missouri has received 108,672 vintage 2012 SO<sub>2</sub> allowances and 23,261 vintage 2012 annual NO<sub>x</sub> allowances based on the emissions characteristics of its generating facilities. Ameren Missouri will use these allowances to comply, in whole or in part, with the emissions restrictions prescribed by CSAPR; however, it currently believes its initial grant of SO<sub>2</sub> allowances will greatly exceed its 2012 CSAPR compliance requirements and its initial grant of annual NO<sub>x</sub> allowances will barely cover what it will need to comply with that aspect of CSAPR. To provide a prudent margin of annual NO<sub>x</sub> allowances, Ameren Missouri believes it should acquire additional allowances for 2012.

CSAPR allows utilities that have excess SO<sub>2</sub> and NO<sub>x</sub> allowances to sell those allowances. Instead of a cash transaction, Ameren Missouri seeks authority for a one-time trade or exchange one thousand fifty (1,050) of the Company's excess 2012 SO<sub>2</sub> allowances- which represents approximately one percent (1%) of its total allocation of such allowances - for five-hundred (500) 2012 annual NO<sub>x</sub> allowances. Ameren Missouri believes that this is the most efficient and cost-effective way to ensure that it has sufficient SO<sub>2</sub> and NO<sub>x</sub> allowances to remain in compliance with CSAPR requirements.

<sup>8</sup> *City of St. Louis*, 73 S.W.2d at 395 and 400. This case involved a merger subject to approval by the PSC under § 5195, RSMo 1929, a predecessor to § 393.190. See also *State ex rel. AG Processing, Inc. v. Public Service Comm'n of State*, 120 S.W.3d 732, 735 (Mo. banc 2003) and *State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

<sup>9</sup> *Id.*

Additionally, Ameren Missouri seeks authority to defer to Account 254, Other Regulatory Liabilities, all revenues associated with the SO<sub>2</sub> allowances portion of the exchange and to amortize the amounts deferred to that account concurrently with the Company's utilization of the acquired NOx allowances. The net cost of all SO<sub>2</sub> and NOx allowances is part of the formula used to calculate rate changes under the Company's approved fuel adjustment clause ("FAC") tariff. Because the exchange of allowances proposed in this application will not involve an exchange of cash, if Ameren Missouri is granted the deferral authority it seeks in this application amortizations will be made from Account 254 and the net cost of an acquired annual NOx allowance will flow through the FAC in the accumulation period during which the allowance is used. Matching revenues and expenses associated with the exchange of allowances in this manner will ensure that the proposed exchange will have no effect on the Company's FAC-related rates and also that those rates reflect as closely as possible Ameren Missouri's actual net fuel costs.<sup>10</sup>

Staff states that based on Ameren Missouri estimates, the exchange of SO<sub>2</sub> emissions allowances for annual NOx emissions allowances would reduce its excess SO<sub>2</sub> allowances by less than 5% while decreasing its estimated need for additional annual NOx allowances by approximately 27%.<sup>11</sup> Staff also agrees that the accounting treatment Ameren Missouri seeks will result in this non-cash transaction having no effect on the revenues and expenses flowing through its FAC, i.e., it will neither increase nor decrease Ameren Missouri's FAC charge. Staff recommends that the Commission conditionally approve Ameren Missouri's application. Ameren Missouri responded to Staff's recommendation agreeing to the conditions.

### **Decision**

Based on the Commission's independent and impartial review of the filings, the Commission determines that Ameren Missouri's proposed exchange of SO<sub>2</sub> emissions allowances for annual NOx emissions allowance is not detrimental to the public interest and the Commission will approve it subject to the conditions recommended by Staff and accepted by Ameren Missouri.

### **THE COMMISSION ORDERS THAT:**

1. Union Electric Company d/b/a Ameren Missouri's application is approved subject to the following conditions:
  - a.) approval of this transaction and accounting treatment sought in Ameren Missouri's application is not determinative of any future ratemaking;
  - b.) approval of this transaction and accounting treatment does not bind anyone from challenging any aspect of the prudence of the transaction;

<sup>10</sup> Procedures already in place to monitor the operation of the FAC, i.e., routine reviews of proposed rate changes, annual true-ups, and periodic prudence reviews - will allow the Commission, the Staff, and other interested parties to monitor and review both the timing and amount of disbursements from the deferred account to ensure that they comply with the authority granted by the Commission in this case.

<sup>11</sup> The exact amount of SO<sub>2</sub> and annual NOx allowances Ameren Missouri will need for 2012 will not be known until early 2013.

c.) approval is granted only for the limited transfer requested in Ameren Missouri's application; and,

d.) Ameren Missouri shall request authorization from the Commission prior to closing any other transactions to sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber any CSAPR SO<sub>2</sub>, seasonal NO<sub>x</sub>, or annual NO<sub>x</sub> emission allowance(s).

2. This order shall become effective January 14, 2012.

3. This file shall close on January 15, 2012.

Gunn, Chm., Jarrett, Kenney, and  
Stoll, CC., concur; Davis, C., abstains.

Harold Stearley, Deputy Chief Regulatory  
Law Judge

**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).** The Commission established ending balances for the 2009-2009 ACA period.

**ORDER ESTABLISHING ENDING ACA BALANCES**

Issue Date: January 18, 2012

Effective Date: January 20, 2012

On December 21, 2011, the Commission issued a report and order regarding Atmos Energy Corporation's 2008-2009 Actual Cost Adjustment. That report and order, which will become effective on January 20, 2012, rejected the disallowances proposed by Staff, but did not establish the amount of Atmos' ending ACA balances for the 2008-2009 period. Instead, the Report and Order directed Staff to file a revised recommendation clearly stating the ending ACA balances, taking into account the adjustments ordered in the December 21 report and order, as well as the earlier report and order in File No. GR-2008-0364 concerning the 2007-2008 ACA period.

Staff filed its revised recommendation on January 6. Staff explains that the ending ACA balances for the 2008-2009 period are affected not only by the report and order in this file and in GR-2008-0364, but also by the resolution of Atmos' 2006-2007 ACA period adjustment in File No. GR-2007-0403. Staff also explained that the Commission failed to take the adjustments in GR-2007-0403 into account when it established final balances for the 2007-2008 period in GR-2008-0364. Taking all three ACA periods into account, Staff recommended the Commission establish the final ACA balances set forth in Appendix B as its modified revised recommendation for the 2008-2009 period.

After Staff filed its revised recommendation, the Commission ordered that any party wishing to respond to that recommendation do so no later than January 12. Atmos filed its response on January 10. No other party responded. Atmos concurs with Staff's modified revised recommendation as set forth in Appendix B to Staff's January 6 filing.

Staff's modified revised recommendation properly takes into account the ACA balances established for the 2006-2007 and 2007-2008 ACA period. The Commission accepts the ending balances recommended by Staff in its Appendix B.

The report and order the Commission issued in this case will become effective on January 20. The Commission will also make this order effective on January 20 so that in combination, this order and the prior report and order will finally resolve all issues in this case and allow any party that wishes to do so to file a single application for rehearing.

**THE COMMISSION ORDERS THAT:**

1. The ending (over)/under recovery balances for Atmos' 2008-2009 Actual Cost Adjustment are established as provided in the following table:

ATMOS ENERGY CORPORATION

Description	Company's 8/31/09 Ending ACA Balances Per 8/09 filing	Scheduling Fee	Prior Period Adjust-ment	Mo. School Recovery	Cashout	Neely-ville & Butler Addition	Staff Recommend-ed ACA Balance for 8/09
<b>SEMO</b>							
Demand ACA	(\$634,905)						(\$634,905)
Commodity ACA	(\$3,762,136)	\$8,531		(\$3,580)	(\$16,459)	(\$2,579)	(\$3,776,223)
<b>Kirksville</b>							
Demand ACA	\$22,071						\$22,071)
Commodity ACA	(\$896,044)	\$1,570		(\$797)	(\$1,119)		(\$896,390)
<b>West</b>							
Demand ACA	\$44,403						\$44,403
Commodity ACA	(\$718,360)	\$0	(\$1,621)			(\$18,494)	(\$738,475)
<b>NEMO</b>							
Demand ACA	\$33,803						\$33,803
Commodity ACA	(\$2,549,115)	\$2,725	(\$30,000)	(\$2,270)	(\$26,188)		(\$2,604,848)

SEMO now includes Neelyville  
 West now includes Butler and Greeley areas

2. This order shall become effective on January 20, 2012.

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

Woodruff, Chief Regulatory Law Judge

**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).

**In the Matter of the Application of Southern Union Company for the Issuance of an Accounting Authority Order Relating to its Natural Gas Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2)**

**File No. GU-2011-0392**

**Evidence, Practice and Procedure. §1 Generally.** *Stare decisis* does not bind the Commission to past Commission decisions

**Accounting. §42 Accounting Authority Orders.**

**Gas. §34 Accounting Authority orders.** The tornado that struck Joplin in May 2011 was extraordinary and justified the issuance of an AAO to defer recording of capital and O & M expenses associated with the damages caused by the tornado.

**Gas. §34 Accounting Authority orders.** Deferral of an expense through an AAO does not require a showing that the expense will probably be recovered in the company's next rate case. Questions of recovery will be decided in that rate case.

**Gas. §34 Accounting Authority orders.** Revenue not generated because of damage resulting from the tornado may not be deferred through an AAO.

**REPORT AND ORDER**

Issue Date: January 25, 2012

Effective Date: February 24, 2012

**FINAL DECISION GRANTING IN PART, AND DENYING IN PART,  
ACCOUNTING AUTHORITY ORDER**

The application of Southern Union Company ("the Company") for an accounting authority order ("AAO") is:

- Granted as to operating and management expenses, and capital costs, because those expenditures constitute extraordinary items. Such items are subject to recording in Account 182.3. Amortization for those items shall start on January 1, 2012, and continue for ten years.
- Denied as to ungenerated revenue.<sup>1</sup> The Company has not carried its burden of proving that its sales dropped, and that any such drop would constitute an "item" for recording in any period. AAOs do not create an item for recording. This decision does not determine whether any item will be recoverable in a future general rate increase request<sup>2</sup> ("rate case"). This decision constitutes the Commission's final decision subject to rehearing under Section 386.500, RSMo 2000.<sup>3</sup>

<sup>1</sup> "Lost revenue," is the term that the Company and Staff use, but that term is misleading because it suggests that the Company had the money and then lost it, which is untrue. OPC's term "expected revenue," is more accurate. "Ungenerated" fully expresses the characteristic determinative of the claim.

<sup>2</sup> As defined at 4 CSR 240-2.065(1).

<sup>3</sup> 4 CSR 240.2-070(13).

### Appearances

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

L. Russell Mitten and Paul A. Boudreau  
Brydon, Swearingen & England, PC  
312 East Capitol, P.O. Box 456, Jefferson City, MO 65102.

For Staff:

Robert Berlin, Sarah Kliethermes, and Goldie Tomkins  
Missouri Public Service Commission  
200 Madison Street, Suite 800, P.O. Box 360, Jefferson City, MO 65102.

For the Office of the Public Counsel:

Marc Poston  
Office of the Public Counsel  
200 Madison Street, P.O. Box 2200, Jefferson City, MO 65102

Senior Regulatory Law Judge: Daniel Jordan.

### Procedure

The Company filed the application on June 6, 2011. On August 19, 2011, Staff filed its recommendation favoring a partial denial of the application and the Company filed a response to the recommendation.<sup>4</sup> The Commission received no application for intervention. The Commission issued notice of a contested case<sup>5</sup> and convened an evidentiary hearing on the application's merits on November 30, 2011. The parties filed briefs on December 23, 2011.

#### I. Past Commission Decisions

At the hearing, the parties appropriately shaped their presentations to matters made relevant by the controlling law as they see it. The controlling law, as quoted below, includes Commission regulations that incorporate federal regulations, which have not changed since 1991. Perhaps for that reason, a 1991 Commission decision ("Sibley") figures prominently in all parties' arguments.<sup>6</sup> The Commission's analysis in a past decision may help resolve issues in a later case.

But the parties do not offer analysis to guide the Commission. They offer past findings and conclusions attempting to restrict the Commission's discretion, as if past Commission decisions constitute a body of case law, like appellate court opinions with the weight of stare decisis. Stare decisis does not bind the Commission to past Commission decisions.<sup>7</sup> Such arguments are misleading, and denigrate the authority and duty of the Commission to apply the law to the facts the best it can, which is the same today as it was in the past.<sup>8</sup>

<sup>4</sup> 4 CSR 240-2.080(15).

<sup>5</sup> On September 20, 2011.

<sup>6</sup> *In the Matter of the Application of Missouri Public Service for the Issuance of an [AAO]*, 129 P.U.R.4<sup>th</sup> 381 (Dec. 20, 1991).

<sup>7</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003).

<sup>8</sup> The parties refer to the Sibley decision as though it added something new to USoA, and refer to purported "prevailing case law;" and a Sibley standard, test or requirements. Those references imply that (i) the Sibley decision constitutes a Commission statement implementing, interpreting, or prescribing law or policy; and (ii) such statement generally applies to AAOs. On the contrary, no such Commission statement controls the disposition of this contested case without promulgation as the statutes require. *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 361 (Mo. banc 2001). See also Section 536.021.9, RSMo 2000; Section 386.125, RSMo Supp. 2010.

That authority and duty may lead the Commission on any day to read the law differently from the way it read the law 20 years before.<sup>9</sup>

## II. Other States' Decisions

The parties also cite decisions of other commissions. The Company cites a Hawai'i Public Utilities Commission ("Hawai'i PUC") decision ("Hawai'i decision")<sup>10</sup> and Staff and OPC cite a Delaware Public Service Commission ("Delaware PSC") decision ("Delaware decision").<sup>11</sup> Those decisions do not bind the Commission<sup>12</sup> and the Commission finds those decisions unpersuasive.

In the Hawai'i decision, the relief, facts, and procedure were significantly different from this case. The Hawai'i utility sought "lost gross margin."<sup>13</sup> The factual basis was Hurricane Iniki, which destroyed over 30 percent of the utility's transmission and 30 percent of the utility's distribution infrastructure. The Hawai'i decision merely approved a settlement just seven weeks after the filing of an application. It cites no controlling authority.

The Delaware decision cites provisions of law that also appear in this decision. But it applies those provisions, without analysis, substituting earlier Delaware PSC decisions for legal reasoning. Earlier Delaware PSC decisions may bind the Delaware PSC, but they do not bind the Commission.<sup>14</sup>

## III. Standards

The burden of proving the elements of an AAO is with the Company<sup>15</sup> and the quantum of proof is a preponderance of the evidence.<sup>16</sup> Discretion's boundaries generally are careful consideration, justice, and the logic of the circumstances.<sup>17</sup> Under those standards, the Commission independently finds the facts<sup>18</sup> as follows.

<sup>9</sup> *Id.* The Company offers a standard under which the Commission may read the law differently only if it can "articulate a sound basis for such a significant change in regulatory policy." *Post-Hearing Brief of the [Company]* at 8-9. In support, the Company cites *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Comm.*, 142 S.W.3d 228, 235 (Mo. App., W.D. 2004), where the court stated, "An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts. 'Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.' The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision." *Id.* (citations omitted).

<sup>10</sup> *Re Citizens Utilities Co., Kauai Elec. Div.*, 138 P.U.R.4<sup>th</sup> 589 (Hawai'i P.U.C., Dec. 9, 1992).

<sup>11</sup> *Re United Delaware, Inc.*, 284 P.U.R.4<sup>th</sup> 496 (Del. P.S.C., Sept. 21, 2010).

<sup>12</sup> *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State of Mo.*, 765 S.W.2d 618, 623 (Mo. App., W.D. App. 1988).

<sup>13</sup> Defined as "revenue lost as a result of its diminished customer base, less variable production costs avoided as a result of diminished demand." Hawai'i decision at 593.

<sup>14</sup> This moots the Company's objection to the Delaware decision. The Company objects that the Commission was not asked, and therefore did not take, official notice on the record of the Delaware decision. The Company cites *Prokopf v. Whaley*, 592 S.W.2d 819, 823 (Mo. banc 1980), stating that a reviewing court cannot take official notice of an administrative regulation, which does not apply to the Delaware decision. Because the Delaware decision's failure to analyze controlling law renders it unhelpful, no prejudice accrues to the Company when we read it.

<sup>15</sup> *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Comm'n of Missouri*, 806 S.W.2d 432, 435 (Mo. App., W.D. 1991).

<sup>16</sup> *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

<sup>17</sup> *Peters v. ContiGroup*, 292 S.W.3d 380, 392 (Mo. App., W.D. 2009).

<sup>18</sup> The findings of fact reflect the Commission's assessments of credibility. *Stone v. Missouri Dept. of Health & Senior Services*, 350 S.W.3d 14, 26 (Mo. Banc. 2011).

**Findings of Fact**

1. The Company is a Delaware corporation authorized to do business in Missouri under the fictitious name of "Missouri Gas Energy." the Company's principal office is located at 3420 Broadway, Kansas City, Missouri 64111.

2. The Company provides natural gas services in 29 Missouri counties to approximately 515,000 customers.

3. For the April 2011 billing month, the Company had in the City of:

- a. Joplin, Missouri ("Joplin"): 16,165 customers; and
- b. Duquesne, Missouri ("Duquesne"): 533 customers.

**I. The Tornado**

4. On May 22, 2011, at 5:17 p.m., the National Weather Service issued a tornado warning for Joplin and Duquesne ("the tornado area") and 24 minutes later, a tornado touched down ("the tornado").

5. The tornado was a rare multi-vortex tornado, in which the funnel cloud spins off smaller, faster funnel clouds within its edges. The tornado rated an EF-5 on the Enhanced Fujita Scale, the highest rating possible. The tornado was the single deadliest tornado recorded.

6. The tornado took lives and property in the tornado area as follows:

- a. 162 people dead and 900 more injured;
- b. 4,000 residences destroyed and 3,500 more damaged; and
- c. 300 businesses destroyed.

7. The tornado resulted in the disconnection of approximately 3,200 customer meters, which represents 0.62 percent of the Company's customer base.

8. As of the date of the hearing, the Company had reconnected about 1,900 of the customers who lost service due to the tornado.

**II. Expenditures**

9. To restore service lost to the tornado, the Company incurred O&M expenses ("O&M") and capital costs ("capital") for repair, restoration, and rebuild activities.

10. Insurance proceeds, government grants, and tax credits will cover some of the O&M and capital.

11. As of July 28, 2011, the Company had spent:

- a. O&M: \$1,042,000.
- b. Capital: \$ 99,500.

12. The projected amounts needed to restore service may run as high as:

- a. O&M: \$1,318,000.
- b. Capital: \$6,667,000.<sup>19</sup>

13. Those projected amounts represent proportions of the projected total as follows:

- a. O&M: 16.5 percent (1/6).
- b. Capital: 83.5 percent (5/6).

14. Amortization will be more accurate the closer it starts to when the Company made the expenditures. Accounting practices amortize expenditures as follows:

- a. O&M over five years; and
- b. Capital over twenty years.

15. The Company's next rate case will occur no later than approximately September 18, 2013.<sup>20</sup>

### III. Ungenerated Revenue

16. Just after the tornado, in the period May-September 2011, Company revenue was up by \$409,119 in the Company's Missouri service territory overall, over the same period in 2010.<sup>21</sup>

17. Customer payments throughout the Company's service territory fund the Company's fixed costs throughout the Company's service territory.

18. The Company collects revenue under a rate structure called straight fixed-variable ("SFV").

19. SFV attributes each customer's bill to two types of Company cost itemized as follows:

a. Fixed: what the Company spends on each customer, whether that the customer consumes gas or not.

b. Variable: what the Company spends on gas that the customer consumes.

But neither charge represents an exclusive fund for paying the respective cost. The Company may pay either cost amounts collected under either attribution.

20. Any drop in revenue from the tornado area resulting from the tornado-related disconnections ("ungenerated revenue") threatens neither the Company's ability to provide safe and adequate service, nor its opportunity to earn a profit.

### **Conclusions of Law**

The Commission independently concludes as follows.

#### I. Jurisdiction

The Commission has jurisdiction as follows. The Company is a public utility.<sup>22</sup>

Public utilities are within the Commission's jurisdiction for record-keeping,<sup>23</sup> and rate-setting,<sup>24</sup> both of which are subjects of the parties' arguments.

<sup>19</sup> Company Exhibit 1, page 5 line 9, to page 6 line 7.

<sup>20</sup> Company Exhibit 2, page 20, lines 13 through 16.

<sup>21</sup> OPC Exhibit 2, page 2 line 18, to page 3 line 20.

<sup>22</sup> Section 386.020(18) and (43), RSMo Supp. 2010.

<sup>23</sup> Section 393.140(4), RSMo 2000.

<sup>24</sup> Section 393.140(11), RSMo 2000.

Staff and OPC argue that issuing an AAO for ungenerated revenue constitutes retroactive ratemaking and single-issue ratemaking. Retroactive ratemaking and single-issue ratemaking are doctrines founded on constitutional and statutory provisions, respectively. But Missouri case law is directly to the contrary. It states, generally, that an AAO does not constitute ratemaking.<sup>25</sup> It also states, specifically, that an AAO does not constitute single-issue ratemaking.<sup>26</sup>

Staff and OPC do not make those arguments as to expenditures. Further, Staff and OPC cite no authority for the Commission to determine the validity of the regulations governing this action. Therefore, the Commission will apply its regulations<sup>27</sup> to its findings as follows.

## II. AAOs

The Commission's regulations<sup>28</sup> incorporate 18 CFR 201, the Uniform System of Accounts ("USoA"). USoA is a set of federal regulations that governs utilities' recording of items. USoA includes *General Instructions*, *Definitions*, and *Balance Sheet Accounts Assets and other Debits* ("Accounts").

Ordinarily, USoA records any item of profit or loss in the year in which the item occurred ("current" year) as set forth in *General Instructions*:

[N]et income shall reflect all items of profit and loss during the period with the exception of [certain items.<sup>29</sup>]

And:

All other items of profit and loss recognized during the year shall be included in the determination of net income for that year. [<sup>30</sup>]

"Shall" signifies a mandate and means "must" in the present tense.<sup>31</sup> As Staff aptly describes it, USoA "defaults" to current recording.

<sup>25</sup> *Missouri Gas Energy v. Pub. Serv. Comm'n, State of Mo.*, 978 S.W.2d 434, 438 (Mo. App., W.D. 1998).

<sup>26</sup> *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n of Missouri*, 858 S.W.2d 806, 813 (Mo. App., W.D. 1993).

<sup>27</sup> *State ex rel. Stewart v. Civil Serv. Comm'n of St. Louis*, 120 S.W.3d 279, 287-88 (Mo. App., E.D. 2003).

<sup>28</sup> 4 CSR 240-40.040(1). The Commission made that regulation under the statutory delegation of authority at Section 393.140(4), RSMo 2000, "to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations [and] forms of accounts, records and memoranda to be kept by such persons and corporations [.]". The Company notes that a change "in the required method or form of keeping a system of accounts" requires six months' notice "to such persons or corporations." Orders of uniform application, as described in that 1913 statute, are now subject to today's statutes on rulemaking. Section 386.250(6); and Sections 536.021 and 386.125, RSMo Supp. 2010. (Compare Section 393.140(8), RSMo 2000, which provides a hearing when the Commission inspects the books of a specific "corporation or person" and makes an order as to a "particular" item.) Rulemaking includes amending a rule. Section 536.021.1, RSMo Supp. 2010. The Commission cannot make a rule through adjudication. *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 361 (Mo. banc 2001). This decision addresses only the Company's right to record the items described in the application, and does not change the uniform method or form of keeping accounts for gas corporations. Therefore, this decision may take effect in less than six months.

<sup>29</sup> General Instruction No. 7 (emphasis added).

<sup>30</sup> General Instruction No. 7.1 (emphasis added).

<sup>31</sup> *State ex rel. Scott v. Kirkpatrick*, 484 S.W.2d 161, 164 (Mo. banc 1972). That requirement is subject to "a variance from the provisions of this rule, in whole or in part, for good cause shown, upon a utility's written application" under 4 CSR 240-40.040(5). No such application is before the Commission.

## A. Generally

The year in which a utility records an item is important because of Commission practice in setting utility rates. Commission practice is to project a utility's future cost of service from a historic test year. If that test year does not include a certain item, that item will not count in setting the rates. Current recording thus excludes items outside the test year from consideration in rate-setting. That is true even for items with far-reaching effects for the utility and the customer.

To protect just and reasonable rates, USoA requires the utility to record certain items in a special account designated "182.3 Other regulatory assets:"

A. This account shall include the amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies. (See Definition No. 31.) [<sup>32</sup>]

Definition No. 31 provides:

Regulatory Assets and Liabilities are assets and liabilities that result from rate actions of regulatory agencies.

Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of [USoA] but for it being probable:

1) that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services [<sup>33</sup>]

Regulatory assets in Account 182.3 are thus preserved beyond their current year for consideration in later rate case. In Commission practice, that treatment is called "deferral" and a Commission order directing that treatment is called an AAO.

An AAO is only necessary to defer an item that is less:

. . . than approximately 5 percent of income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent, as extraordinary. [<sup>34</sup>]

The last sentence expressly provides "Commission approval . . . to treat an item of less than 5 percent, as extraordinary."<sup>35</sup> Otherwise the utility makes those determinations for itself every day.

<sup>32</sup> Account No. 182.3.

<sup>33</sup> Definition No. 31.

<sup>34</sup> General Instruction No. 7.

<sup>35</sup> That plain language shows that two arguments of Staff and OPC to the contrary are meritless: (i) deferral is possible only for amounts greater than 5 percent of income; and (ii) the Company should file rate case.

To summarize:

- A utility must record all items of profit and loss.
- The utility routinely does that on its own.
- A utility must determine the recording year: current or deferred.
- The utility routinely does that on its own, too.
- No AAO is necessary for any recording, except to defer 5 percent or less.
- Items deferred are preserved for consideration in a later rate case.<sup>36</sup>

The elements of an AAO are as follows.

#### B. Extraordinary

USoA makes an exception to current recording for:

Extraordinary items. . . . 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 [<sup>37</sup>]

That language examines an event's:

- Time (during current period);
- Rarity (unusual, infrequent, not foreseeably recurring, activities abnormal and significantly different from the ordinary and typical,); and
- Effect (significant).

Those characteristics are all manifest in the tornado. The tornado occurred in the current period because it occurred on May 22, 2011, which was the period of the application. The tornado was rare because it caused damage unseen in the United States for 60 years. The tornado had a significant effect because it disconnected 3,200 meters.<sup>38</sup> Therefore, "items related to the effects of" the tornado are extraordinary, and are subject to deferred recording.

#### C. Items

If an event is extraordinary, consequent items are free from current recording. The Company and Staff agree, and OPC does not object, to deferred recording for the O&M and capital (together, "actual expenditures") required to restore the Company's service after the Joplin tornado. Because those expenditures are extraordinary, their recording shall be deferred.

<sup>36</sup> Later consideration in a rate case may explain why prior authorization is required for smaller items and not for larger items. As in this case, small items may cause disproportionately large litigation. Such litigation is better before a rate case than during a rate case.

<sup>37</sup> General Instruction No. 7 (emphasis added).

<sup>38</sup> Staff's and OPC's restriction of "significant effect" to dollar amounts has no basis in USoA.

*i. Amount*

Each party offered evidence of the amounts spent on restoration. But the expenditures were continuing as of the hearing date, so any number based on the record in this action was already obsolete when it was offered. An amount certain for 2011 is ascertainable only when all information for 2011 is available. In other words, this AAO consists of:

. . . just putting all this stuff in a box and saying, hey we're going to take a look at this box later on and determine whether it's appropriate to be . . . recovered or not [<sup>39</sup>]

The Commission has approximated as best it can the eventual amounts required to restore service. But no further finding is necessary or helpful, so the Commission will make its order as to the quality, but not the quantity, of items subject to deferral.

*ii. Amortization*

The parties dispute the period and start date of amortization for deferred expenditures. The Company requests a five year period. The record shows that the standard amortizations are (i) five years for O&M, and (ii) twenty years for capital. The Company estimates that the ratio of eventual expenditures will be approximately 5/6 capital and 1/6 O&M. Therefore, the Commission will set amortization at Staff's recommended ten years.<sup>40</sup> The Commission will order the amortization to begin on January 1, 2011 because a closer start date yields a more accurate result.

*iii. Conditions*

OPC asks the Commission to condition any AAO on a requirement that the Company file a rate case generally no later than May 22, 2013. The Company argues that such an action is already due by September 18, 2013, because its rate includes an infrastructure and system replacement surcharge ("ISRS"), which requires a rate case every three years. OPC's premise is that General Instruction No. 7 bars deferral below 5 percent, which the plain language refutes.

OPC also asks the Commission to impose a condition that safeguards against deferring expenditures that the Company was scheduled to make anyway because such expenditures are not "related to the effects of" the tornado. That determination will be ripe if the Company offers scheduled items as deferred items in its next rate case. In any event, OPC proposes no such language that would provide what it wants.

Also, OPC proposes no language providing its proposed conditions. The Company does not object to Staff's proposed conditions: including all setoffs and detailed documentation. Therefore, the Commission will grant the application as to expenditures as described, subject to Staff's proposed conditions as set forth in the ordered paragraphs.

<sup>39</sup> Transcript, volume II, page 61 line 23 to page 63 line 1.

<sup>40</sup> This is less generous than the Company's requested five-year period, but substantially more generous than the weighted average of the periods for capital and O&M.  $(20 \times 5) + (5 \times 1) / 6 = 17.5$ . On this matter the Commission gives weight to Staff's expertise in accounting practice.

### III. Probable Recovery

Staff and OPC argue that the Company must also prove that an item is “probably” recoverable in the next rate case. The Company argues that no such requirement exists. The Company is correct.

#### A. Recording Period

Staff and OPC cite the description of a regulatory asset that appears in both *Definitions* and *Accounts*.

Staff and OPC read “the Commission will probably allow recovery for such items” in the following:

Regulatory Assets and Liabilities are assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of the Uniform System of Accounts but for it being probable: 1) that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services [. <sup>41</sup>]

And:

B. The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated other comprehensive income, determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services [. <sup>42</sup>]

That language refutes Staff’s and OPC’s reading as follows.

As the Company notes, the language addresses only the period of inclusion. It describes items that “would have been included in” “one” or “the current” “period “but for it being probable that such items will be included in a different period.” The period of inclusion, current or different, is the only distinction between regulatory assets and other assets under the quoted language. And to be included for purposes of developing rates does not equal “recoverable.” Many items are included in the Commission’s consideration when the Commission develops rates. Some items merit recovery, and others do not, but that determination occurs in a later rate case.

<sup>41</sup> Definition No. 31 (emphasis added).

<sup>42</sup> Emphasis added.

This is plain from other provisions, not cited by Staff and OPC, of Account No. 182.3:

C. If rate recovery of all or a part of an amount is disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of disallowance.

D. The records supporting the entries to this account shall be kept so that the utility can furnish full information as to the nature and amount of each regulatory asset included in this account, including justification for inclusion of such amounts in this account. [<sup>43</sup>]

In other words, Account No. 182.3 is for an amount that:

- Would be included in the current period for determining income; but
- Will probably be included in a different period for developing rates;
- For which recovery will be determined later based on records kept.

That simply describes deferred recording: recording an item as paragraph B describes, for determination of recovery in a later rate case as paragraph C describes, based on records as paragraph D describes.

Deferred recording—preserving an item for consideration in a later rate case—is *the* relief that an AAO grants, as described by the case law footnoted above and worth quoting here:

In [an earlier] case, the court made it clear that AAOs are not the same as ratemaking decisions, and that AAOs create no expectation that deferral terms within them will be incorporated or followed in rate application proceedings. The whole idea of AAOs is to defer a final decision on current extraordinary costs until a rate case is in order. At the rate case, the utility is allowed to make a case that the deferred costs should be included, but again there is no authority for the proposition put forth here that the PSC is bound by the AAO terms. [<sup>44</sup>]

And:

The Commission authorized [the utility] to defer certain costs by recording them in Account No. 186. The Commission's order did not presume to determine a new rate but effectively permitted [the utility] the option to file a rate case by December 31, 1992, and then to present evidence and argue that the deferred costs recorded in Account No. 186 should be considered by the Commission in approving a rate change. [<sup>45</sup>]

That case law holds that an AAO simply sets an item aside for later consideration in a separate action.

<sup>43</sup> Account No. 182.3 (emphasis added).

<sup>44</sup> *Missouri Gas Energy v. Pub. Serv. Comm'n, State of Mo.*, 978 S.W.2d 434, 438 (Mo. App., W.D. 1998) (citation omitted).

<sup>45</sup> *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n of Missouri*, 858 S.W.2d 806, 813 (Mo. App., W.D. 1993).

Staff and OPC leave unexplained two crucial matters. The first is why the Commission would determine recoverability twice: once in this action and again in the later rate case.<sup>46</sup> The second is “probability.” Staff and OPC leave probability undefined so neither Commission nor a reviewing court can tell whether the evidence meets that standard.

Therefore, the Commission concludes that “but for it being probable” does not make “probable recovery” an element of the Company’s claim.

## B. Capitalization of Regulatory Assets

OPC cites Financial Accounting Board Standard No. 71, Section 9 (“FAS 71.9”). FAS 71.9 does not govern this Commission under any law cited. Even if it did, FAS 71.9 does not set requirements for the issuance of an AAO and does not discuss the period for recording an item.

FAS 71.9 constitutes a guideline for accounting treatment of Company assets. That determination must account for Commission actions according to FAS 71.9. FAS 71.9 thus describes the accounting consequences of—not the legal prerequisites for—deferred recording as follows.

First, the Commission may create a regulatory asset:

Rate actions of a regulator can provide reasonable assurance of the existence of an asset.

Second, if recovery of a past cost will generate enough revenue to cover that cost, the Company must capitalize it:<sup>47</sup>

An enterprise shall capitalize all or part of an incurred cost that would otherwise be charged to expense if both of the following criteria are met:

a. It is probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable cost for rate-making purposes.

b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate adjustment clause, this criterion requires that the regulator’s intent be to permit recovery of the previously incurred cost. [<sup>48</sup>]

FAS 71.9 addresses capitalization of deferred claims, not standards for granting the application.<sup>49</sup> Therefore, the word “probable” does not make probable recovery an element of the Company’s claim.

<sup>46</sup> Staff and OPC may believe that, under their theory, they need win only once and the Company must win twice. But see, *State ex rel. Praxair, Inc. v. Missouri Pub. Serv. Comm’n*, 344 S.W.3d 178, 186-88 (Mo. banc 2011).

<sup>47</sup> That treatment, Staff and OPC argue, leads to further undesirable consequences: that an AAO for ungenerated revenue will relieve the Company of business risk, shift that risk to ratepayers, and distort the Company’s financial image. Those considerations can support allocation of a loss to the utility, as in *State of Missouri ex rel. Union Elec. Co.*, 765 S.W.2d 618 (Mo. App., W.D. 1988). The Commission addresses those considerations in its rejection of the ungenerated revenue claim below.

<sup>48</sup> FAS 71, Section 9 (emphasis added).

<sup>49</sup> “As can be seen, not only do these laws and regulations not share a common purpose, they likewise don’t even address a common subject matter.” *Dept of Soc. Servs. v. Senior Citizens Nursing Home Dist. of Ray County*, 224 S.W.3d 1, 14 (Mo. App., W.D. 2007).

### C. Summary as to Probable Recovery

Staff's "probable recovery" argument creates a new kind of mini-rate case outside of any other rate case. No such intent appears anywhere in the controlling law. The Commission concludes that "probable recovery" is not an element of a claim for an AAO.

## IV. Ungenerated Revenue

The Company also seeks to record ungenerated revenue in Account 182.3 in an amount equal to its fixed cost charge times the customers who lost service due to the tornado. The Company argues that customers disconnected due to the tornado don't pay bills, part of which is earmarked as fixed costs, so the Company cannot pay its fixed costs. Staff and OPC allege that there was no drop in revenue and that nothing prevents the Company from paying its fixed costs. Staff and OPC also argue that revenue not generated, from service not provided, is not an "item" for recording in any period. Staff and OPC are correct.

### A. No Drop in Revenue and No Unpaid Costs

The Company hypothesizes a loss by isolating a drop in revenue in the tornado area. No authority makes that area relevant to exclusion of the rest of the Company's service territory. On the contrary, Staff and OPC showed that Company revenue is up.

Staff and OPC supported their allegations with evidence that supports the findings above as follows. The maximum number of meters disconnected was less than two-thirds of one percent of the Company's customer base. Over half were re-connected as of the date of the hearing. Company revenue was up \$409,119 in the months after the tornado over the same time the previous year. The Company made no attempt to rebut that evidence, which negates the Company's allegation of a "loss."

Even if there were a drop in revenue, it would not prevent recovery of fixed costs. The Company argues that:

Consequently, instead of covering its fixed costs through rates, the funds necessary to pay those costs are coming directly from MGE's earnings. Requiring MGE to dip into earnings to cover its fixed costs of providing service acts to deny the company the reasonable opportunity to earn a fair rate of return to which it is entitled by law. <sup>[50]</sup>

But that happens whenever a customer leaves the Company's service under ordinary events. The Company equates a customer's departure to a reduced opportunity for profit while ignoring the costs saved by providing no service. The Company offers no authority for its lopsided definition of opportunity to earn.

SFV does not create two types of money. SFV merely attributes the Company's costs of serving a customer class to a line on customer bills. The Company stands SFV on its head, changing it from a description of how the Company collects revenue to a prescription for how the Company shall spend revenue. The Company offered no evidence that revenue continuously generated, from its 511,800 customers not deprived of service, is insufficient to cover fixed costs.

<sup>50</sup> Transcript, volume II, page 30, lines 20 through 25.

On the contrary, the rates that the Company is collecting throughout the State include amounts for its fixed costs throughout the State. The absence of any real loss makes the case for rejection of ungenerated revenue even stronger than in State of Missouri ex rel. Union Elec. Co.<sup>51</sup> In that case, the item rejected was money actually spent on the aborted Callaway II power plant (“cancellation costs”). The utility claimed recovery of cancellation costs, the Commission rejected that claim, and the Court of Appeals affirmed on that point. Reasons for allocating the loss to the utility included the compensation for business risk that the utility receives in its rates. The Commission need not guarantee the Company’s profit, nor shift the risk of disappointing profits to ratepayers, especially when the source of disappointment is the provision of no service.

#### B. No Item

In support of recording ungenerated revenue on a deferred basis, the Company urges the Commission to look only at whether the tornado was extraordinary. Staff and OPC argue that the AAO sought would not only allow the recording of an item, it would create the item recorded. Staff and OPC are correct.

An extraordinary item is simply one that would ordinarily be currently recorded according to *Definitions* and *Accounts*. Account No. 182.3 provides:

B. The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated or other comprehensive income, determinations in the current period under the general requirements of [USoA.<sup>52</sup>]

Definition No. 31 provides:

. . . Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of [USoA.<sup>53</sup>]

Deferred recording is merely the alternative to current recording.

The Company argues that the Commission must allow deferral of revenues because the Commission allowed deferral of costs in the Sibley decision and USoA applies equally to both. The Company’s premise is right but its conclusion is wrong. Consistent application of USoA results in different results on different facts.

As Staff notes, in the Sibley decision, the Commission deferred recording of actual expenditures. This explains the language on which the Company relies:

[T]he decision to defer costs associated with an event turns on whether the event is in fact extraordinary and nonrecurring. [<sup>54</sup>]

<sup>51</sup> 765 S.W.2d 618 (Mo. App., W.D. 1988).

<sup>52</sup> Emphasis added.

<sup>53</sup> Emphasis added.

<sup>54</sup> 129 P.U.R.4<sup>th</sup> at 385 (emphasis added).

Actual expenditures exist in the past, present, or future and represent an exchange of value that the Company must record. Ordinarily, the Company records them currently and, if they are extraordinary, the Company must record them in Account 182.3.

The Company's claim is different. Ungenerated revenue never has existed, never does exist, and never will exist. Revenue not generated, from service not provided, represents no exchange of value. There is neither revenue nor cost to record, in the current period nor in any other.

The Company showed no instance when service not provided resulted in recording any revenue or cost, lost or generated, on a deferred or current basis. That is because the Company cannot have an item of profit or loss when it provides no service, whether the cause of no service is ordinary or extraordinary. Services not provided and revenues not generated are mere expectancies, are things that simply did not happen, and are not items at all.

### C. Summary as to Ungenerated Revenue

An AAO only determines the period for recording an item but the Company seeks an AAO to create the item itself by layering fiction upon fiction. To issue an AAO for ungenerated revenue would create a phantom loss, and an unearned windfall, for the Company. Therefore, the Commission will deny the AAO as to ungenerated revenue.

### V. Summary

Each party conflates this action with an irrelevant agenda. The Company wants the Commission to make an item out of something it never records otherwise, while Staff and OPC want the Commission to determine that the newly minted item will not be recoverable when the Company raises it in an action not yet filed. Neither matter is within the function of an AAO.

### Rulings

Therefore, the Commission issues its AAO as follows.

#### **THE COMMISSION ORDERS THAT:**

1. The *Application* of Southern Union Company ("the Company") for an accounting authority order ("AAO") to defer recording items related to the effects of the Joplin tornado of May 22, 2011, to Account No. 182.3, Other Regulatory Assets, ("application") is denied in part and granted in part as follows.

2. The application is denied as to ungenerated revenue as described in the body of this order.

3. The application is granted as to actual incremental operations and maintenance expenses, and capital costs, associated with repair and restoration activities, with depreciation and carrying charges equal to the Company's ongoing Allowance for Funds Used during Construction rates associated with capital expenditures.

4. Authority to defer recording is conditioned on the following. The Company shall:

- a. Not seek to recover through its Infrastructure System Replacement Surcharge rate any capital costs for which it is deferring depreciation and carrying charges under this order.

- b. Apply, to the total amount of deferred costs, any insurance claim proceeds, government payments, government credits, and other offsets applicable to incremental operation and maintenance expense or capital expenditures.
  - c. Ratably amortize deferred costs expense over a ten-year (120-month) period beginning on January 1, 2012, and concluding on December 31, 2021.
  - d. Maintain records, invoices and other documents as required by 18 CFR 201, Account No. 182.3. For each expenditure in Account No. 182.3, those records shall support the nature and amount, including any related deferred taxes recorded as a result of the cost deferral, and shall justify inclusion. The Company shall make such records available for review by the Commission Staff, the Office of the Public Counsel, and other interveners, pursuant to 4 CSR 240-2.085 and Section 386.480, RSMo.
5. Nothing in this order shall constitute a finding or conclusion by the Commission of the reasonableness of any amount deferred, and the Commission reserves the right to consider the ratemaking treatment to be afforded any deferred amount.
6. This order shall become effective February 24, 2012.
  7. This file shall close on February 25, 2012.

Gunn, Chm., Jarrett and Kenney, CC, concur,  
Stoll, C., abstained,  
and certify compliance with the provisions of  
Section 536.080, RSMo.

Jordan, Senior Regulatory Law Judge

**In the Matter of an Investigation Into Various Issues Related to the Missouri Universal Service Fund****File No. TO-2012-0257**

**Telecommunications. §14.1 Universal Service Fund.** The Commission reduced the Universal Service Fund assessment rate as recommended by the Missouri Universal Service Board.

**ORDER GRANTING INTERVENTION AND DECREASING ASSESSMENT RATE**

Issue Date: February 1, 2012

Effective Date: February 11, 2012

On January 25, 2012, the Staff of the Commission, acting at the request of the Missouri Universal Service Board, filed a motion asking the Commission to approve a decrease of the Missouri Universal Service Fund assessment rate from .0029 to .0025 as recommended by the Board at its January 25 meeting. Staff also asked the Commission to expedite its approval of the assessment rate decrease so that the affected telecommunications carriers would have time to change their billing arrangements before the April 1, 2012 effective date of the change.

The Commission directed that notice of Staff's motion be sent to all interexchange carriers, competitive local exchange carriers, and incumbent local exchange carriers. The Commission also ordered that any person, entity wishing to intervene, or otherwise respond to Staff's motion do so no later than January 31.

Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri filed a motion to intervene and a response to Staff's motion on January 31. AT&T Missouri asked to intervene but also indicated it did not object to Staff's motion so long as the Commission approves the proposed reduction in the assessment in time to allow telecommunications companies, such as itself, at least 60 days to implement the change. The Commission will grant AT&T Missouri's application to intervene and notes that by approving the reduced assessment today, the Commission will allow the 60 days lead-time requested by the company.

Section 392.248.1, RSMo 2000 creates the Missouri Universal Service Board and charges it with the duty to "ensure just, reasonable, and affordable rates for reasonably comparable essential local telecommunications services throughout the state." That statute also creates a state Universal Service Fund that is funded through an assessment on all telecommunications companies in the state. The Commission is required to establish the level of funding needed to accomplish the purposes of the Universal Service Fund.<sup>1</sup>

Staff's motion explains that the Missouri Universal Service Board has determined that the Universal Service Fund's needs can be met with a reduced assessment rate of .0025 to replace the existing rate of .0029. The Board recommends that the reduced assessment rate become effective on April 1, 2012, to allow the affected telecommunications companies time to adjust the bills they send to their customers.

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<sup>1</sup> Section 392.248.3, RSMo 2000.

The Commission finds that the Universal Service Board's recommendation is reasonable. Furthermore, no person or entity has expressed any opposition to that recommendation. The Commission will reduce the assessment rate as recommended by the Universal Service Board.

**THE COMMISSION ORDERS THAT:**

1. Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri's motion to intervene is granted.
2. The assessment rate for the Missouri Universal Service Fund is reduced from .0029 to .0025, effective April 1, 2012.
3. The Commission's Data Center shall send a copy of this order to all interexchange carriers, competitive local exchange carriers, and incumbent local exchange carriers doing business in Missouri.
4. This order shall become effective on February 11, 2012.

Gunn, Chm., Jarrett and Kenney, CC., concur; Stoll, C., not participating.

Woodruff, Chief Regulatory Law Judge

**In the Matter of the Application of Southern Union Company d/b/a Missouri Gas Energy, Sigma Acquisition Corporation and Energy Transfer Equity, L.P. for An Order Authorizing Them to Perform in Accordance with a Merger Agreement and to Undertake Related Transactions**

**File No. GM-2011-0412**

**Gas. §6 Transfer, lease and sale.** The Commission approved a stipulation and agreement regarding a transaction by which Southern Union Company became a subsidiary of Energy Transfer Equity, L.P.

**ORDER APPROVING STIPULATION AND AGREEMENT AND  
AUTHORIZING MERGER**

Issue Date: February 29, 2012

Effective Date: March 10, 2012

Southern Union Company, d/b/a Missouri Gas Energy, Sigma Acquisition Corporation, and Energy Transfer Equity, L.P. have filed an application asking the Commission to approve a merger in which Sigma would merge with and into Southern Union Company, with Southern Union continuing as the surviving corporation as a subsidiary of Energy Transfer Equity. The Commission provided notice of the application and invited interested entities to apply to intervene. No such requests to intervene were received.

On February 16, 2012, the Commission's Staff and each of the applicants filed a Non-Unanimous Stipulation and Agreement that resolves all issues in the case. Public Counsel, the only other party, did not sign the stipulation and agreement. However, the stipulation and agreement indicates Public Counsel does not oppose the agreement and does not intend to request a hearing regarding the application. Commission Rule 4 CSR 240-2.115(2) provides that other parties have seven days in which to object to a non-unanimous stipulation and agreement. If no party files a timely objection to a stipulation and agreement, the Commission may treat it as a unanimous stipulation and agreement.

Public Counsel filed a response to the stipulation and agreement on February 23. Public Counsel does not oppose the stipulation and agreement and does not request a hearing. However, it filed a response to explain that it did not sign the stipulation and agreement because it distrusts Southern Union's credibility following what it describes as Southern Union's attempt to renege on a similar consumer-protecting agreement included in a 2003 stipulation and agreement made when Southern Union acquired Panhandle Eastern Pipeline Company. Public Counsel complains that Southern Union has recently filed an application asking the Commission for relief from one of the provisions of the 2003 stipulation and agreement.

Southern Union's application for relief from that stipulation and agreement is currently pending before the Commission in File No. GE-2011-0282. But the Commission notes that section 4.A of the stipulation and agreement in this case requires Southern Union to withdraw its application in GE-2011-0282 with prejudice upon Commission approval of the stipulation and agreement.

Public Counsel does not object to the stipulation and agreement and does not request a hearing. Therefore, for the purpose of considering that stipulation and agreement, the Commission will treat it as a unanimous stipulation and agreement, while recognizing Public Counsel's reservations about the agreement.

On February 29, Staff, Southern Union, Energy Transfer Equity, and Sigma Acquisition filed an addendum to their stipulation and agreement indicating that it was the intent of all signatories that:

any existing or future holding company or holding companies intermediary between Energy Transfer Equity, L.P. and Southern Union Company shall be fully bound by the provisions of the Non-unanimous Stipulation and Agreement in the same manner as ETE.

The signatories to the addendum again indicate that Public Counsel does not object to the addendum.

After reviewing the stipulation and agreement, as clarified by the February 29 addendum, the Commission independently finds and concludes that the stipulation and agreement, as clarified, is a reasonable resolution of the issues addressed by that stipulation and agreement and that such stipulation and agreement should be approved. The Commission will authorize the applicants to perform in accordance with the terms of their merger agreement, subject to the terms and conditions set forth in the stipulation and agreement.

Specifically, the Commission finds that, subject to the terms set forth in the stipulation and agreement, which shall bind Southern Union Company and its parent companies (and any successors or assigns thereof) as well as the terms of the stipulation and agreement in GM-2003-0238, which, except as expressly addressed in the stipulation and agreement in this case and approved by the Commission, shall continue to bind Southern Union (and which Southern Union's parent companies and successors or assigns thereof shall not cause Southern Union to contravene), the transaction described in the Application is not detrimental to the public interest.

Because no party opposes the relief granted in this order, and because the parties request that the Commission approve the stipulation and agreement as soon as possible, the Commission will make this order effective in ten days.

**THE COMMISSION ORDERS THAT:**

1. The non-unanimous stipulation and agreement filed on February 16, 2012, as clarified by the February 29 addendum, is approved and the signatories to that stipulation and agreement are ordered to comply with its terms. A copy of the stipulation and agreement and addendum are attached to this order.

2. Southern Union Company, Sigma Acquisition Corporation, and Energy Transfer Equity, L.P. are authorized to perform in accordance with, or as may be permitted by or result from, the terms of the Merger Agreement, which, among other things, shall result in the effectuation of the Transaction.

3. To the extent necessary under the terms of the stipulation and agreement approved by the Commission in Case No. GM-2003-0238 and/or the terms of the stipulation and agreement approved by the Commission in Case No. GO-2005-0019, Southern Union is authorized to (1) cause the Citrus Merger to occur through the merger of Citrus ETP with and into CrossCounty and (2) cause PEPL Holdings to guarantee payment on a contingent recourse basis, of up to \$2.0 billion of indebtedness of ETP (or, in the alternative, to indemnify a subsidiary of ETP for payments made by such subsidiary with respect to a guarantee of up to \$2.0 billion of indebtedness of ETP by such subsidiary).

4. Southern Union Company shall never be an obligor with respect to the guarantee and this guarantee shall otherwise be non-recourse to Southern Union Company.

5. The Commission grants such other relief as may be necessary and appropriate to accomplish the purposes of the Transaction and the Amended Application and to consummate the Transaction and related undertakings in accordance with the Merger Agreement.

6. This order shall become effective on March 10, 2012.

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

Woodruff, 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 Kansas City Power & Light Company for Authority to Issue Debt Securities****File No. EF-2012-0187**

**ELECTRIC. §38. Financing practices.** The Commission approved an unopposed request by the utility to issue up to \$300 million of debt securities, subject to certain conditions imposed by the Commission's staff, and to enter into interest rate hedging instruments.

**ORDER GRANTING APPLICATION**

Issue Date: February 29, 2012

Effective Date: March 9, 2012

On December 16, 2011, Kansas City Power & Light Company ("Company") filed an application seeking authority from the Missouri Public Service Commission ("Commission") to issue up to \$300,000,000 of debt securities through December 31, 2013 and to enter into interest rate hedging instruments in connection with such debt securities.<sup>1</sup> On February 16, 2012, the Staff of the Commission filed a recommendation to approve the application subject to conditions. On February 24, 2012, the Company filed its reply to the Staff recommendation in which it agreed to the conditions suggested by Staff. Neither the governing statute<sup>2</sup> nor any other law requires a hearing before approving the unopposed application.<sup>3</sup>

The Company proposes to use the proceeds from the issuance and sale of the new indebtedness for refinancing outstanding long-term debt and to fund capital expenditures.

The Company explains its proposed issuance of the debt securities in paragraphs 12 through 13 of its application, as follows:

12. The debt securities will have maturities of one year to 40 years and will be issued by the Applicant or through agents or underwriters for the Applicant in multiple offerings of differing amounts with different interest rates (including variable interest rates) and other negotiated terms and conditions. Interest rates on the debt securities, represented by either (i) the coupon on fixed rate debt securities or (ii) the initial rate on any variable debt securities, will not exceed nine percent (9%).

13. The debt securities may be senior or subordinated and may be either unsecured or secured under the Applicant's existing general mortgage debt indentures, depending on cost differentials and market conditions at the time of issuance. The debt may also take the form of "fall-away" mortgage debt in which it is initially secured but then converts to unsecured based on certain conditions.

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<sup>1</sup> Kansas City Power & Light Company's application was filed pursuant to Sections 393.180, and 393.200, RSMo 2000, and Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.120.

<sup>2</sup> Section 393.200, RSMo. All sections are in the 2000 Revised Statutes of Missouri unless otherwise stated.

<sup>3</sup> *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

The Company also requests authority to enter into interest rate hedging instruments in conjunction with the issuance of debt securities in order to “lock in” the key underlying rate of all or a portion of an upcoming debt issuance and to change the interest rate mode on the issued security from floating to fixed, or vice versa, depending on which is more economical. The Company does not anticipate that any financing granted would be subject to fees associated with the fee schedule found in Section 386.300, RSMo.

Staff recommends that the Commission approve the application subject to the following conditions:

1. That nothing in the Commission’s order shall be considered a finding by the Commission of the value of this transaction for rate making purposes, and that the Commission reserves the right to consider the rate making treatment to be afforded the financing transaction and its impact on cost of capital, in any future proceeding;
2. That the Company shall file with the Commission within ten (10) days of the issuance of any financing authorized pursuant to a Commission order in this proceeding, a report including the amount of secured indebtedness issued, date of issuance, interest rate (initial rate if variable), maturity date, redemption schedules or special terms, if any, use of proceeds, estimated expenses, and loan or indenture agreement concerning each issuance;
3. That the interest rate for any debt issuance covered by the Application is not to exceed the greater of (i) nine percent (9%) or (ii) a rate that is consistent with similar securities of comparable credit quality and maturities issued by other issuers;
4. That the Company shall file with the Commission any information concerning communication with credit rating agencies concerning this issuance;
5. That the Company shall file with the Commission as a non-case related submission any credit rating agency reports published on KCP&L’s or GPE’s corporate credit quality or the credit quality of its securities;
6. That the amount of secured debt KCP&L can issue be limited to an amount not to exceed net additions to plant in service; construction work in progress to the extent this is intended to be added to plant in service; and refinancing of existing long-term debt; and,
7. That to the extent that any non-regulated investments made by KCP&L or GPE and affiliated companies may potentially impact KCP&L’s credit quality and resulting credit ratings, KCP&L shall notify Staff of such possibility and provide a status report to the Commission regarding the amount of financing used under this authority and the intended use of any remaining authorized but unissued funds.

The Commission has reviewed and considered the Company’s verified application and response and the Staff’s verified recommendation and memorandum and concludes that the application should be granted. The Commission will require the Company to comply with the conditions requested by Staff. As required by Section 393.200, RSMo, the Commission finds that the proposed issuance of debt securities is or will be reasonably required for the purposes specified in the application and that such purposes are not in whole, or in part, reasonably chargeable to operating expenses or to income.

**THE COMMISSION ORDERS THAT:**

1. Kansas City Power & Light Company's application filed on December 16, 2011 is granted subject to the conditions recommended by the Commission's Staff, which are delineated in the body of this order.

2. Kansas City Power & Light Company is authorized to enter into interest rate hedging instruments with one or more counterparties in conjunction with the debt securities issued under the authority of this order.

3. Kansas City Power & Light Company is authorized to execute all documents and take all actions necessary for the above-described transactions.

4. Nothing in this order shall be considered a finding by the Commission of the value of this transaction for rate making purposes, which includes, but is not limited to the capital structure, and the Commission reserves the right to consider the rate making treatment to be afforded these financing transactions and their effect on cost of capital, in any later proceeding or proceedings.

5. Nothing in this order shall constitute an opinion of prudence on the overall structure of Kansas City Power & Light Company and that Company's current credit facility.

6. This order shall become effective on March 9, 2012.

7. This file may be closed on March 10, 2012.

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

Bushmann, Regulatory Law Judge

**In the Matter of the Application of The Empire District Electric Company and White River Valley Electric Cooperative for Approval of a Seventh Written Territorial Agreement Designating the Boundaries of Exclusive Service Areas within Christian and Taney Counties**

**File No. EO-2012-0192**

**ELECTRIC. §11. Territorial agreements.** The Commission approved a territorial agreement between an electrical corporation and an electric cooperative that designates the boundaries of exclusive service areas within Christian and Taney counties in Missouri.

**REPORT AND ORDER  
APPROVING SEVENTH TERRITORIAL AGREEMENT**

Issue Date: February 29, 2012

Effective Date: March 29, 2012

**Procedural History**

On December 20, 2012, The Empire District Electric Company (“Empire”) and White River Valley Electric Cooperative (“White River”) filed an application under Section 394.312, RSMo<sup>1</sup>, seeking approval of a seventh territorial agreement (“Agreement”). The Missouri Public Service Commission (“Commission”) issued notice of the application and set an intervention deadline. There were no requests to intervene. The Staff of the Commission filed its recommendation on February 17, 2012. Staff states that the Agreement designates the service area boundary between White River and Empire regarding structures in certain parts of the cities of Sparta and Forsyth, Missouri, and gives White River the exclusive right to serve an area near a high school in Sparta and structures in a residential housing development in Forsyth. Staff states that the Agreement is not detrimental to the public interest and recommends Commission approval.

**Findings of Fact**

1. Empire is an “electrical corporation” and “public utility” as defined in Section 386.020, RSMo, with its principal place of business in Joplin, Missouri
2. White River is a rural electric cooperative pursuant to Chapter 394, RSMo, with its principal place of business in Branson, Missouri.
3. The cities of Sparta and Forsyth, Missouri, currently have populations greater than 1,500 inhabitants, so are not “rural areas”.<sup>2</sup> As a result, White River cannot provide electric service to new structures built within the city limits of Sparta and Forsyth.

<sup>1</sup> Unless otherwise noted, all statutory references are to the Revised Statutes of Missouri, 2010.

<sup>2</sup> Section 394.020.3, RSMo.

4. In the Agreement, Empire and White River specifically designate the boundaries of three exclusive electric service areas within portions of Christian County and Taney County, Missouri, predominantly within the city limits of Sparta and Forsyth, Missouri. The Agreement gives White River the exclusive right to serve an area that includes a new sewer lift station near a high school in Sparta, Missouri, and to serve structures in a residential housing development in Forsyth, Missouri.

5. White River has existing facilities that will adequately serve the areas described in the Agreement. Empire would need to install costly and duplicative facilities in order to provide service to the areas described in the Agreement.

6. No existing customers of either Empire or White River will have their electric service changed by the proposed agreement.

7. There are no other electric service providers in the areas covered by the Agreement.

8. The cities of Sparta and Forsyth, Missouri, have passed ordinances consenting to White River using public rights-of-way necessary to provide electric service.

9. Empire and White River have paid the fee set by Commission rule as required under Section 394.312.8, RSMo.

10. The establishment of exclusive service areas in the Agreement will minimize duplication of facilities, allow customers to know with certainty who their provider will be, and allow Empire and White River to avail themselves of prior investment and planning for serving the public.

### **Conclusions of Law**

1. The Commission has jurisdiction over territorial agreements between electric corporations and rural electric cooperatives.<sup>3</sup>

2. The Commission need not hold an evidentiary hearing prior to approving territorial agreements.<sup>4</sup>

3. The application is in compliance with Section 394.312, RSMo, in that the Agreement specifically describes the areas subject to the Agreement; the Agreement does not affect the rights or duties of any supplier not a party to the Agreement; the designation of such areas is not detrimental to the public interest; and Empire and White River have paid the required fee.

4. The proposed Agreement is not detrimental to the public interest.

### **Decision**

Having considered the joint application and Staff's verified recommendation in support of approval of the application, the Commission finds that there are no facts in dispute and, therefore, accepts the facts as true. The Commission concludes that the seventh territorial agreement between Empire and White River is not detrimental to the public interest and will be approved.

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<sup>3</sup> Section 394.312.1, RSMo.

<sup>4</sup> *Deffenderfer Enterprises, Inc. v. Public Service Comm'n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

**THE COMMISSION ORDERS THAT:**

1. The joint application for approval of the seventh territorial agreement between The Empire District Electric Company and White River Valley Electric Cooperative is approved.
2. Empire shall file with the Commission revised tariff sheets amending any descriptions of its service territory in Christian and Taney Counties, Missouri, that may be affected by the Agreement.
3. This order shall become effective on March 29, 2012.
4. This file may be closed on March 30, 2012.

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

Bushmann, Regulatory Law Judge

**In the Matter of Missouri-American Water Company's Request for Authority to Implement A General Rate Increase for Water and Sewer Service Provided in Missouri Service Area**

**File No. WR-2011-0337, et al.**

**RATES. §112.** Sewer. The Commission approved a Non-Unanimous Stipulation and Agreement that increased Missouri-American Water Company's annual sewer revenue by \$725,000 and established eight sewer districts.

**RATES §111.** Water. The Commission approved a Non-Unanimous Stipulation and Agreement that increased Missouri-American Water Company's annual water revenue by \$23,255,000 and established eight water districts.

**SEWER. §14.** Rates and revenues. The Commission approved a Non-Unanimous Stipulation and Agreement that increased Missouri-American Water Company's annual sewer revenue by \$725,000 and established eight sewer districts.

**WATER. §16.** Rates and revenues. The Commission approved a Non-Unanimous Stipulation and Agreement that increased Missouri-American Water Company's annual water revenue by \$23,255,000 and established eight water districts.

**ORDER APPROVING NON-UNANIMOUS  
STIPULATION AND AGREEMENT**

Issue Date: March 7, 2012

Effective Date: March 16, 2012

**Procedural History**

On June 30, 2011, Missouri American Water Company ("MAWC") submitted a tariff designed to implement a general rate increase for its water and sewer service; File Nos. WR-2011-0037 and SR-2011-0338. MAWC indicated the new utility service rates were designed to increase its gross annual revenues by approximately \$42.9 million exclusive of applicable gross receipts, sales, franchise or occupational fees or taxes. The submitted tariff sheets carried an effective date of July 30, 2011.

On August 19, 2011, MAWC submitted tariff sheets designed to implement a general rate increase for water and sewer service provided in its recently acquired Roark Division; File Nos. WR-2012-0056 and SR-2012-0057.<sup>1</sup> The revised rates in these schedules were designed to produce an additional \$54,462 in gross annual water revenues and an additional \$116,565 in gross annual sewer revenues for this division, also exclusive of applicable gross receipts, sales, franchise or occupational fees or taxes. Those tariff sheets carried an effective date of September 19, 2011. The Roark Division revenue requirements were included with the request in File Nos. WR-2011-0337 and SR-2011-0338; however, MAWC could not file the tariff sheets for this division in conjunction with its previous filings until the adoption of the existing tariffs for Roark were approved by the Commission in File No. WO-2011-0213. That approval was effective on August 12, 2011.

<sup>1</sup> The Commission approved this acquisition, effective May 7, 2011, in File No. WO-2011-0213.

The Commission issued notices, set an intervention deadline, suspended the tariff sheets until May 27, 2012, and consolidated MAWC's four rate case files. A procedural schedule was set culminating with an evidentiary hearing to begin on February 21, 2012.

At the parties request, the procedural schedule was suspended, and on February 24, 2012 the majority of the parties filed a Non-Unanimous Stipulation and Agreement ("Agreement") purporting to resolve all issues in this matter.<sup>2</sup> The signatory parties include MAWC, the Commission's Staff, the Office of the Public Counsel ("Public Counsel"), Ag Processing, Inc. ("AGP"), the Missouri Industrial Energy Consumers ("MIEC"), the Metropolitan St. Louis Sewer District ("MSD"), the City of St. Joseph ("St. Joseph"), BJC HealthCare ("BJC"), Triumph Foods, L.L.C. (Triumph"), The Empire District Electric Company ("Empire") and the City of Warrensburg ("Warrensburg").<sup>3</sup> The remaining parties, the Public Water Supply Districts Nos. 1 and 2 of Andrew County (Water Districts"), the City of Brunswick ("Brunswick"), the City of Joplin, Missouri ("Joplin"), the City of Jefferson ("Jefferson City") and the Utility Workers Union of America, Local 335 ("Local 335") have affirmatively indicated that they do not oppose the Agreement and that they will not request a hearing on any issue in this matter.<sup>4</sup> Furthermore, Commission Rule 4 CSR 240-2.115 provides that the Commission may consider a non-unanimous stipulation to be unanimous if no party files an objection within seven days of the filing of the agreement. No party objected to the Agreement within that deadline, so the Commission will treat the Agreement as if it were unanimous.

The Commission held an on-the-record proceeding on March 6, 2012 to direct questions to the parties regarding the Agreement. All of the parties present, and the witnesses that were proffered,<sup>5</sup> stated that they believed that the terms of the Agreement would set just and reasonable rates that would be sufficient for MAWC to maintain safe and adequate service.<sup>6</sup>

### **The Agreement**

The signatories have agreed to a total annual increase in revenue for MAWC of \$24 million - \$23,255,000 in water revenue and \$725,000 in sewer revenue. They have also agreed to the establishment of 8 water districts and 8 sewer districts.

<sup>2</sup> EFIS Docket Entry No. 283, *Non-Unanimous Stipulation and Agreement*, filed on February 24, 2012. EFIS is the Commission's Electronic Filing and Information System.

<sup>3</sup> The City of Warrensburg requested to become a signatory party on February 28, 2012, after its City Council had an opportunity to vote on the Agreement. Warrensburg's request was granted on March 2, 2012, after no party objected within the response deadline set by the Commission.

<sup>4</sup> Local 335 and Jefferson City filed separate notices of their intents not to oppose the Agreement. See EFIS Docket Entry No. 282, *Notice of UWUA Local 335*, filed on February 24, 2012 and EFIS Docket Entry No. 285, *City of Jefferson's Notice Regarding Non-Unanimous Stipulation filed February 24, 2012*, filed on February 27, 2012.

<sup>5</sup> The witnesses proffered were: Dennis Williams for MAWC; Jim Busch, Kim Bolin and Mark Oligschlaeger for Staff; Barbara Meisenheimer for Public Counsel; Donald Johnstone for AGP; and Greg Meyer for MIEC.

<sup>6</sup> All of the parties entered their appearances with the exception of Local 335, Warrensburg and Jefferson City.

With regard to the water districts, the signatories propose to combine Warren County with the St. Louis Metro District (St. Louis Metro) and to combine Loma Linda with the Joplin District (Joplin). The signatories further propose to maintain the following individual Districts: Mexico, Jefferson City, Warrensburg, Platte County, and St. Joseph. District 8, in their proposal, will consist of the following water systems: Brunswick, Lakewood Manor, Spring Valley, Ozark Mountain, Lake Taneycomo, White Branch, Rankin Acres, Riverside Estates, Roark and Lake Carmel/Maplewood. The systems included in District 8 will be grouped into four groups, with one group that consists of systems that are charged a flat rate (i.e. no commodity charge) while the other three groups are based on similar commodity charges within each group. Appendix A to the Agreement provides the rates and charges for each District.

The signatories also list the sewer districts, and their rates and charges, in Appendix A. Those districts include: Cedar Hill, Warren County, Jefferson City, Maplewood, Ozark Meadows, Platte County, Roark-Rate A and Roark-Rate B. Under the Agreement, Warren County would have a flat customer charge with no commodity charge, while the remaining districts would have both, a customer charge and a commodity charge, with the customer charge varying based upon customer class.

The signatories ask that new rates be allowed to go into effect on April 1, 2012. They further suggest that new rates have a delayed implementation date (63-day delay) for the old Aqua systems to comply with the moratorium imposed on rate increases in Aqua Missouri, Inc.'s last rate case.<sup>7</sup>

The agreement also contains various other provisions, including provisions to address: (1) the pension/FAS 87 tracker mechanism and OPEB/FAS 106 tracker mechanism; (2) the tank painting tracker; (3) revenue recording for the St. Louis Metro District; (4) call center reports; (5) customer service and billing issues; (6) customer records information; (7) bad debt/recovery tracking; (8) the infrastructure system replacement surcharge; (9) depreciation; (10) a depreciation study/continuing property records; (11) the Platte County water treatment facility retirement; (12) the Empire interruptible contract; (13) special accounting for Business Transformation System; (14) the MSD contract; (15) a cost allocation study; (16) customer class definitions; (17) district specific EMS runs; and (18) future acquisitions.

Further, in the event the Commission accepts the terms of the Agreement, the signatories agree that all prefiled testimony not yet admitted into evidence shall be received into evidence without the necessity of the witnesses taking the stand. And finally, the Agreement contains a contingent waiver of rights. If the Commission unconditionally approves the Agreement without modification, the signatories agree to waive their respective rights to present oral argument and written briefs pursuant to §536.080.1, RSMo 2000; their respective rights to the reading of the transcript by the Commission pursuant to §536.080.2, RSMo 2000; their respective rights to seek rehearing, pursuant to §536.500, RSMo 2000; and their respective rights to judicial review pursuant to §386.510, RSMo 2000.

<sup>7</sup> See File Nos. SR-2010-0023, WR-2010-0025, SR-2010-0026, WR-2010-0027.

## Ratemaking Standards

The Commission has exclusive jurisdiction to establish public utility rates,<sup>8</sup> and the rates it sets have the force and effect of law.<sup>9</sup> A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission.<sup>10</sup> Nor can a public utility change its rates without first seeking authority from the Commission.<sup>11</sup> A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's,<sup>12</sup> subject to judicial review on the question of reasonableness.<sup>13</sup>

A “just and reasonable” rate is one that is fair to both the utility and its customers.<sup>14</sup> It is no more than is sufficient to “keep public utility plants in proper repair for effective public service, [and]. . . to insure to the investors a reasonable return upon funds invested.”<sup>15</sup> The Commission’s guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.<sup>16</sup> However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.<sup>17</sup> The Commission must consider the “public interest” when it makes its determination as to whether the proposed increase in rates is just and reasonable.<sup>18</sup> The public interest is a matter of policy to be determined by the Commission.<sup>19</sup> It is within the discretion of the Commission to determine when the evidence indicates the public interest would be served.<sup>20</sup> Determining what is in the interest of the public is a balancing process.<sup>21</sup> In making such a determination, the total interests of the public served must be assessed.<sup>22</sup>

<sup>8</sup> *May Department Stores Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41, 57 (Mo.1937).

<sup>9</sup> *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

<sup>10</sup> *Id.*

<sup>11</sup> *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

<sup>12</sup> *May Dep't Stores*, 107 S.W.2d at 50.

<sup>13</sup> *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (1918); *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 210 S.W. 381 (1919); *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

<sup>14</sup> *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

<sup>15</sup> *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 272 S.W. 971, 973 (Mo. banc 1925).

<sup>16</sup> *May Dep't Stores Co.*, 107 S.W.2d at 48 (1937).

<sup>17</sup> *Utility Consumers Council, Inc.*, 585 S.W.2d at 49.

<sup>18</sup> *In re Rahn's Estate*, 291 S.W. 120, 123 (Mo. 1926); *Morrishead v. Railways Co.*, 96 S.W. 261, 271 (Mo. banc 1907); *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974). The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission's authority.

<sup>19</sup> *State ex rel. Public Water Supply District v. Pub. Serv. Comm'n*, 600 S.W.2d 147, 154 (Mo. App. 1980); *State ex rel. Mo. Pac. Freight Transport Co. v. Pub. Serv. Comm'n*, 288 S.W.2d 679, 682 (Mo. App. 1956).

<sup>20</sup> *State ex rel. Intercon Gas, Inc. v. Public Service Comm'n of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

<sup>21</sup> *Jefferson County*, 600 S.W.2d at 154; *State ex rel. Churchill Truck Lines, Inc. v. Pub. Serv. Comm'n*, 555 S.W.2d 328, 335 (Mo. App. 1977). *In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.). See also Footnote Number 23.

<sup>22</sup> *Id.*

This means that some of the public may suffer adverse consequences for the total public interest.<sup>23</sup> Individual rights are subservient to the rights of the public.<sup>24</sup> The “public interest” necessarily must include the interests of both the ratepaying public and the investing public,<sup>25</sup> however, as noted, the rights of individual groups are subservient to the rights of the public in general.

The “just and reasonable,”<sup>26</sup> standard for setting utility rates is founded on constitutional provisions, as the United States Supreme Court has explained:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.<sup>27</sup>

And balancing the interests of the investor with those of the consumers and the public in general has no single formula:

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.<sup>28</sup>

Determining whether a rate adjustment is necessary requires comparing MAWC’s current net income to its 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:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.<sup>29</sup>

<sup>23</sup> *Id.*

<sup>24</sup> *Mo. Pac. Freight Transport Co.*, 288 S.W.2d at 682. Ordinarily, the citizen has the right to use that which is his own, in such a manner as he pleases, but if the use thereof seriously affects the general public, society and the laws thereof demand a surrender of a part of the individual rights for the general welfare of the public, for such is the basis of all government. *Bellerive Inv. Co. v. Kansas City*, 13 S.W.2d 628, 640 (Mo. 1929).

<sup>25</sup> The United States Supreme Court tells us simply that “the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests.” *State ex rel. Missouri Gas Energy v. Public Service Comm’n*, 186 S.W.3d 376, 383 (Mo. App. 2005), *citing to*, *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, (1944). The Missouri Supreme Court has also previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property. See *State ex rel. City of St. Louis v. Public Service Comm’n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).

<sup>26</sup> *Id.* and Section 393.150.2, RSMo 2000.

<sup>27</sup> *Bluefield Water Works & Improvement Co. v. Public Serv. Comm’n of the State of West Virginia*, 262 U.S. 679, 690 (1923).

<sup>28</sup> *Federal Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

<sup>29</sup> *Hope Natural Gas Co.*, 320 U.S. at 603 (1944).

That and similar holdings have led to a conventional analysis of the resources devoted to service, from which the Commission determines revenue requirement as follows.

To provide service, a utility devotes resources, which accounting conventions classify as either expense or investment. Expenses include operation, replacement of capital items as they depreciate ("current depreciation"), and taxes on the return. Investment is the basis ("rate base") on which the utility seeks profit ("return"). 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 = Cost of Providing Utility Service or  $RR = O + (V - D) R$   
where,<sup>30</sup>

RR = Revenue Requirement;  
O = Operating Costs; (such as fuel, payroll, maintenance, etc., Depreciation and Taxes);  
V = Gross Valuation of Property Used for Providing Service;  
D = Accumulated Depreciation Representing the Capital Recovery of Gross Property Investment.  
(V - D) = Rate Base (Gross Property Investment less Accumulated Depreciation = Net Property Investment)  
R = Overall Rate of Return or Weighted Cost of Capital  
(V - D) R = Return Allowed on Net Property Investment

The overall Rate of Return ("R") for MAWC can be further broken down as follows:<sup>31</sup>

$R = i L + d P + k E$  or Overall Rate of Return (%)

I = Embedded Cost of Debt  
L = Proportion of Debt in the Capital Structure  
d = Embedded Cost of Preferred Stock  
P = Proportion of Preferred Stock in the Capital Structure  
k = Required Return on Common Equity (ROE)  
E = Proportion of Common Equity in the Capital Structure

But determining the revenue requirement does not end the analysis, because the utility must collect that amount from its customers, and all customers need not receive identical treatment. Rate design is how a utility distributes its revenue requirement among its various classes of customers. Customers vary as to the costs attributable to their service. Just and reasonable rates may account for such differences among customers.

<sup>30</sup> Staff Exh. 3, Staff Report: Cost of Service, Appendix 2, Schedule 20.

<sup>31</sup> *Id.*

## Conclusions<sup>32</sup>

A utility has the burden of proving that increased rates are just and reasonable<sup>33</sup> by a preponderance of the evidence.<sup>34</sup> In this order, the Commission grants the signatory parties' unopposed request to enter all pre-filed testimony and accompanying reports and schedules into the record.<sup>35</sup> The record thus contains substantial and competent evidence.<sup>36</sup>

The Commission recognizes that the recommended revenue requirement proposed in the Agreement is not a trivial amount of money to customers like those who testified at the public hearings. That being said, the Commission also recognizes that the Agreement before the Commission resulted from negotiations between many parties with diverse interests – residential, commercial, industrial and municipal. Local Public Hearings were held and comment cards were directly mailed to MAWC's customers to receive public comment on the proposed rate increase.<sup>37</sup> The Commission's Staff provided a neutral analysis of the proposed rate increase and rate design, and Public Counsel was an active party to ensure the rights of the ratepaying public.

Subject matter experts, including accountants, economists and engineers, filed extensive testimony outlining their respective analyses and positions prior to the signatories reaching a consensus as to the reasonableness of the Agreement. The signatories agree, and the non-signatories did not raise objection, to the conclusion that the proposed revenue requirement and rate design set out in the Agreement are just and reasonable.

<sup>32</sup> Section 386.420.2, RSMo 2000 requires a report of the Commission's conclusions.

<sup>33</sup> Section 393.150.2, RSMo 2000.

<sup>34</sup> A preponderance of the evidence is the minimum standard of proof in civil cases. *Jamison v. State, Dept. of Social Services, Div. of Family Services* 218 S.W.3d 399, 415-416 (Mo. banc 2007).

<sup>35</sup> See Paragraph 28 of the Agreement.

<sup>36</sup> The competent and substantial evidence standard is not a standard of proof but, rather, is a standard of judicial review of an administrative agency's decision pursuant to section 536.140.2, RSMo Cum.Supp.2010. *Schnell v. Zobrist*, 323 S.W.3d 403, 412 (Mo. App. 2010). Indeed, many parties to a contested matter can present substantial evidence, but only one party can meet the preponderance of the evidence standard. Unlike determining whether competent and substantial evidence supports an agency's decision, in determining whether the preponderance of the evidence supports a party's position, the trier of fact must resolve conflicting evidence and decide "which of the parties' positions [is] more probable, more credible and of greater weight." *Id.*

<sup>37</sup> Public Hearings were held in: Branson, Missouri (December 14, 2011) Transcript Vol. 6; Joplin, Missouri (December 14, 2011) Transcript Vol. 7; Warsaw, Missouri (December 15, 2011) Transcript Vol. 8; Sedalia, Missouri (December 15, 2011) Transcript Vol. 9; Riverside, Missouri (January 5, 2012) Transcript Vol. 11; St. Joseph, Missouri (January 5, 2012) Transcript Vol. 12; St. Louis, Missouri (January 9, 2012) Transcript Vol. 13; St. Louis, Missouri (January 9, 2012) Transcript Vol. 14; Brunswick, Missouri (January 17, 2012) Transcript Vol. 15; Mexico, Missouri (January 23, 2012) Transcript Vol. 16; Jefferson City, Missouri (January 23, 2012) Transcript Vol. 17. In addition to the public hearings, the Commission also directed MAWC to send customer comment cards to each of its customers. Some 417,000 cards were mailed to MAWC's customers.

The Commission has compared the substantial and competent evidence on the whole record with the Agreement as to both rate adjustment<sup>38</sup> and rate design.<sup>39</sup> The Commission independently finds and concludes that MAWC has met its burden of proof that the rates proposed in the Agreement, and the rate design determining how those rates are collected among the individual districts and rate classes, are just and reasonable and in the public interest. Further, the Agreement's proposed terms support the provision of safe and adequate service. The revenue increase approved by the Commission today is concluded to be no more than what is sufficient to keep MAWC's utility plants in proper repair for effective public service, and insure to MAWC's investors an opportunity to earn a reasonable return upon funds invested.

The parties expressly ask for an order approving all of the specific terms and conditions of the Agreement.<sup>40</sup> And, without further discussion, the Commission incorporates all provisions of the Agreement, as if fully set forth, into this order.

### **THE COMMISSION ORDERS THAT:**

1. The Non-Unanimous Stipulation and Agreement ("Agreement") filed on February 24, 2012 is approved. The provisions of the Agreement are incorporated into this order, as if fully set forth, unconditionally and without modification. The signatory parties shall comply with the terms of the Agreement. A copy of the Agreement shall be attached to this order as "Attachment A."

2. In conformity with Paragraph 18 of the Agreement, the Commission approves the "Nonunanimous Stipulation and Agreement as to Special Contract" ("Empire Agreement") executed by Missouri American Water Company and The Empire District Electric Company, (filed on January 19, 2012) subject to the conditions delineated in that paragraph.<sup>41</sup> The provisions of the Empire Agreement are incorporated into this order, as if fully set forth. The signatory parties to the Empire Agreement shall comply with the terms of their agreement. A copy of the Empire Agreement shall be attached to this order as "Attachment B."

<sup>38</sup> Although the Agreement is commonly referred to as a "Black Box Settlement," and the signatories parties do not stipulate to a specific capital structure, rate base, return on equity and over-all rate of return, the revenue requirement agreed upon (\$24 million) would be generated using an ROE within the range argued by the parties in their prefiled testimony. Working backwards through the Revenue Requirement formula, and averaging out the differences between the parties' positions on rate base and capital structure, it is clear the agreed upon revenue requirement would be generated using an ROE that falls somewhere between the ROEs recommended by the signatories' subject matter experts. Additionally, in its Cost of Service Report, Staff identified 10% as the average ROE authorized for MAWC's parent company's other water utility subsidiaries for 2010. Adding and subtracting 100 basis points from this 10% creates a zone of reasonableness for the ROE ranging between 9.0% and 11.0%. Again, projecting backward, the recommended revenue requirement would be generated using an ROE within this range.

<sup>39</sup> The witnesses for the signatories cited various reasons in their testimony justifying the consolidation of a number of MAWC's current water and sewer districts, as is proposed in the Agreement. Those reasons included similar operating characteristics, source of supply, geographic location, efficient allocation of shared corporate and labor expenses, mitigation of rate shock, and application of the cost causation principle.

<sup>40</sup> The Agreement waives procedural requirements that would otherwise be necessary before final decision. Section 536.060, RSMo 2000. Also, because the settlement being approved disposes of this action, the Commission need not separately state its findings of fact. Section 536.090, RSMo 2000.

<sup>41</sup> EFIS Docket Entry No. 153, *Nonunanimous Stipulation and Agreement as to Special Contract*, filed January 19, 2012.

3. In conformity with Paragraph 20 of the Agreement, the Commission approves the continuation of the existing contract rate between the Metropolitan St. Louis Sewer District and Missouri American Water Company for the provision of customer usage data. The provisions of the "Water Usage Data Agreement" are incorporated into this order, as if fully set forth. The signatory parties to the "Water Usage Data Agreement" shall comply with the terms of their agreement. A copy of the "Water Usage Data Agreement" shall be attached to this order as "Attachment C."

4. The tariff sheets submitted under Tariff File Nos. YW-2011-0673, YW-2011-0674, YW-2011-0675, YW-2011-0676, YW-2011-0677, YW-2011-0678, YW-2011-0679, YW-2011-0680, YW-2011-0681, YS-2011-0682, YS-2011-0683, YS-2011-0684, YS-2011-0685, YS-2011-0686 on June 30, 2011, by Missouri American Water Company, for the purpose of increasing rates for utility service, are rejected.

5. The tariff sheets submitted under Tariff File Nos. YW-2012-0074, YS-2012-0075 on August 19, 2012, by Missouri American Water Company, for the purpose of increasing rates for utility service, are rejected.

6. The specific tariff sheets rejected are:

**P.S.C MO NO. 1**

**[YW-2011-0673 - Water – St. Joseph]**

15th Revised Sheet No. 1 Cancelling 14th Revised Sheet No. 1  
 1st Revised Sheet No. 1a Cancelling Original Sheet No. 1a  
 3rd Revised Sheet No. 1B Cancelling 2nd Revised Sheet No. 1B  
 12th Revised Sheet No. 2 Cancelling 11th Revised Sheet No. 2  
 1st Revised Sheet No. 3 Cancelling Original Sheet No. 3  
 1st Revised Sheet No. 4 Cancelling Original Sheet No. 4

**P.S.C MO NO. 2**

**[YW-2011-0674 – Water – Joplin]**

15th Revised Sheet No. 3 Cancelling 14th Revised Sheet No. 3  
 1st Revised Sheet No. 3A Cancelling Original Sheet No. 3A  
 1st Revised Sheet No. 3B Cancelling Original Sheet No. 3B  
 1st Revised Sheet No. 3C Cancelling Original Sheet No. 3C  
 3rd Revised Sheet No. 4 Cancelling 2nd Revised Sheet No. 4  
 10th Revised Sheet No. 5 Cancelling 9th Revised Sheet No. 5  
 1st Revised Sheet No. 6 Cancelling Original Sheet No. 6  
 1st Revised Sheet No. 7 Cancelling Original Sheet No. 7

**P.S.C MO NO. 3**

**[YW-2011-0675 – Water - Jefferson City]**

14th Revised Sheet No. 1 Cancelling 13th Revised Sheet No. 1  
 2nd Revised Sheet No. 1-A Cancelling 1st Revised Sheet No. 1-A  
 7<sup>th</sup> Revised Sheet No. 2A Cancelling 6th Revised Sheet No. 2A  
 12th Revised Sheet No. 3 Cancelling 11th Revised Sheet No. 3  
 1st Revised Sheet No. 3A Cancelling Original Sheet No. 3A  
 13th Revised Sheet No. 4 Cancelling 12th Revised Sheet No. 4  
 4th Revised Sheet No. 5 Cancelling 3rd Revised Sheet No. 5  
 5th Revised Sheet No. 5A Cancelling 4th Revised Sheet No. 5A  
 2nd Revised Sheet No. 5B Cancelling 1st Revised Sheet No. 5B

**P.S.C MO NO. 4****[YW-2011-0676 – Water - Brunswick]**

12th Revised Sheet No. A-1 Cancelling 11th Revised Sheet No. A-1  
 9th Revised Sheet No. A-2 Cancelling 8th Revised Sheet No. A-2  
 9th Revised Sheet No. A-3 Cancelling 8th Revised Sheet No. A-3  
 4th Revised Sheet No. A-4 Cancelling 3rd Revised Sheet No. A-4

**P.S.C MO NO. 4****[YW-2011-0676 – Water - Mexico]**

12th Revised Sheet No. B-1 Cancelling 11th Revised Sheet No. B-1  
 9th Revised Sheet No. B-2 Cancelling 8th Revised Sheet No. B-2  
 9th Revised Sheet No. B-3 Cancelling 8th Revised Sheet No. B-3  
 4th Revised Sheet No. B-4 Cancelling 3rd Revised Sheet No. B-4

**P.S.C MO NO. 4****[YW-2011-0676 – Water – Platte County]**

12th Revised Sheet No. C-1 Cancelling 11th Revised Sheet No. C-1  
 9th Revised Sheet No. C-2 Cancelling 8th Revised Sheet No. C-2  
 9th Revised Sheet No. C-3 Cancelling 8th Revised Sheet No. C-3  
 4th Revised Sheet No. C-4 Cancelling 3rd Revised Sheet No. C-4

**P.S.C MO NO. 4****[YW-2011-0676 – Water – Warrensburg]**

13th Revised Sheet No. D-1 Cancelling 12th Revised Sheet No. D-1  
 9th Revised Sheet No. D-2 Cancelling 8th Revised Sheet No. D-2  
 9th Revised Sheet No. D-3 Cancelling 8th Revised Sheet No. D-3  
 2nd Revised Sheet No. D-5 Cancelling 1st Revised Sheet No. D-5

**P.S.C MO NO. 4****[YW-2011-0676 – Water – St. Charles]**

11th Revised Sheet No. E-1 Cancelling 10th Revised Sheet No. E-1  
 1st Revised Sheet No. E-1a Cancelling Original Sheet No. E-1a  
 9th Revised Sheet No. E-3 Cancelling 8th Revised Sheet No. E-3  
 1st Revised Sheet No. E-3a Cancelling Original Sheet No. E-3a  
 1st Revised Sheet No. E-4a Cancelling Original Sheet No. E-4a  
 6th Revised Sheet No. E-5 Cancelling 5th Revised Sheet No. E-5  
 2nd Revised Sheet No. E-5A Cancelling 1st Revised Sheet No. E-5A  
 2nd Revised Sheet No. E-5b Cancelling 1st Revised Sheet No. E-5b  
 2nd Revised Sheet No. E-5c Cancelling 1st Revised Sheet No. E-5c  
 2nd Revised Sheet No. E-5d Cancelling 1st Revised Sheet No. E-5d  
 2nd Revised Sheet No. E-5e Cancelling 1st Revised Sheet No. E-5e  
 2nd Revised Sheet No. E-5f Cancelling 1st Revised Sheet No. E-5f  
 1st Revised Sheet No. E-5g Cancelling Original Sheet No. E-5g  
 1st Revised Sheet No. F-1 Cancelling Original Sheet No. F-1

**P.S.C MO NO. 6****[YW-2011-0677 – Water – St. Louis]**

16th Revised Sheet No. RT 1.0 Cancelling 15th Revised Sheet No. RT 1.0  
 1st Revised Sheet No. RT 1.0(a) Cancelling Original Sheet No. RT 1.0(a)  
 16th Revised Sheet No. RT 2.0 Cancelling 15th Revised Sheet No. RT 2.0  
 16th Revised Sheet No. RT 2.1 Cancelling 15th Revised Sheet No. RT 2.1  
 16th Revised Sheet No. RT 2.2 Cancelling 15th Revised Sheet No. RT 2.2  
 13th Revised Sheet No. RT 3.0 Cancelling 12th Revised Sheet No. RT 3.0  
 12th Revised Sheet No. RT 3.1 Cancelling 11th Revised Sheet No. RT 3.1

14th Revised Sheet No. RT 4.0 Cancelling 13th Revised Sheet No. RT 4.0  
 4th Revised Sheet No. RT 4.0(a) Cancelling 3rd Revised Sheet No. RT 4.0(a)  
 2nd Revised Sheet No. RT 4.0(b) Cancelling 1st Revised Sheet No. RT 4.0(b)  
 16th Revised Sheet No. RT 5.0 Cancelling 15th Revised Sheet No. RT 5.0  
 2nd Revised Sheet No. RT 5.0(a) Cancelling 1st Revised Sheet No. RT 5.0(a)  
 16th Revised Sheet No. RT 5.1 Cancelling 15th Revised Sheet No. RT 5.1  
 2nd Revised Sheet No. RT 5.1(a) Cancelling 1st Revised Sheet No. RT 5.1(a)  
 16th Revised Sheet No. RT 5.2 Cancelling 15th Revised Sheet No. RT 5.2  
 16th Revised Sheet No. RT 6.0 Cancelling 15th Revised Sheet No. RT 6.0  
 2nd Revised Sheet No. RT 6.0(a) Cancelling 1st Revised Sheet No. RT 6.0(a)  
 16th Revised Sheet No. RT 7.0 Cancelling 15th Revised Sheet No. RT 7.0  
 3rd Revised Sheet No. RT 7.0(a) Cancelling 2nd Revised Sheet No. RT 7.0(a)  
 16th Revised Sheet No. RT 8.0 Cancelling 15th Revised Sheet No. RT 8.0  
 2nd Revised Sheet No. RT 10.0 Cancelling 1st Revised Sheet No. RT 10.0  
 3rd Revised Sheet No. RT 10.0(a) Cancelling 2nd Revised Sheet No.  
 RT10.0(a)  
 1st Revised Sheet No. RT 11.0 Cancelling Original Sheet No. RT 11.0  
 7th Revised Sheet No. RT 12.0 Cancelling 6th Revised Sheet No. RT 12.0  
 12th Revised Sheet No. RT 18.0 Cancelling 11th Revised Sheet No. RT 18.0

**P.S.C MO NO. 7**

**[YW-2011-0678 – Water – Warren County]**

4th Revised Sheet No. 4 Cancelling 3rd Revised Sheet No. 4  
 2nd Revised Sheet No. 5 Cancelling 1st Revised Sheet No. 5

**P.S.C MO NO. 9**

**[YW-2011-0679 – Water – Jefferson City]**

5th Revised Sheet No. WR 1 Cancelling 4th Revised Sheet No. WR 1  
 4th Revised Sheet No. WR 2 Cancelling 3rd Revised Sheet No. WR 2

**P.S.C MO NO. 11**

**[YW-2011-0680 – Water – Taney County]**

5th Revised Sheet No. WR 1 Cancelling 4th Revised Sheet No. WR 1  
 6th Revised Sheet No. WR 2 Cancelling 5th Revised Sheet No. WR 2  
 5th Revised Sheet No. WR 4 Cancelling 4th Revised Sheet No. WR 4  
 4th Revised Sheet No. WR 5 Cancelling 3rd Revised Sheet No. WR 5  
 4th Revised Sheet No. WR 6 Cancelling 3rd Revised Sheet No. WR 6  
 4th Revised Sheet No. WR 7 Cancelling 3rd Revised Sheet No. WR 7  
 4th Revised Sheet No. WR 8 Cancelling 3rd Revised Sheet No. WR 8  
 3rd Revised Sheet No. WSC - 1 Cancelling 2nd Revised Sheet No. WSC - 1

**P.S.C MO NO. 13 [YW-2011-0681]**

Original Table of Contents Sheet 1

Original Sheet No. RT 1  
 Original Sheet No. RT 2  
 Original Sheet No. RT 3  
 Original Sheet No. RT 4  
 Original Sheet No. RT 5  
 Original Sheet No. RT 6  
 Original Sheet No. RT 7  
 Original Sheet No. RT 8  
 Original Sheet No. RT 9  
 Original Sheet No. RT 10  
 Original Sheet No. RT 11

Original Sheet No. RT 12  
 Original Sheet No. RT 13  
 Original Sheet No. RT 14

**P.S.C MO NO. 15**

**[YW-2012-0074 - Water – Stone and Taney Counties]**

4th Revised Sheet No. 1, Cancelling 3rd Revised Sheet No. 1  
 2nd Revised Sheet No. 1a, Cancelling 1st Revised Sheet No. 1a  
 1st Revised Sheet No. 2, Cancelling Original Sheet No. 2

**P.S.C MO NO. 2**

**[YS-2011-0682 – Sewer – Platte County]**

7th Revised Sheet No. 4 Cancelling 6th Revised Sheet No. 4  
 3rd Revised Sheet No. 5 Cancelling 2nd Revised Sheet No. 5

**P.S.C MO NO. 7**

**[YS-2011-0683 – Sewer – Warren County]**

4th Revised Sheet No. 9 Cancelling 3rd Revised Sheet No. 9

**P.S.C MO NO. 8**

**[YS-2011-0684 – Sewer – Cedar Hill]**

6th Revised Sheet No. 4 Cancelling 5th Revised Sheet No. 4  
 Original Sheet No. 4B

**P.S.C MO NO. 10**

**[YS-2011-0685 – Sewer – Cole & Pettis Counties]**

5th Revised Sheet No. SR1 Cancelling 4th Revised Sheet No. SR1  
 4th Revised Sheet No. SR2 Cancelling 3rd Revised Sheet No. SR2  
 2nd Revised Sheet No. SR5 Cancelling 1st Revised Sheet No. SR5

**P.S.C MO NO. 12**

**[YS-2011-0686 – Sewer – Morgan County]**

4th Revised Sheet No. 4 Cancelling 3rd Revised Sheet No. 4  
 1st Revised Sheet No. 5 Cancelling Original Sheet No. 5

**P.S.C MO NO. 14**

**[YS-2012-0075 – Sewer – Stone and Taney Counties]**

4th Revised Sheet No. 1, Cancelling 3rd Revised Sheet No. 1  
 2nd Revised Sheet No. 1a, Cancelling 1st Revised Sheet No. 1a  
 1st Revised Sheet No. 2, Cancelling Original Sheet No. 2

7. Pursuant to Commission Rule 4 CSR 240-3.650(17) and Section 393.1006.6(1), RSMo Cum.Supp.2010, MAWC's current Infrastructure System Replacement Surcharge is reset to zero upon the effective date of the new rates in this proceeding. Any new ISRS filings implemented between the dates the new rates are established in this proceeding and the effective date of new rates established in Missouri American Water Company's next rate case proceeding shall follow the terms established for said filing in Paragraph 14 of the Agreement filed on February 24, 2012.

8. The prefiled testimony, including all exhibits, appendices, schedules, etc. attached thereto, as well as all reports of all witnesses, that are already filed in the Commission's Electronic Filing and Information System ("EFIS") are hereby admitted into evidence. A notation in EFIS for the issuance of this order shall stand in lieu of a notation in EFIS for any exhibit's entry into the record.

9. Missouri American Water Company shall file new tariff sheets consistent with this order.

10. The Commission's Staff shall file a recommendation regarding approving Missouri American Water Company's compliance tariffs no later than two days after the tariff sheets referenced in Paragraph 9 are filed.

11. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order, are hereby denied.

12. Paragraphs 1-3 of this order shall become effective on March 16, 2012.

13. Paragraphs 4-11 shall become effective immediately upon this order's issuance.

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

Stearley, Deputy Chief Regulatory Law Judge

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

**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.

**Briarcliff Development Company, Complainant, v. Kansas City Power & Light  
Company, Respondent.**

**File No. EC-2011-0383**

**RATES. §104. Electric and power.** The electric utility improperly refused to provide service to a company under the all-electric rate schedule when the name on the account had been previously changed because the company acquired the status of a customer under the utility's tariffs from its undisclosed agent.

**ELECTRIC. §7. Jurisdiction and powers generally.** The Commission does have the authority to determine what approved rate should be applied to a customer, but does not have the authority to provide equitable relief, determine damages, or award pecuniary relief, including granting the customer's request for re-billing, refund and interest.

**REPORT AND ORDER**

**Issue Date:** March 7, 2012

**Effective Date:** April 6, 2012

**APPEARANCES**

Appearing for **BRIARCLIFF DEVELOPMENT COMPANY:**

**Jeremiah D. Finnegan**, Finnegan, Conrad & Peterson, L.C., 1209 Penntower  
Office Center, 3100 Broadway, Kansas City MO 64111.

Appearing for **KANSAS CITY POWER & LIGHT COMPANY:**

**James M. Fischer**, Fischer & Dority, PC, 101 Madison, Suite 400, Jefferson  
City MO 65101, and

**Roger W. Steiner**, Kansas City Power & Light Company, 1200 Main St., 16th  
Floor, Kansas City MO 64105.

Appearing for the **STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

**Sarah L. Kliethermes**, Associate Counsel, Governor Office Building, 200 Madison  
Street, Jefferson City, Missouri 65102.

**REGULATORY LAW JUDGE:** Michael Bushmann, Regulatory Law Judge

**I. Procedural History**

On May 26, 2011, Briarcliff Development Company ("Briarcliff" or "Briarcliff Development") filed a formal complaint against Kansas City Power & Light Company ("KCP&L"). Briarcliff alleges that KCP&L failed to properly apply its tariff in August 2009 by refusing to provide electric service to Briarcliff on the large general all-electric rate schedule ("1LGAE"). Briarcliff asserts that it was entitled to continue receiving the all-electric rate as of August 2009 when it changed the name associated with that account on KCP&L records because it was a customer of KCP&L prior to the general service all-electric rate being frozen. Briarcliff contends that KCP&L's actions in using a different name as the customer name in its records from 1999 to 2009 and in refusing to allow Briarcliff to receive the all-electric rate after August 2009 were arbitrary, capricious and unreasonable. Briarcliff requests that the Missouri Public Service

Commission (“Commission”) require KCP&L to immediately allow Briarcliff to receive the large general all-electric service rate, to re-bill Briarcliff for electric service at the all-electric rate from August 2009 until KCP&L reinstates services at that all-electric rate, and refund any difference between the all-electric rate and the general service rate Briarcliff is currently paying, with interest.

KCP&L 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 January 24, 2012 to address Briarcliff’s allegations.<sup>1</sup>

## **II. Findings of Fact**

Any finding of fact for which it appears that 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. On January 19, 2012, the parties filed a Joint Stipulation of Material Non-Disputed Facts, which the Commission incorporates and adopts in its entirety as its own Findings of Fact. The stipulated facts in the Joint Stipulation are as follows:

1. Complainant Briarcliff Development Company is a Missouri corporation located at 4151 N. Mulberry Street, Kansas City, Missouri 64116.

2. Respondent Kansas City Power & Light Company is an electrical corporation and public utility as defined in Section 386.020, RSMo, engaged in the business of manufacture, transmission and distribution of electricity subject to the regulatory authority of the Commission pursuant to Chapters 386 and 393, RSMo.

3. Briarcliff Development is the owner of several commercial office buildings, including the Briarcliff I building (“Briarcliff I”), the Briarcliff II building (“Briarcliff II”) and the Briarcliff III building (“Briarcliff III”).

4. Briarcliff I is located at 4100 N. Mulberry Street, Kansas City, Missouri 64116.

5. Briarcliff Development has owned Briarcliff I since it was developed in 1999.

6. KCP&L has provided electric service to the premises located at 4100 N. Mulberry Street, Kansas City, Missouri 64116 continuously since 1999.

7. In the development of Briarcliff I, Briarcliff relied upon the existence of KCP&L’s all-electric rate and this all-electric rate was instrumental in Briarcliff’s decision to develop it as an all-electric building to be served under KCP&L’s all electric rate schedules.

<sup>1</sup> Transcript, Volume 2. In total, the Commission admitted the testimony of four witnesses and received eight exhibits into evidence. Post-hearing briefs were filed on February 17, 2012 and 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).

8. KCP&L's customer names and service dates of record for Briarcliff I are as follows:

<u>Customer Name</u>	<u>Service From</u>	<u>Service To</u>
Briarcliff West Development	5/17/1999	6/14/1999
Winbury Realty	6/14/1999	8/5/2009
Briarcliff Development	8/5/2009	Current

9. Electric service began at Briarcliff I on May 17, 1999 and continued through June 14, 1999 in the name of Briarcliff West Development at the request of someone who identified himself as Lee Swartz. At this time, Briarcliff West Development was the legal entity responsible for payment.

10. On June 11, 1999, someone who identified herself as Ms. Dianne Painter called KCP&L to have service set up in the name of Winbury Realty as of June 14, 1999. Service at Briarcliff I was put in the name of Winbury Realty by KCP&L on June 14, 1999. The account remained in the name of Winbury Realty for over 10 years commencing on June 14, 1999 and terminating on August 5, 2009.

11. From May 17, 1999 through January 25, 2001, service to the premise was under the [Medium General Service All-Electric] 1MGAE rate schedule, and service from January 25, 2001 through August 5, 2009 was under the [Large General Service All-Electric] 1LGAE rate schedule.

12. The Report and Order in Case No. ER-2006-0314 addresses the discounted rates of KCP&L all-electric and separately metered space heating rate schedules as outlined below:

[Issue] Should the existing general service all-electric rate schedules and the separately metered space heating provisions of KCPL's standard general service tariffs be eliminated or restricted to existing customers only until there is a comprehensive class cost of service study and/or cost-effectiveness study which analyzes and supports such tariffs and provisions as well as KCPL's Affordability, Energy Efficiency and Demand Response programs? (Report and Order, Case No. ER-2006-0314, page 82)

... The Commission is concerned that during KCPL's winter season, commercial and industrial customers under the all-electric general service tariffs pay about 23% less for the entire electricity usage than they would otherwise pay under the standard general service tariff, and that the commercial and industrial customers under the separately metered space heating provision would pay about 54% less for such usage than they would pay under the standard general service tariff.

However, the Commission recognizes that KCPL participated in an extensive class cost of service study in 1996, and that KCPL has reached an agreement for class cost of service and rate design in the present case. The Commission will adopt Staff's suggestion, and Trigen's alternative suggestion, that the Commission restrict the existing general service all-electric rate schedules and the separately metered space heating provisions of KCPL's standard general tariffs to existing customers until there is a comprehensive class cost of service

study. This appears to be a reasonable solution, since no one has performed a cost study of the impacts of eliminating the current rates.

(Report and Order, Case No. ER-2006-0314, page 83) [emphasis added]

13. In Re Kansas City Power & Light Company, Case No. ER-2007-0291 (“2007 Rate Case”), The Commission ordered at p. 82 of the Report And Order in the 2007 Rate Case as follows:

The availability of KCPL’s general service all-electric tariffs and separately- metered space heating rates should be restricted to those qualifying customers’ commercial and industrial physical locations being served under such all-electric tariffs or separately metered space heating rates as of the date used for the billing determinants used in this case, and such rates should only be available to such customers for so long as they continuously remain on that rate schedule (i.e., the all-electric or separately metered space heating rate schedule they are on as of such date).

14. Since the effective date of rates in the 2007 Rate Case, the relevant KCP&L rate schedules are denoted as “FROZEN” (Large General Service – All Electric (Frozen) in Sheet 19A and Separately Metered Space Heat (Frozen) in Sheet 11A.

15. In an email dated February 8, 2008, from David Sutphin (KCP&L employee) to Richie Benninghoven (contact person for Briarcliff Development), KCP&L notified Briarcliff that if the name changes, then the account must be changed to a standard electric tariff. The email states:

Effective January 1, 2008, the Commission restricted KCP&L’s general service all-electric and separately-metered space heating tariffs to those commercial and industrial customers who have been taking service under these rates as of December 31, 2007. This action “Freezes” these rates to existing customers for so long as they remain on the all-electric or space heating rate schedules. This also means that if the customer name changes on an account served by these tariffs or if an existing heat rate customer requests the rate to be changed, due to changes in building usage or load, the account must be changed to a standard electric tariff.

16. On August 5, 2009, KCP&L was contacted by someone identifying himself as Jim Unruh, Senior Vice President of the Winbury Group and directed to put the account in the name of Briarcliff Development.

17. Effective August 5, 2009, the customer name on KCP&L’s records for the Briarcliff I building was changed by KCP&L from “Winbury Realty” to “Briarcliff Development.”

18. On August 10, 2009, KCP&L was again contacted by someone identifying himself as Mr. Jim Unruh. He stated that Briarcliff I was no longer going to be managed by their company and instead they would be managing Briarcliff I in house. He also stated that bills should be sent to Skip Rosenstock, who was the Senior Property Manager for Briarcliff Realty from July 2009 to May 2011, at 4151 N. Mulberry, Ste. 205, Kansas City, Missouri 64116.

19. Commencing with the first billing after KCP&L was notified of the change of customer name on KCP&L's records, KCP&L ceased billing "Winbury Realty" and began billing "Briarcliff Development" for electric service to the Briarcliff I building at the Large General Service (1LGSE) rate instead of continuing on under the Large General All Electric (1LGAE) rate.

20. The pertinent language of the Large General Service - All Electric (Frozen) schedule commencing January 1, 2008, reads as follows: "This Schedule is available only to Customers' physical locations currently taking service under the Schedule and who are served hereunder continuously thereafter."

21. KCP&L's General Rules and Regulations Applying to Electric Service, P.S.C. MO. No. 2, Sheet 1.05 under I. Definitions defines Customer as follows:

"1.04 CUSTOMER: Any person applying for, receiving, using, or agreeing to take a class of electric service supplied by the Company under one rate schedule at a single point of delivery at and for use within the premise either (a) occupied by such persons, or (b) as may, with the consent of the Company, be designated in the service application or by other means acceptable to the Company."

The Commission makes the following Findings of Fact in addition to the stipulated facts of the parties:

22. 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."<sup>2</sup> Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."<sup>3</sup> Although Public Counsel did not file a notice of its intention not to participate in this matter, Public Counsel did not appear for the procedural conference or evidentiary hearing, nor did Public Counsel file any pleadings in this matter.<sup>4</sup>

23. 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.<sup>5</sup>

24. As of June 1, 1999, Briarcliff West Realty Company, as the owner of Briarcliff I, entered into a management agreement with Winbury Group of K.C., Inc. ("Winbury Group"), wherein Winbury Group agreed to perform property management services with regard to Briarcliff I. The agreement provided, in part, that Winbury Group, as the manager, is the "exclusive managing agent for the Project, and all obligations or expenses incurred hereunder by Manager shall be for the account of, on behalf of, and at the expense of the Owner ... Manager shall enter into or renew contracts in the name of the Owner for electricity..."<sup>6</sup> KCP&L was not a party to that management agreement.<sup>7</sup>

<sup>2</sup> Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

<sup>3</sup> Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

<sup>4</sup> Transcript, Volumes 1 and 2. See also the EFIS docket entries for File Number EC-2011-0383. Public Counsel is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.090 and 2.116.

<sup>5</sup> Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

<sup>6</sup> Briarcliff Ex. 1, Hagedorn Direct, Schedule NH-5.

<sup>7</sup> *Id.*

25. Effective June 28, 1999, Briarcliff West Realty Company merged into Briarcliff Development Company, with Briarcliff Development Company as the surviving corporation.<sup>8</sup>

26. KCP&L was not aware prior to August 2009 that Winbury Group was acting as the agent on behalf of Briarcliff in managing the Briarcliff I property.<sup>9</sup>

27. KCP&L entered into a service agreement with Winbury Group for providing electric service to the Briarcliff I property.<sup>10</sup>

28. Winbury Group of K.C., Inc. and Winbury Realty of K.C., Inc. are separate business entities, although both companies listed the same officers and directors on their 1999 annual registration reports filed with the Missouri Secretary of State.<sup>11</sup> Neither corporation is a party to this case.

29. Neither Winbury Group nor Winbury Realty of K.C., Inc. have any common ownership with Briarcliff.<sup>12</sup>

30. Prior to August 2009, Winbury Group paid KCP&L for charges associated with providing electric service to Briarcliff I.<sup>13</sup>

31. Briarcliff alleges in the pre-filed testimony of Nathaniel Hagedorn that it had occupied Briarcliff I and continuously received and used electric service at that location since 1999.<sup>14</sup> At the hearing, Mr. Hagedorn testified that Briarcliff did not physically occupy any part of the premises at Briarcliff I.<sup>15</sup> The Commission finds Mr. Hagedorn's testimony at the hearing to be more credible than his assertions in the pre-filed testimony. The Commission specifically finds that Briarcliff did not physically occupy any part of the premises at Briarcliff I and, consequently, did not receive or use electric service from KCP&L at that location.

32. No evidence was offered or admitted that Briarcliff applied to KCP&L for electric service at Briarcliff I prior to August 2009.

33. No evidence was offered or admitted that Briarcliff reached a mutual agreement with KCP&L prior to August 2009 to take electric service at Briarcliff I.

<sup>8</sup> Briarcliff Ex. 1, Hagedorn Direct, Schedule NH-6.

<sup>9</sup> KCP&L Ex. 1 NP and HC, Henrich Rebuttal, p. 4.

<sup>10</sup> Transcript, Vol. 2, p. 82.

<sup>11</sup> Briarcliff Ex. 1, Hagedorn Direct, Schedules NH-3 and NH-4. Transcript, Vol. 2, p. 69.

<sup>12</sup> Transcript, Vol. 2, p.64.

<sup>13</sup> Transcript, Vol. 2, p.58-59; Briarcliff Ex. 1, Hagedorn Direct, p. 11; Briarcliff Ex. 3, Hagedorn Surrebuttal, p. 9.

<sup>14</sup> Briarcliff Ex. 1, Hagedorn Direct, p. 9, 14; Briarcliff Ex. 2, Hagedorn Rebuttal, p. 1, 5; Briarcliff Ex. 3, Hagedorn Surrebuttal, p. 2.

<sup>15</sup> Transcript, Vol. 2, p. 68.

34. Following the 2007 rate case, KCP&L adopted a tariff effective January 1, 2008 titled “Large General Service-All Electric (Frozen)”, which states, in part, that “[t]his Schedule is available only to Customers’ physical locations currently taking service under this Schedule and who are served hereunder continuously thereafter”.<sup>16</sup>

35. KCP&L’s tariffs, P.S.C. MO. No. 2, Sheet 1.05, Section 1.03, defines a “person” as “[a]ny individual, partnership, co-partnership, firm, company, public or private corporation, association, joint stock company, trust, estate, political subdivision, governmental agency or other legal entity recognized by law”.<sup>17</sup>

36. KCP&L’s tariffs, the General Rules and Regulations Applying to Electric Service, P.S.C. MO. No. 2, Sheet 1.07A, subsection 2.02, Provisions, incorporate by reference the provisions of Commission Rule 4 CSR 240, Chapter 13, Utility Billing Practices. In that Chapter 13, 4 CSR 240-13.015(1)(E) includes a definition of “customer” that is different than the definition in subsection 1.04 of the tariffs and described in Finding of Fact 21 above. Chapter 13 rules apply to residential utility service for domestic purposes.<sup>18</sup> KCP&L has not provided residential utility service to Briarcliff I.<sup>19</sup>

37. KCP&L’s customary practice and procedure for designating the name of its customers was to use the name of the person listed on the “Acct/Premise” line of the computer form in KCP&L’s records titled “S.O. Maintenance: E-GS”, which form is also known as the service application.<sup>20</sup>

38. As part of its customary practice and procedure, KCP&L refers to the person listed on the “Acct/Premise” line of the service application as the “customer of record”.<sup>21</sup>

39. The term “customer of record” is not defined in KCP&L’s tariffs, the General Rules and Regulations Applying to Electric Service.<sup>22</sup>

40. KCP&L’s tariffs, the General Rules and Regulations Applying to Electric Service, P.S.C. MO. No. 2, Sheet 1.07, subsection 1.14, defines a “service agreement”. Subsections 2.01 through 2.11 of those tariffs describe certain terms and conditions of all service agreements, including that service agreements are subject to modification by the Commission.

39. The term “customer of record” is not defined in KCP&L’s tariffs, the General Rules and Regulations Applying to Electric Service.<sup>22</sup>

40. KCP&L’s tariffs, the General Rules and Regulations Applying to Electric Service, P.S.C. MO. No. 2, Sheet 1.07, subsection 1.14, defines a “service agreement”. Subsections 2.01 through 2.11 of those tariffs describe certain terms and conditions of all service agreements, including that service agreements are subject to modification by the Commission.

<sup>16</sup> Briarcliff Ex. 1, Hagedorn Direct, Schedule NH-2.

<sup>17</sup> Staff Ex. 1, Scheperle Direct, Appendix 1-3.

<sup>18</sup> Commission Rule 4 CSR 240-13.010(1) and 4 CSR 240-13.015(1)(U). Transcript, Vol. 2, p. 144-5.

<sup>19</sup> Transcript Vol. 2, p. 130; Briarcliff Ex. 3, Hagedorn Surrebuttal, p. 5.

<sup>20</sup> Transcript Vol. 2, p. 78, 81, 89, 93-5, 96; KCP&L Ex. 1 NP and HC, Henrich Rebuttal, Schedules JAH-1, JAH-2, and JAH-3.

<sup>21</sup> Transcript, Vol. 2, p. 89.

<sup>22</sup> Briarcliff Ex. 3, Hagedorn Surrebuttal, p. 3.

### **III. Conclusions of Law**

Although Briarcliff is not a person or an entity regulated by the Commission, it submitted itself to the Commission's jurisdiction when Briarcliff filed its complaint pursuant to Section 386.390, RSMo 2000. KCP&L provides electric service to customers throughout the service area certificated to it by the Commission. KCP&L 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. Since Briarcliff brought the complaint, it bears the burden of proof.<sup>23</sup> The burden of proof is the preponderance of the evidence standard.<sup>24</sup> In order to meet this standard, Briarcliff must convince the Commission it is "more likely than not" that KCP&L violated an applicable statute, rule, or provision of a Commission-approved tariff.<sup>25</sup>

The first issue is whether KCP&L properly applied its tariff as of August 2009 in refusing to provide service to Briarcliff I on the 1LGAE (general service all-electric) rate schedule under a customer name differing from the customer name associated with that service prior to the general service all-electric rate schedule being frozen. Resolution of this issue requires interpretation of previous Commission decisions. The Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.<sup>26</sup> 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.<sup>27</sup>

The Commission's decision in the 2007 rate case limited the availability of the all-electric rate after January 1, 2008. Thereafter, that lower rate would only be "available to such customers for so long as they continuously remain on that rate schedule".<sup>28</sup> The Commission interprets the word "they" in that decision to modify the word "customers", and not the word "locations" that appears earlier in that text. To find otherwise would mean that locations receiving the all-electric rate could continue to receive that rate indefinitely regardless of how many owners or tenants occupied those premises, which would be contrary to the Commission's intent in limiting that schedule in the 2007 rate case. This interpretation is supported by KCP&L's

<sup>23</sup> *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n of State of Mo.*, 116 S.W.3d 680, 693 (Mo. Ct. App. 2003).

<sup>24</sup> *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).

<sup>25</sup> *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).

<sup>26</sup> *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).

<sup>27</sup> *Id.*

<sup>28</sup> File No. ER-2007-0291, *Report and Order*, p. 82.

subsequent amended tariff effective January 1 2008 which states, in part, that “[t]his Schedule is available only to Customers’ physical locations currently taking service under this Schedule and who are served hereunder continuously thereafter”. If continuous service was based on the physical location (and not an individual customer), the word “who” in the tariff would have been replaced by words such as “that” or “which”. Applying this interpretation of the 2007 rate case decision and the tariff to the facts of this case requires determining whether Briarcliff was a “customer” being served continuously after January 1, 2008.

If Briarcliff was already a “customer” from January 1, 2008 until August 2009 when the name on the account was changed from that of the agent to Briarcliff, then it continuously remained on that rate schedule and KCP&L should have made the lower all- electric schedule available to Briarcliff. If Briarcliff was not a “customer” prior to August 2009, then there was a break in the continuity of customers for the Briarcliff I building when the name was changed and KCP&L properly refused service under the all-electric schedule.

There was considerable evidence presented concerning whether Briarcliff and its agent were “responsible parties” as defined in the KCP&L tariffs and their legal obligation, if any, to provide payment to KCP&L for electric service. Persons who are customers of KCP&L as defined in the tariffs and persons who are responsible for payment are similar, but may not necessarily be the same. To the extent that the parties attempt to equate the two classifications, those efforts are misplaced. The critical question is whether Briarcliff was a “customer” of KCP&L prior to August 2009, not whether it was responsible for payment.

There are three potential definitions of “customer” that could describe Briarcliff’s status with KCP&L prior to August 2009- KCP&L’s customary practice and procedure for designating customers, the definition of “customer” in Commission Rule 4 CSR 240-13.015(1)(E) that was incorporated into KCP&L’s tariffs, and the definition in KCP&L’s tariffs found in subsection 1.04. KCP&L’s customary practice and procedure for designation of customers, including a “customer of record”, is not defined in its tariffs. Since tariffs have the force and effect of a law<sup>29</sup> and KCP&L’s practices are not accorded the status of a law, the definitions of “customer” found in the tariffs must be given more weight than those customary practices.

The two different definitions of “customer” in the tariffs are the definition in Commission Rule 4 CSR 240-13.015(1)(E) and the definition in subsection 1.04 of the tariffs. Commission Rule 4 CSR 240-13.015(1)(E) is a part of Chapter 13 of the Commission’s rules, which only apply to residential utility services for domestic purposes. The record is clear that Briarcliff was a commercial enterprise, not residential, and KCP&L did not provide residential utility to service to Briarcliff I. While the Chapter 13 rules were incorporated by reference into KCP&L’s tariffs, the definition of “customer” in Commission Rule 4 CSR 240-13.015(1)(E) is not applicable in this case because the electric service KCP&L provided to Briarcliff I was not residential service. Therefore, the appropriate definition of “customer” to apply is the definition found in subsection 1.04 of the tariffs.

<sup>29</sup> *State ex rel. St. Louis County Gas Co. v. Public Service Commission*, 286 S.W. 84, 86 (Mo. 1926); *State ex rel. Jackson County v. Public Service Commission*, 532 S.W. 2d 20, 29 (Mo. 1975).

If Briarcliff meets all the elements of the definition in subsection 1.04 after January 1, 2008, then it was a “customer” and entitled to continue to receive the all-electric rate. That definition requires that a “customer be:

1. any person,
2. applying for, receiving, using, or agreeing to take a class of electric service,
3. supplied by the Company under one rate schedule at a single point of delivery at and for use within the premise either
  - (a) occupied by such persons, or
  - (b) as may, with the consent of the Company, be designated in the service application or by other means acceptable to the Company.

With regard to element number 1, Briarcliff was a “person” at all times pertinent hereto as defined in subsection 1.03 of KCP&L’s tariffs, as it was a Missouri corporation. With regard to element number 3, KCP&L supplied electric service under an all-electric rate schedule from 1999 until August 2009 for use within the Briarcliff I building. Although Briarcliff did not physically occupy that building, the address of the building was designated on the service application by KCP&L in 1999 and thereafter. The evidence shows that Briarcliff satisfies the first and third elements of the definition.

The remaining element number 2 requires Briarcliff to demonstrate that it applied for, received, used or agreed to take a class of electric service from KCP&L. First, there is no credible evidence that Briarcliff applied for electric service at the Briarcliff I building. Briarcliff’s predecessor, Briarcliff West Realty Company, applied for service in May 1999, and Briarcliff’s agent, Winbury Group, applied for service in June 1999. Briarcliff itself did not apply for service prior to August 2009. Second, Briarcliff did not physically occupy any part of the premises at Briarcliff I and, consequently, did not receive or use electric service from KCP&L at that location. Third, there is insufficient evidence that Briarcliff itself agreed with KCP&L to take electric service at Briarcliff I. The word “agree” is defined as “to grant consent...to come to an understanding or to terms”.<sup>30</sup> There was no evidence that Briarcliff through its own actions reached a mutual agreement with KCP&L prior to August 2009 concerning electric service. Since neither Briarcliff nor KCP&L granted consent or came to an understanding with the other in regard to service, Briarcliff itself could not have agreed to take electric service for the Briarcliff I building. Briarcliff has not met element number 2 of the definition of “customer”. Therefore, it was not a customer of KCP&L prior to August 2009 unless it can acquire customer status in some other manner.

Although Briarcliff does not itself meet the definition of “customer” under the tariff, Briarcliff can acquire customer status through its agent, Winbury Group, under the general rules of agency law. Winbury Group does meet the definition of “customer” in the tariff because it applied for and agreed to take electric service under a service agreement with KCP&L. In 1999, Winbury Group executed a management agreement with Briarcliff’s predecessor, wherein Winbury Group was named as the managing agent for the Briarcliff I building and received express authority to contract for electric service in the name of Briarcliff. However, Winbury Group failed to disclose to KCP&L that Briarcliff was its principal under the management agreement.

Restatement (Third) of Agency, Section 6.03 (2006) states that “[w]hen an agent acting with actual authority makes a contract on behalf of an undisclosed principal...the principal ... and the third party have the same rights, liabilities, and defenses against each other as if the principal made the contract personally...” The Missouri Court of Appeals has stated in that in the situation of an agent contracting on behalf of an undisclosed principal, “the contract inures to the benefit of the principal who may appear and hold the other party to the contract made by the agent. By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party...”<sup>31</sup> Substitution of the principal for the agent is not permitted if it causes injury to the third party<sup>32</sup>, but KCP&L is not injured by Briarcliff receiving the all-electric rate because it merely continues the status quo that had been in place for ten years. Moreover, KCP&L has requested that the Commission permit it to charge Briarcliff the all-electric rate on a prospective basis, which further suggests that KCP&L will not be injured by Briarcliff receiving the all-electric rate. These agency principles and case law lead to the conclusion that Briarcliff, as the undisclosed principal, can claim the benefits of the service agreement contract for itself and acquire Winbury Group’s status as a “customer” that agreed to take electric service at the Briarcliff I building.

The Commission is cognizant of the limits of its statutory authority. The Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto.<sup>33</sup> The Commission cannot enforce, construe or annul contracts,<sup>34</sup> nor can it declare or enforce principles of law or equity.<sup>35</sup> However, the Commission does have the authority to interpret and apply tariffs,<sup>36</sup> including the exclusive jurisdiction to determine and classify which of two approved rates apply to a customer of a public utility.<sup>37</sup> The service agreement between KCP&L and Winbury Group is a contract, but that contract is defined by the KCP&L tariffs, and the terms and conditions of that agreement are described in the tariffs. The service agreement is so intertwined with the KCP&L tariffs that the Commission determines it has the statutory authority to interpret the relationship between Briarcliff, KCP&L and Winbury Group under that agreement in order to reach a decision concerning whether Briarcliff meets the definition of “customer” under the KCP&L tariffs.

<sup>30</sup> *The American Heritage Dictionary*, (Second College Edition 1982).

<sup>31</sup> *Phillips v. Hoke Construction, Inc.*, 834 S.W.2d 785, 789 (Mo. App. S.D. 1992)

<sup>32</sup> *Id.*

<sup>33</sup> *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 766, 168 S.W.2d 1044, 1046 (1943).

<sup>34</sup> *Wilshire Const. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971).

<sup>35</sup> *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 547 (Mo. Ct. App. 2008).

<sup>36</sup> *State ex rel. Missouri Pipeline Co. v. Missouri Public Service Com'n*, 307 S.W.3d 162, 177 (Mo. Ct. App. 2009).

<sup>37</sup> *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d at 1047.

The Commission concludes that Briarcliff acquired Winbury Group's status as a "customer" that agreed to take electric service from KCP&L and continuously maintained that status from 1999 through August 2009. Therefore, KCP&L improperly refused to provide service to Briarcliff under the all-electric rate schedule when the name on the account for the Briarcliff I building changed in August 2009. By so concluding, the Commission need not consider further the two additional issues presented by the parties regarding the grant of a waiver or variance of the KCP&L tariff or amendment of the tariff to provide Briarcliff the all-electric rate.

In its complaint, Briarcliff requests that the Commission require KCP&L to immediately allow Briarcliff to receive the large general all-electric service rate, to re-bill Briarcliff for electric service at the all-electric rate from August 2009 until KCP&L reinstates services at that all-electric rate, and refund any difference between the all-electric rate and the general service rate Briarcliff is currently paying, with interest. The Commission does have the authority to determine what approved rate should be applied to Briarcliff<sup>38</sup>, and will require that KCP&L apply the all-electric rate to Briarcliff prospectively. However, the Commission does not have the authority to provide equitable relief, determine damages, or award pecuniary relief.<sup>39</sup> The Commission is not a court of law and, consequently, may not grant Briarcliff's requests for re-billing, refund, and interest.<sup>40</sup> The Commission notes that KCP&L's actions in refusing to provide service to Briarcliff I under the all-electric rate schedule beginning in August 2009 were made in good faith and reasonably based on information available to it at that time.

#### **IV. Decision**

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission determines that the substantial and competent evidence in the record as a whole supports the conclusion that Briarcliff has met, by a preponderance of the evidence, its burden of proving that KCP&L incorrectly applied a tariff provision by refusing to provide service to Briarcliff I on the all-electric rate schedule as of August 2009.

<sup>38</sup> *Id.*

<sup>39</sup> *American Petroleum Exchange v. Public Service Com'n*, 172 S.W.2d 952, 955 (Mo. 1943).

<sup>40</sup> See, *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d at 1046; *DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo. Ct. App. 1978); *State ex rel. Laundry, Inc. v. Pub.Serv. Comm'n*, 327 Mo. 93, 34 S.W.2d 37, 46 (1931).

**THE COMMISSION ORDERS THAT:**

1. Briarcliff Development Company's Complaint is sustained.
2. Kansas City Power & Light shall provide electric service to Briarcliff I on the 1LGAE (general service all-electric) rate schedule beginning on the effective date of this order and continuing for so long as Briarcliff Development Company continuously remains on that rate schedule.
3. This Report and Order shall become effective on April 6, 2012.
4. This file shall close on April 7, 2012.

Gunn, Chm., and Jarrett, C., concur;  
Kenney, C., dissents, with separate  
dissenting opinion to follow;  
and certify compliance with the provisions  
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 7th day of March, 2012.

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

**In the Matter of the Determination of Carrying Costs for the Phase-In Tariffs of KCP&L Greater Missouri Operations Company**

**File No. ER-2012-0024**

**Electric. §20 Rates.** By ordering a phase-in of rates, the Commission has effectively denied the utility the right to earn a full return on investment during the phase-in period unless appropriate carrying costs are allowed during the phase-in.

**Electric. §20 Rates.** The Commission has express statutory authority to order that rates be phased in.

**Rates. §3 Jurisdiction and powers of the State Commission.** The Commission retained jurisdiction to determine questions regarding phase in of a rate increase even while the order that established the rates to be phased in was under judicial review

**REPORT AND ORDER**

**Issue Date: March 7, 2012**

**Effective Date: April 6, 2012**

**APPEARANCES**

**James M. Fischer, Esq.**, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Kansas City Power & Light Company.

**Roger W. Steiner, Esq.**, , 1200 Main Street, 16<sup>th</sup> Floor, Post Office Box 418679, Kansas City, Missouri, 64105-9679, for Kansas City Power & Light Company.

**Stuart W. Conrad, Esq.**, Finnegan, Conrad & Peterson, L.C., 1209 Penntower Building, 3100 Broadway, Suite 1209, Kansas City, Missouri 64111, for Midwest Energy Users' Association.

**Lewis R. Mills, Jr., Esq.**, Public Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

**Nathan Williams, Esq.**, Deputy Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

**REGULATORY LAW JUDGE: Ronald D. Pridgin, Senior**

**Procedural History**

On May 4, 2011, the Commission issued its *Report and Order* in GMO's last rate case, File No. ER-2010-0356. In its *Report & Order*, the Commission determined that it was appropriate to adopt a different method of allocating the costs of Iatan 2 between the MPS and L&P divisions than that proposed by GMO, based largely upon the recommendations of the Commission Staff.<sup>1</sup>

<sup>1</sup> *Report and Order*, pp. 195-204.

In its findings of fact, the Commission specifically found: “The Iatan 2 Allocation is more akin to a rate design issue since it determines the relative amount of the rate increase that will be received by both the MPS and the L&P service areas rather than the overall revenue requirement impact of Iatan 2.”<sup>2</sup> As a result of this rate design determination, a larger increase was adopted for the L&P division than originally proposed by GMO.

Timely applications for rehearing were filed by GMO, Ag Processing Inc., a cooperative (“AGP”), the Office of the Public Counsel (“OPC”), and Dogwood Energy, LLC on various issues. After receiving additional responses and arguments, the Commission held an on-the-record question and answer session on May 26, 2011, to better understand the requests for rehearing and clarification regarding the Iatan allocation issue.

On May 27, 2011, the Commission issued its *Order of Clarification and Modification* in which it determined that:

Because of the magnitude of the rate increase and the effects on the ratepayers in the L&P service area, the Commission determines in its discretion that a just and reasonable method of implementing this large increase is by phasing it in over a reasonable number of years. The Commission further concludes that rates for L&P service area should initially be set at an amount equal to the \$22.1 million originally proposed by GMO with the remaining increase plus carrying costs being phased-in in equal parts over a two year period.<sup>3</sup>

Following that order, GMO filed tariffs (Tariff File Nos. YE-2011-0608, YE-2011-0609, and YE-2011-0610) to implement the phase-in, including carrying costs. OPC and AGP objected to the proposed carrying costs and additional filings were made regarding the subject.

On June 24, 2011, GMO filed its Writ of Review of the Commission’s *Report & Order* in File No. ER-2010-0356 with the Cole County Circuit Court appealing issues not related to the phase-in plan. On or about June 30 and July 20, 2011, respectively, AGP and Public Counsel filed their Writ of Review with the Cole County Circuit Court. On August 1, 2011, the Circuit Court issued its Order Consolidating Cases. (Consolidated Case Nos. 11-ACCC00415, 11 AC-CC00432, and 11AC-CC00474)

On June 25, 2011, the Commission issued its *Order Approving Tariff Sheets and Setting Procedural Conference* stating that additional evidence was needed to determine the appropriate carrying costs. On June 28, 2011, a procedural conference was held and the parties who participated at the conference filed a joint proposed procedural schedule, including the filing of pre-filed testimony, a list of issues, order of witnesses, order of cross-examination, and evidentiary hearings.

On July 25, 2011, the Commission issued its *Notice of Opening Case, and Notice Opening a New File and Adopting Procedural Schedule* in File No. ER-2012-0024. The Commission also filed in File No. ER-2012-0024 various tariffs and pleadings that had been previously filed in GMO’s last rate case, File No. ER-2010-0356. On July 25, 2011, the Commission also issued its *Notice Closing File* in File No. ER-2010-0356.

<sup>2</sup> *Id.*

<sup>3</sup> *Order of Clarification and Modification*, p. 7.

On August 16, 2011, GMO file its Motion to Suspend Procedural Schedule to allow the parties to discuss settlement of the case. On August 17, 2011, the Commission issued its Order Granting Motion to Suspend Procedural Schedule.

On September 2, 2011, GMO and Staff filed a Non-Unanimous Stipulation and Agreement (“the Stipulation”) which recommended that the Commission approve the use of a 3.25 percent carrying cost in GMO’s phase-in tariffs. In addition, the Stipulation recommends that the Commission should order that the attached tariff schedules for the second, third and fourth year of the phase-in plan shall become effective automatically in each subsequent year on June 25 without further order of the Commission, unless suspended by the Commission for good cause shown.

OPC, Robert Wagner, Dogwood, the Missouri Department of Natural Resources and Union Electric Company d/b/a Ameren Missouri have indicated that they do not oppose the Stipulation. On September 8, 2011, AGP filed its Objection to the Stipulation, and requested a hearing.

### **General Findings of Fact**

1. Because, as discussed above in the Procedural History, the Commission has ordered a phase-in of rates, GMO will recognize a cash flow detriment during the phase-in.<sup>4</sup>

2. The first year rate increase that the Commission has allowed GMO is \$22,101,088, which is \$7,671,708 less than what GMO would have received absent the phase-in.<sup>5</sup>

3. By ordering the phase-in, the Commission has effectively denied GMO the right to earn a full return on investment during the first year of its rate increase, unless appropriate carrying costs are allowed to be recovered during the phase-in.<sup>6</sup>

4. GMO and the Staff of the Commission have filed a Non-Unanimous Stipulation and Agreement (“the Stipulation”) that resolves their dispute on the amount of the carrying costs. GMO and Staff agree that GMO should have a carrying cost rate of 3.25 percent.<sup>7</sup>

5. GMO and Staff included exemplar tariffs with the Stipulation. The amount of rate increase reflected by these tariffs for June 25, 2012 is a \$11,756,983 increase above the June 25, 2011 tariffs. That reflects the phase-in rate increase of one half of the difference between \$29,772,796 and \$22,101,088 (\$3,835,854), the deferred revenue during the period of June 25, 2011 through June 24, 2012 (\$7,671,708), and the carrying costs agreed to in the Stipulation (3.25 percent) on the deferred revenue of \$7,671,708 (\$249,331).<sup>8</sup>

<sup>4</sup> Ex. 2, p. 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Ex. 1.

<sup>8</sup> Ex. 3, p. 3.

6. To effectuate the June 25, 2013 phase-in, GMO and Staff have included exemplar tariffs. These tariffs reflect the remaining phase-in rate increase of one half of the difference between \$29,772,796 and \$22,101,088 (\$3,835,854), the deferred revenue during the period of June 25, 2012 through June 24, 2013 (\$3,835,854), and the carrying costs (3.25 percent) on the deferred revenue of \$3,835,854 (\$124,665). This increase is offset by the reversal of the prior years' deferred revenues and the prior year's carrying costs.<sup>9</sup>

7. To effectuate the June 25, 2014 phase-in, GMO and Staff have included exemplar tariffs. These tariffs complete the phase-in and establish the rates for GMO's Light & Power ("L&P") division at \$29,772,796, which is the amount of the rate increase as ordered prior to phase-in.<sup>10</sup>

### **General Conclusions of Law**

1. The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision.

2. 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. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.<sup>11</sup>

3. GMO is an electric utility and a public utility subject to Commission jurisdiction.<sup>12</sup> The Commission has authority to regulate the rates GMO may charge for electricity.<sup>13</sup>

### **Conclusions of Law Regarding Jurisdiction**

4. In making its determination, the Commission may adopt or reject any or all of any witnesses' testimony.<sup>14</sup> Testimony need not be refuted or controverted to be disbelieved by the Commission.<sup>15</sup> The Commission determines what weight to accord to the evidence adduced.<sup>16</sup> "It may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it."<sup>17</sup>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Witness credibility is solely within the discretion of the Commission, who is free to believe all, some, or none of a witness' testimony. *State ex. rel. Missouri Gas Energy v. Public Service Comm'n*, 186 S.W.3d 376, 389 (Mo. App. 2005).

<sup>12</sup> Section 386.020(15), (42) RSMo 2006 (all statutory cites to RSMo 2006 unless otherwise indicated).

<sup>13</sup> Section 393.140(11).

<sup>14</sup> *State ex. rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880 (Mo. App., W.D. 1985).

<sup>15</sup> *State ex. rel. Rice v. Public Service Commission*, 220 S.W.2d 61, 65 (Mo. banc 1949).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

The Commission may evaluate the expert testimony presented to it and choose between the various experts.<sup>18</sup>

5. The Staff of the Commission is represented by the Commission's Staff Counsel, an employee of the Commission authorized by statute to "represent and appear for the commission in all actions and proceedings involving this or any other law [involving the commission.]"<sup>19</sup> The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"<sup>20</sup> The remaining party is an association of industrial consumers.

### **The Issues**

On December 21, 2011, the parties filed an Issues List. The issues the parties present to the Commission for resolution are:

1. Does the Commission have jurisdiction in this case?
2. Does the Commission decision consider all relevant factors?
3. Should GMO's carrying costs in the phase-in tariff schedules filed in this proceeding be 3.25 percent per year?
4. Should the Commission order that the tariff schedules filed with the Non-Unanimous Stipulation and Agreement on September 2, 2011 for the second, third and fourth year of the phase-in plan be allowed to become effective automatically in each subsequent year on June 25 without further order of the Commission, unless suspended by the Commission for good cause shown?

### **Discussion**

#### ***Issue 1 - Does the Commission have jurisdiction in this case?***

### **Findings of Fact**

8. In GMO's most recent rate case, AGP's counsel repeatedly urged the Commission to phase in the rate increase.<sup>21</sup>
9. AGP's counsel stated, among other things, that "(t)he statute allows for phase-ins for unusually large rate base additions. No question that this qualifies."<sup>22</sup>
10. He also asked the Commission to "(o)rder GMO to file their next tariffs in a certain period of time and reflect at that time their carrying costs."<sup>23</sup>
11. Further, he urged the Commission to "(j)ust do the right thing and phase in the additional amount."<sup>24</sup>
12. He also argued that "(w)e have a solution to continue to recognize that customers have made budgeting decisions, and that is the phase-in."<sup>25</sup>

<sup>18</sup> *Associated Natural Gas, supra*, 706 S.W.2d at 882.

<sup>19</sup> Section 386.071.

<sup>20</sup> Sections 386.700 and 386.710.

<sup>21</sup> Commission File No. ER-2010-0356, Oral Argument, Tr. pp. 4973-74, 4982-83, 4986, 4989, 4992-93, ,5005-06 (May 26, 2011).

<sup>22</sup> *Id.* at 4973.

<sup>23</sup> *Id.* at 4975.

<sup>24</sup> *Id.* at 4986.

<sup>25</sup> *Id.* at 5005.

**Conclusions of Law**

6. Pursuant to Missouri statutes, all orders of the Missouri Public Service Commission (“Commission” or “PSC”) shall be in force and shall be prima facie lawful and reasonable until found otherwise.<sup>26</sup>

7. Orders of the Commission remain in force until changed by the Commission or found to be unlawful.<sup>27</sup>

8. A party’s dissatisfaction with a Commission order and the pendency of any appeal of that order has no bearing on its effect. Commission orders remain in effect despite a pending application for rehearing.<sup>28</sup>

9. The Commission’s orders also remain in effect despite a pending writ of review.<sup>29</sup>

10. “Unquestionably, the orders of the Commission were presumptively valid under the provisions of § 386.270 prior to the ruling of the circuit court.”<sup>30</sup>

11. Orders of the Commission enjoy a presumption of validity throughout their review.<sup>31</sup>

12. Even an adverse ruling on a Commission order by the circuit court does not invalidate that order while the appeal continues.<sup>32</sup>

13. A party aggrieved by a Commission decision has the right to protect its interests by applying to the circuit court for a stay of enforcement of the Commission’s order pursuant to Section 386.520.<sup>33</sup>

14. “This section provides the opportunity to stay the Commission’s order upon issuance of a stay order by the circuit court and the filing of a bond.”<sup>34</sup>

15. No stay has issued in this case. Thus, the Commission’s May 4, 2011 *Report and Order* and the May 27, 2011 *Order of Clarification and Modification* in File No. ER-2010-0356 both remain effective and valid.

<sup>26</sup> Section 386.270.3 RSMo (2000).

<sup>27</sup> Section 386.490.3.

<sup>28</sup> Section 386.500.3.

<sup>29</sup> Section 386.520.1.

<sup>30</sup> *State ex rel. GTE North, Inc. v. PSC*, 835 S.W.2d 356, 366 (Mo. App. W.D. 1992).

<sup>31</sup> See *State ex rel. Kansas City Power & Light Co. v. PSC*, 76 S.W.2d 343, 350 (Mo. 1934); *State ex rel. Midwest Gas Users’ Assoc. v. PSC*, 976 S.W.2d 470, 476 (Mo. App. W.D. 1998).

<sup>32</sup> See *Kansas City Power & Light Co. v. PSC*, 76 S.W.2d at 368.

<sup>33</sup> *State ex rel. GTE North, Inc. v. PSC*, 835 S.W.2d 356, 366-67 (Mo. App. W.D. 1992).

<sup>34</sup> *Id.* at 367.

16. The Commission has express statutory authority to direct a utility to file tariffs reflecting the phase-in of rates authorized in a rate case after the conclusion of the rate case hearing:

If, after hearing, the commission determines that any electrical corporation should be allowed a total increase in revenue that is primarily due to an unusually large increase in the corporation's rate base, the commission, in its discretion, need not allow the full amount of such increase to take effect at one time, but may instead phase in such increase over a reasonable number of years. Any such phase-in shall allow the electrical corporation to recover the revenue which would have been allowed in the absence of a phase-in and shall make a just and reasonable adjustment thereto to reflect the fact that recovery of a part of such revenue is deferred to future years. In order to implement the phase-in, the commission may, in its discretion, approve tariff schedules which will take effect from time to time after the phase-in is initially approved.<sup>35</sup>

17. The Commission has acted upon this statutory authority in previous rate cases.<sup>36</sup>

18. The Commission does not lose its jurisdiction to exercise such ministerial functions after the filing of the notice of appeal. In Union Electric Company's 1984 rate case, the Commission issued its report and order by which it phased-in the utility's increased rates over a period of eight years.<sup>37</sup> Several industrial users intervened in the rate proceeding. After the Commission issued its report and order, those industrial users filed a petition for writ of review in the Circuit Court of Cole County. Nevertheless, the Commission continued to implement its report and order, phasing-in the utility's rates until it issued a report and order in 1987 in which it determined that the phase-in should be ended.<sup>38</sup>

19. In addition, it is very common for the Commission to spin off dockets from rate cases in order to examine additional issues. For example, the Commission has ordered the creation of new dockets to review rate design, tree trimming policies and other issues related to previously decided rate cases and other complaint proceedings.<sup>39</sup>

<sup>35</sup> Section 393.155.1.

<sup>36</sup> See *Report and Order*, In the Matter of the Determination of In-Service Criteria for the Union Electric Co.'s Callaway Nuclear Plant and Callaway Rate Base and Related Issues, File Nos. EO-85-17, ER-85-160, 27 Mo. P.S.C. (N.S.) 183, 318 (Mar. 29, 1985); *Report and Order*, In the matter of Kansas City Power & Light Company for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the Company, and the determination of in-service criteria for Kansas City Power & Light Company's Wolf Creek Generating Station and Wolf Creek rate base and related issues, File Nos. ER-85-128, EO-85-185, EO-85-224, 28 Mo. P.S.C. (N.S.) 228, 424 (Apr. 23, 1986).

<sup>37</sup> See *Report and Order*, In the Matter of the Determination of In-Service Criteria for the Union Electric Co.'s Callaway Nuclear Plant and Callaway Rate Base and Related Issues, File Nos. EO-85-17, ER-85-160, 27 Mo. P.S.C. (N.S.) 183, 3271-72 (Mar. 29, 1985).

<sup>38</sup> See *Report and Order*, *Staff of the PSC vs. Union Electric Co.*, File Nos. EC-87-114, EC-87-115 (Dec. 21, 1987).

<sup>39</sup> See e.g., In re Aquila, 2005 WL 2039745, File Nos. ER-2005-0436 (August 23, 2005); Re Kansas City Power & Light Company, File No. ER-94-199 and ER-94-197; File No. ET-97-113 (June 13, 1997); Re Union Electric Company, *Order Regarding Union Electric's Tree Trimming Policies and Closing Case*, File No. EW-2004-0583, 2005 WL 742841 (April 10, 2005); Re St. Louis County Water Co., *Report and Order*, File No. WO-98-223 (February 13, 2001).

20. A party may not encourage a tribunal to take a specific action and then complain on appeal that the specific action adopted is unlawful.<sup>40</sup>

### **Decision**

In GMO's most recent rate case, counsel for AGP acknowledged that this Commission has the statutory authority to phase in the rate increases and repeatedly urged the Commission to do so. We agree. Due to the plain language of Section 393.155 RSMo, the Commission finds this issue in favor of GMO and Staff. Section 393.155 RSMo clearly allows the Commission to phase in rate increases.

The Commission has jurisdiction in this case.

### ***Issue 2 - Does the Commission decision consider all relevant factors?***

### **Findings of Fact**

There are no additional findings of fact.

### **Conclusions of Law**

21. Courts do not assume the legislature intends a statute to have an absurd or unreasonable effect.<sup>41</sup>

22. The customer rates the Commission approved in File No. ER-2010-0356 are presumptively correct until the Commission again considers all relevant factors for new customer rates in a subsequent general electric rate proceeding, or a court holds them to be unlawful and/or unreasonable.<sup>42</sup>

23. In order to implement the phase-in, the commission may, in its discretion, approve tariff schedules which will take effect from time to time after the phase-in is initially approved.<sup>43</sup>

24. The Commission has previously ordered phase-ins of rate increases.<sup>44</sup>

### **Decision**

The Commission finds this issue in favor of GMO and Staff. The Commission's decision applies Section 393.155.1 RSMo to arrive at carrying costs; the Commission considered all relevant factors in GMO's prior rate case, which is File No. ER-2010-0356.

### ***Issue 3 - Should GMO's carrying costs in the phase-in tariff schedules filed in this proceeding be 3.25 percent per year?***

<sup>40</sup> See *Rosencranz v. Rosencranz*, 87 S.W.3d 429 (Mo. App. 1982); *State ex rel. American Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 531-32 (Mo. App. W.D. 2008); *Lindahl v. State of Missouri*, \_\_\_S.W.3d \_\_\_, 2011 WL 3273469 (Mo. App. W.D.) (Opinion Filed: August 2, 2011).

<sup>41</sup> See *State ex. rel. County of Jackson v. Public Service Commission*, 14 S.W.3d 99, 102 (Mo.App. 2000)

<sup>42</sup> Sections 386.490.2 RSMo 2000, 386.510 RSMo 2000 (repealed); see also *State ex. rel. AG Processing, Inc.*, 276 S.W.3d 303, 605-06; see also Sections 386.510, .520 RSMo Supp. 2011.

<sup>43</sup> Section 393.155.1 RSMo 2000.

<sup>44</sup> See *In the Matter of Kansas City Power & Light Company*, 28 Mo.P.S.C. (N.S.) 228, 419 (Report and Order, April 23, 1986); *In the Matter of Kansas City Power & Light Company*, 29 Mo.P.S.C. (N.S.) 295 (Order Approving Joint Recommendation, November 23, 1987).

**Findings of Fact**

13. Both Staff and GMO have taken the position the rate of 3.25 percent per year should be used to determine the “just and reasonable adjustment” to reflect deferral to the future of the recovery of revenue which would have been allowed in the absence of the phase-in.<sup>45</sup>

14. Sixteen banks have committed to provide advances to GMO totaling up to \$450 million at interest rates specified in the facility.<sup>46</sup>

15. Those interest rates are primarily 2.75 percent plus the British Bankers Association LIBOR rate for an equivalent term loan or 1.75 percent plus the highest of (a) the Federal Funds Rate plus one-half of one percent (1/2%), (b) Bank of America’s publicly announced “prime rate” in effect and (c) the Eurodollar base rate plus one percent (1%).<sup>47</sup>

16. Although past interest rate experience does not assure similar future rates, the fact that the Federal Reserve has assured financial markets that it will maintain the Federal Funds rate at its current level for the next couple of years provides some certainty the current level of short-term rates will continue in the near future.<sup>48</sup>

17. GMO has been taking one month advances at LIBOR plus 2.75 percent and, over the phase-in period, that one month advances rate would range from 2.95 to 3.10 percent.<sup>49</sup>

18. Based on the three-month LIBOR rates since January 2010, interest on three-month advances to GMO during the phase-in period could be as high as 3.25 percent.<sup>50</sup>

19. The “prime rate” has been 3.25 percent for about the immediately past three years; therefore, the alternative rate GMO might pay during the phase-in period is 3.25 percent plus 1.75 percent or 5.00 percent.<sup>51</sup>

20. Based on Staff witness Murray’s analysis of GMO’s weighted average cost of short-term debt through May 2011, GMO took an advance on May 11, 2011, at an interest rate of 5.00 percent.<sup>52</sup>

21. If the Commission uses GMO’s cost of short-term debt for determining the “carrying costs” for the revenue increase phase-in, 3.25 percent is a “fair and reasonable” rate to use for that purpose.<sup>53</sup>

<sup>45</sup> Ex. 1.

<sup>46</sup> Ex. 2, p. 6.

<sup>47</sup> Ex. 4, p. 3.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.* at 4.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 5.

22. GMO's fuel adjustment clause states that "interest at [GMO's] short-term borrowing rate"— average interest paid on short-term debt — is used to calculate the "carrying costs" for the under- or over-collection of the costs and revenues that flow through that clause as required by § 386.266.4(2), RSMo 2011.<sup>54</sup>

23. GMO's average interest on short-term debt used in its fuel adjustment clause, which changes monthly, ranged from just under two percent to just under four percent per year over the twenty months of January 2010 to August 2011.<sup>55</sup>

### **Conclusions of Law**

There are no additional conclusions of law for this issue.

### **Decision**

The Commission finds this issue in favor of GMO and Staff. GMO's carrying costs for the phased-in rates shall be 3.25 percent per year

***Issue 4 - Should the Commission order that the tariff schedules filed with the Non-Unanimous Stipulation and Agreement on September 2, 2011 for the second, third and fourth year of the phase-in plan be allowed to become effective automatically in each subsequent year on June 25 without further order of the Commission, unless suspended by the Commission for good cause shown?***

### **Findings of Fact**

24. The exemplar tariff schedules marked as Exhibit A of the Non-Unanimous Stipulation and Agreement filed in this case on September 2, 2011, are designed to implement, and would implement, a "just and reasonable adjustment" to reflect deferral to the future of the recovery of revenue which would have been allowed in the absence of the phase-in base on a rate of 3.25 percent per year for "carrying costs."<sup>56</sup>

### **Conclusions of Law**

There are no additional conclusions of law for this issue.

### **Decision**

The Commission finds this issue in favor of GMO and Staff.

<sup>54</sup> Ex. 6, p.1.

<sup>55</sup> Id. at 2.

<sup>56</sup> Ex. 1, Ex. 3, pp. 2-4, Ex. 7, pp. 1-2.

**THE COMMISSION ORDERS THAT:**

1. AG Processing, Inc's. evidentiary objections are overruled.
2. The proposed tariff sheets filed by KCP&L Greater Missouri Operations Company on May 31, 2011, Tariff No. YE-2011-0608, YE-2011-0609 and YE-2011-0610, are rejected.
3. KCP&L Greater Missouri Operations Company shall file tariffs that comport with this Report and Order.
4. All pending motions and other requests for relief not granted are denied.
5. This Report and Order shall become effective on April 6, 2012.

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

Dated at Jefferson City, Missouri,  
on this 7<sup>th</sup> day of March, 2012.

**NOTE:** The case was appealed to the Missouri Court Of Appeals. Affirmed by *In Re KCP&L Greater Missouri Operations Co.*, 408 S.W.3d 175 (Mo. App. W.D. 2013).

**In the Matter of the Joint Application of Atmos Energy Corporation and Liberty Energy (Midstates) Corp. for Authority to Sell Certain Missouri Assets to Liberty Energy (Midstates) Corp. and, in Connection Therewith, Certain Other Related Transactions.**

**File No. GM-2012-0037**

**Gas. §6 Transfer, lease and sale.** The Commission approved the proposed transfer of a gas company's assets as being not detrimental to the public interest.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

Issue Date: March 14, 2012

Effective Date: March 24, 2012

**Syllabus:** This order approves the Unanimous Stipulation and Agreement ("Stipulation"), and allows Liberty Energy (Midstates) Corp. ("Liberty") to buy the natural gas and natural gas transportation systems of Atmos Energy Corporation ("Atmos"). The order also grants a waiver from the Commission's rule requiring a 60-day notice before filing a contested case.

**Procedural History**

On August 1, 2011, Atmos Energy Corporation ("Atmos") and Liberty Energy (Midstates) Corp. ("Liberty") filed an application. That application requests, among other things, authority from the Commission for Liberty to buy Atmos' natural gas and natural gas transportation systems. IBEW Local No. 1439 ("IBEW") intervened.

**The Joint Applicants**

Atmos is a Texas corporation that owns and operates a natural gas transmission and distribution system in Missouri. It is a "gas corporation" and a "public utility" subject to the Commission's jurisdiction.

Liberty is a Missouri corporation formed to acquire Atmos. It is a wholly owned subsidiary of Liberty Energy Utilities Co. ("Liberty Energy"), which is a wholly owned subsidiary of Liberty Utilities Co. ("Liberty Utilities"), and an indirect subsidiary of Algonquin Power & Utilities Corp. ("Algonquin").

The applicants state that the sale would not be detrimental to the public interest because Liberty is qualified to provide safe, reliable and affordable service. Further, they state they will be able to raise the necessary capital on reasonable terms and to maintain a reasonable capital structure. Finally, the sale would not impact tax revenues of the Missouri political subdivisions in which any structures, facilities, or equipment of Atmos is located.

**Unanimous Stipulation and Agreement**

On February 17, 2012, Liberty, Atmos, IBEW, the Staff of the Commission, and the Office of the Public Counsel submitted a Unanimous Stipulation and Agreement ("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: rate moratorium; rate base offset; acquisition costs and premium; environmental concerns; injuries, damages and workers' compensation; prepaid pension asset; affiliate transaction and Cost Allocation Manual (CAM); adherence to previous Commission orders and stipulations and agreements; tariffs; depreciation issues; credit issues; financing authorization; service quality conditions; Continuing Services Agreement (CSA); gas supply and hedging plans; FERC approvals; gas safety; IBEW conditions and miscellaneous conditions.

Due to the Stipulation, this case may be decided without convening a hearing.<sup>1</sup> Also, the Commission need not separately state its findings of fact or conclusions of law.<sup>2</sup>

The Commission can approve the requested sale upon finding the sale would not be detrimental to the public interest.<sup>3</sup> The Commission has reviewed the pleadings, and the Stipulation, and upon that review, finds that the proposed sale 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 transaction described in the Asset Purchase Agreement attached to the Joint Application is not detrimental to the public interest.
2. Atmos Energy Corporation is authorized to sell, and Liberty Energy (Midstates) Corp. is authorized to purchase, the assets identified in the Joint Application, including the issuance of new certificates of convenience and necessity for the service areas currently served by Atmos Energy Corporation.
3. Atmos Energy Corporation and Liberty Energy (Midstates) Corp. are authorized to enter into, execute and perform in accordance with the terms described in the Asset Purchase Agreement and to take and all other actions which may be reasonably necessary and incidental to the performance of the acquisition.
4. Liberty Energy (Midstates) Corp. is authorized to maintain its books and records outside of Missouri, pursuant to Commission Rule 4 CSR 240-10.010.
5. Atmos Energy Corporation is authorized to abandon the provision of natural gas distribution in Missouri upon the closing of the transaction.
6. The relief sought in the Joint Application and the conditions of the Unanimous Stipulation and Agreement are not detrimental to the public interest.
7. The Motion for Waiver of the 60-day notice of filing contained in Commission Rule 4 CSR 240-4.020(2) is granted.
8. Commission approval of the Unanimous Stipulation and Agreement is conditioned upon Liberty Energy (Midstates) Corp. filing with the Commission evidence of necessary FERC approval to transport gas to Rich Hill and Hume prior to closing.

<sup>1</sup> Section 536.060 RSMo Cum. Supp. 2010.

<sup>2</sup> Section 536.090 RSMo Cum Supp. 2010.

<sup>3</sup> Section 393.190 RSMo (2000), Commission Rule 4 CSR 240-3.215.

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9. Atmos Energy Corporation shall record the entries determined in its Missouri Depreciation Study submitted on June 1, 2011, prior to close of this transaction.

10. Liberty Energy (Midstates) Corp. is authorized until March 31, 2014 to not assess reconnection charges, delinquent payment charges, or foregone delivery charge fees resulting from any system conversion related error(s) and to no disconnect customers whenever the reason for the disconnection is the result of any system conversion related errors(s).

11. The terms of the Unanimous Stipulation and Agreement 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.

12. This order shall become effective on March 24, 2012.

13. This case shall be closed on March 25, 2012.

Gunn, Chm., 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 re: Union Electric Company's 2011 Utility Resource Filing Pursuant to 4 CSR 240 – Chapter 22.****File No. EO-2011-0271****Electric**

**§42 Planning and Management.** The purpose of the IRP review process is to determine whether the company has sufficiently explained why it chose the preferred resource plan that it chose. The process does not determine whether that resource plan is correct.

**Electric**

**§42 Planning and Management.** While the Commission does not pre-approve the utility's plan, it is important that the utility undertake an appropriate planning process and that the planning process be transparent to the Commission and the public.

**Electric**

**§42 Planning and Management.** A change in circumstances during the study process does not mean that the study is deficient.

**Electric**

**§42 Planning and Management.** The Commission's regulation requires an electric utility to undertake a planning process. It does not require the utility to reach a particular result, or even a result of which the Commission would approve.

**Electric**

**§42 Planning and Management.** Despite deficiencies in the utility's IRP filing, it would be a waste of resources to require the utility to look backward to use old data to revise that filing. Instead, the utility was ordered to take steps to improve its next IRP filing.

**REPORT AND ORDER**

**Issue Date: March 28, 2012**  
**Effective Date: April 27, 2012**

**APPEARANCES**

**Thomas M. Byrne**, Managing Associate General Counsel, and **Wendy K. Tatro**, Associate General Counsel, Ameren Services Company, P.O. Box 66149, 1901 Chouteau Ave., St. Louis, Missouri 63103;  
For Union Electric Company, d/b/a Ameren Missouri.

**Nathan Williams**, Deputy Counsel, and **John Borgmeyer**, Legal Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102  
For the Staff of the Missouri Public Service Commission.

**Lewis R. Mills, Jr.**, Public Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102  
For the Office of the Public Counsel and the Public.

**Jennifer Frazier**, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102  
For the Missouri Department of Natural Resources.

**Diana Vuylsteke**, Attorney at Law, Bryan Cave, LLP, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102  
For Missouri Industrial Energy Consumers.

**Henry B. Robertson**, Great Rivers Environmental Law Center, 705 Olive Street, Suite 614, St. Louis, Missouri 63101.

**Shannon Fisk**, Counsel, Natural Resources Defense Council, 2 North Riverside Plaza, Suite 2250, Chicago, Illinois 60606  
For the Natural Resources Defense Council, Sierra Club, Renew Missouri, Mid-Missouri Peaceworks, and the Great Rivers Environmental Law Center.

**CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff**

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

## **FINDINGS OF FACT**

### **PROCEDURAL HISTORY**

On February 23, 2011, Union Electric Company, d/b/a Ameren Missouri, filed its 2011 Integrated Resource Planning (IRP) filing, as it was required to do by the Commission's Integrated Resource Planning Rule, 4 CSR 240-22.080(1). The IRP rule requires investor-owned electric utilities, such as Ameren Missouri, to engage in a resource planning process that considers all options, including demand side efficiency and energy management measures, to provide safe, reliable, and efficient electric service to the public at reasonable rates, in a manner that serves the public interest. The purpose of the IRP filing is to demonstrate that Ameren Missouri has engaged in a planning process that complies with the requirements of the rule.

Ameren Missouri made its 2011 IRP filing pursuant to the terms of the Commission's IRP rules as they existed in February 2011. Subsequently, the Commission promulgated revised IRP rules that took effect on June 30, 2011. For purposes of its consideration of Ameren Missouri's 2011 IRP filing, the Commission will apply the rules that were in effect at the time Ameren Missouri made that filing. Unless otherwise indicated, all citations are to the old rules.

As required by the IRP rule, the Commission gave notice of Ameren Missouri's IRP filing and invited interested parties to intervene. The Commission allowed the following parties to intervene: the Missouri Department of Natural Resources (DNR); the Missouri Industrial Energy Consumers (MIEC); the Sierra Club, Missouri Coalition for the Environment, The Missouri Nuclear Weapons Education Fund, operating as Mid-Missouri Peaceworks, and the Natural Resources Defense Council (collectively NRDC); the Missouri Energy Group (MEG); Grain Belt Express Clean Line LLC; and the Missouri Joint Municipal Electrical Utility Commission (MJMEUC).

The IRP rule establishes a process by which the Commission gathers information to allow it to determine whether the electric utility's IRP filing complies with the requirements of the IRP rule. The first step in that process requires the Commission's Staff to review the utility's IRP compliance filing and to file a report describing any deficiencies in the utility's compliance with the IRP rule. Staff filed its report, in which it identified several deficiencies in Ameren Missouri's IRP filing, on June 23, 2011. The IRP rule also allows the Office of the Public Counsel and any intervenors to file their own reports describing deficiencies in the utility's IRP filing. Public Counsel, DNR, Grain Belt Express, and NRDC filed such reports on June 23, 2011.

On August 22, 2011, Ameren Missouri filed a detailed response to the alleged deficiencies. The filing of that response is the last procedural step mandated by the Commission's IRP rule. Thereafter, Commission Rule 4 CSR 240-22.080(9) states: "[t]he commission will issue an order which indicates on what items, if any, a hearing will be held and which establishes a procedural schedule."

Following a procedural conference held on September 12, 2011, the Commission established a procedural schedule that required the parties to prefile testimony and scheduled a hearing. That hearing took place on December 15 and 16, 2011. Thereafter, the parties filed briefs on January 20, 2012, and February 21, 2012.

In addition to the February 23, 2011 IRP filing, on October 25, 2011, Ameren Missouri filed a notice of change in its preferred 2011 utility resource plan as it is allowed to do under the Commission's rules. The Commission assigned File Number EO-2012-0127 to that filing and on December 21, 2011, consolidated that file into this one. As a result, the Commission will address Ameren Missouri's October 25, 2011 filing along with the other issues in this report and order.

This case is about the Commission's determination of whether Ameren Missouri has adequately planned for the future. To that end, the various parties have set before the Commission various alleged deficiencies in Ameren Missouri's planning efforts. The Commission will examine the substance of those alleged deficiencies.

### **The Alleged Deficiencies**

#### **Minimization of the Present Worth of Long-Run Utility Costs as the "Primary Selection Criteria"**

This alleged deficiency is at the heart of the objections to Ameren Missouri's IRP plan. The section of the IRP rule in question is part of the Policy Objectives portion of the rule. After establishing that the fundamental objective of the resource planning process is to "provide the public with energy services that are safe, reliable and efficient, at just and reasonable rates, in a manner that serves the public interest", the rule requires the electric utility to "use minimization of the present worth of long-run utility costs as the primary selection criterion in choosing the preferred resource plan."<sup>1</sup> The parties generally refer to the concept of "minimization of present worth of long-run utility costs" as "present value of revenue requirement," or PVRR.

<sup>1</sup> Commission Rule 4 CSR 240-22.010(2)(B).

PVRR simply means the revenue requirement associated with a given plan, on a present value basis, over the 20-year span of the planning period. PVRR is determined by quantifying the revenue required to cover all utility costs, including the allowed rate of return. It does not consider whether the company will be able to actually earn the required revenue. Specifically, it reflects no impact from revenue the company may lose when it sells less energy because of the successful implementation of energy efficiency measures.<sup>2</sup> Ameren Missouri refers to this loss of revenue as the throughput disincentive.

In its IRP study, Ameren Missouri claims that it used PVRR as its primary selection criteria in that it gave PVRR a weight of 30 percent in evaluating the various resource plans. Ameren Missouri gave each of four other criteria a weight of between 10 and 20 percent.<sup>3</sup>

Ameren Missouri's initial evaluation pointed to its demand-side management (DSM) only options as resulting in the lowest PVRRs.<sup>4</sup> Based solely on PVRR, Ameren Missouri's study indicated the preferred resource plan should be the realistic achievable potential (RAP) DSM plan. The company indicated that if the RAP DSM plan were adopted, "no supply-side resources would be needed in the planning horizon, even with the retirement of Meramec (an existing coal-fired plant), assuming customer response to program incentives is consistent with our estimates."<sup>5</sup> However, Ameren Missouri did not adopt the RAP plan as its preferred resource plan. Instead, the company concluded the RAP plan was impractical at that time because of "financial implementation barriers posed by existing state policies".<sup>6</sup> Instead, Ameren Missouri adopted the low-risk DSM plan, a less aggressive plan that has a higher PVRR than the RAP plan. Under that plan, Ameren Missouri would continue operating the Meramec coal-fired plant and would install a new gas-fired combined cycle plant in 2029.<sup>7</sup>

Furthermore, on October 25, 2011, Ameren Missouri notified the Commission that it was modifying its preferred resource plan to eliminate investment in DSM programs after June 30, 2012, unless it receives favorable treatment from the Commission of its filing under the Missouri Energy Efficiency Investment Act (MEEIA).<sup>8</sup> That Notice of Change created File Number EO-2012-0127, which has been consolidated with this file.

<sup>2</sup> Michels Surrebuttal, Ex. 5, Page 13, Lines 22-23.

<sup>3</sup> Michels Surrebuttal, Ex. 5, Page 18, Lines 3-5.

<sup>4</sup> Ameren Missouri's 2011 IRP, Ex. 1, Chapter 9, Page 24.

<sup>5</sup> Ameren Missouri's 2011 IRP, Ex. 1, Chapter 10, Page 17.

<sup>6</sup> Ameren Missouri's 2011 IRP, Ex 1, Chapter 10, Page 16.

<sup>7</sup> Ameren Missouri's Response, Ex. 2, Exhibit A, Page 3.

<sup>8</sup> The Commission is currently considering Ameren Missouri's MEEIA filing in File Number EO-2012-142.

Staff, Public Counsel, and the intervening parties object that by adopting a preferred resource plan that does not minimize PVRR, and then modifying that plan in a manner that further increases PVRR, Ameren Missouri has ignored the requirement of the IRP regulation that it use minimization of PVRR as the “primary selection criterion” in choosing the preferred resource plan.<sup>9</sup>

Ameren Missouri explains that it gave minimization of PVRR primary consideration when it evaluated various available resource plans. However, it points to another provision of the rule to explain why it ultimately chose a preferred resource plan that does not minimize PVRR. Section 4 CSR 240-22.010(2)(C) requires the electric utility to:

explicitly identify and, where possible, quantitatively analyze any other considerations which are critical to meeting the fundamental objective of the resource planning process, but which may constrain or limit the minimization of the present worth of expected utility costs....

Ameren Missouri’s IRP explains that the company did not choose a preferred resource plan that minimizes PVRR through energy efficiency because of the uncertainty it perceives regarding its ability to recover the substantial costs associated with energy efficiency because of the throughput disincentive.<sup>10</sup>

Ameren Missouri used the minimization of PVRR as the primary selection criterion when evaluating possible resource plans within the meaning of the rule as written. For the Commission to interpret the rule to require that minimizing PVRR be accorded a specific weight in that evaluation process, for example requiring that it be given a weight of at least 51 percent, would not change the company’s choice of preferred resource plan in this case and might not be appropriate when considering the different circumstances that may be presented in a future IRP case.

In any event, the meaning of “primary” is not the real concern of any party. What, Staff, Public Counsel, and the intervening parties would really like is for the Commission to order Ameren Missouri to choose a different preferred resource plan that emphasizes the public’s interest in maximizing energy efficiency. But that action is not within the Commission’s authority in *this* proceeding regarding compliance with the IRP rule. For purposes of *this* case, the Commission determines that the company has sufficiently explained why it chose the preferred resource plan that it did and has therefore complied with the rule. The Commission’s determination of whether Ameren Missouri is in fact “providing the public with energy services that are safe, reliable and efficient, at just and reasonable rates, in a manner that serves the public interest”<sup>11</sup> must wait for the appropriate rate case in which the Commission can consider all relevant factors. Ultimately, the Commission may find that Ameren has adopted an imprudent resource plan, with financial consequences for the company flowing from that determination. But the IRP process is not the proper forum for that determination.

<sup>9</sup> 4 CSR 240-22.010(2)(B).

<sup>11</sup> 4 CSR 240-22.010(2)(A).

**Ameren Missouri's Adoption of a New Preferred Resource Plan**

The Commission's rule requires an electric utility to notify the Commission in writing within sixty days if "the utility's business plan or acquisition strategy becomes materially inconsistent with the preferred resource plan, or if the utility determines that the preferred resource plan or acquisition strategy is no longer appropriate."<sup>12</sup> On October 25, 2011, Ameren Missouri filed a notice indicating that on or about 60 days before the filing, it had determined that the preferred resource plan it described in its 2011 IRP filing was no longer appropriate. Ameren Missouri indicated it took that step because of its uncertainty of being able to obtain Commission approval of a mechanism under MEEIA by which the company can avoid the throughput disincentive to spending on energy efficiency. For that reason, Ameren Missouri's witness testified that because of the throughput disincentive the company has already lost approximately \$24.8 million in 2009-2011 because of decreased sales resulting from its previous energy efficiency spending. The company expected to lose an additional \$27.9 million in 2012-2014 due to what it has already spent on energy efficiency. Transcript, Page 50, Lines 1-6.

There is no provision in the Commission's IRP rules that would require, or allow, the Commission to accept, reject, or in any other way act upon Ameren Missouri's notice of its adoption of a new preferred resource plan. That is entirely consistent with the previously discussed fact that the rule does not give the Commission authority to approve or reject the company's resource plans, resource acquisition strategies or investment decisions. Therefore, the Commission will take no further action regarding Ameren Missouri's notice of its adoption of a new preferred resource plan.

The other deficiencies described by Staff, Public Counsel and the intervening parties are more specific in nature. Ameren Missouri suggests that it is not necessary for the Commission to address those alleged deficiencies in detail. The Commission disagrees. Although the purpose of the IRP filing is not to pre-approve the utility's preferred resource plan or to mandate adoption of a particular resource plan, it is important that the utility undertake an appropriate planning process and that the planning process be transparent to the Commission and the public. Therefore, the Commission will address the other identified deficiencies.

**Need for Capacity Used as the Basis for Alternative Resource Plans**

The Commission's rule requires Ameren Missouri to "consider and analyze demand- side efficiency and energy management measures on an equivalent basis with supply-side alternatives in the resource planning process."<sup>13</sup> In its analysis, Ameren Missouri considered the use of demand side efficiency and energy management measures only in circumstances where it had identified a capacity shortfall.<sup>14</sup> When

<sup>12</sup> 4 CSR 240-22.080(12). (Because Ameren Missouri made its update filing after the revised rule went into effect, this reference is to the Commission's current Chapter 22 rule. The specific language in the former rule was different, but the substance and intent of the rule has not changed.)

<sup>13</sup> 4 CSR 240-22.020(2)(A).

<sup>14</sup> Transcript, Pages 241-242, Lines 10-25, 1-7.

it determined that it would need additional capacity, it treated demand-side and supply-side resources equivalently. However, Ameren Missouri did not evaluate whether existing supply-side resources could be replaced with less costly demand-side resources. In other words, demand-side resources were not allowed to compete on the basis of PVRR with existing supply-side resources.<sup>15</sup>

That is an important distinction because Ameren Missouri is considering the possible retirement of part of its coal-fired generation fleet and is considering very expensive environmental upgrades to the portion of its fleet that is not retired. If it would be more effective to retire those plants and replace them with cheaper demand-side resources, that possibility should be considered in the planning process.

The Commission agrees that the rule requires that demand-side resources be allowed to compete on the basis of PVRR with existing supply-side resources as part of the IRP process. Ameren Missouri's IRP failed to undertake that comparison and, therefore, it is deficient.

### **Use of Assumed Two-Year Rate Case Cycle**

Commission Rule 4 CSR 240-22.060(4)(B) requires the electric utility to model the financial impact of various alternative resource plans based on the assumption that rates will be adjusted annually, in a manner consistent with Missouri law. Ameren Missouri explained that in an effort to capture the effects of regulatory lag, it analyzed the various alternative resource plans assuming a two-year rate case cycle with a historic test year lag resulting in 18 months of overall effective regulatory lag.<sup>16</sup>

Ameren Missouri's assumption of 18 months of regulatory lag is inconsistent with the regulation's required assumption of annual rate adjustments. Ameren Missouri's assumption is significant because it tends to decrease the attractiveness of DSM alternatives. The assumption of annual rate adjustments is a part of the rule and cannot be ignored. Furthermore, Ameren Missouri did not request a waiver of that requirement of the rule. To the extent that it assumes 18 months of regulatory lag, Ameren Missouri's IRP is deficient.

### **Rejection of MAP**

Ameren Missouri considered an alternative resource plan based on maximum achievable potential (MAP) DSM savings. After performing its analysis of MAP, Ameren Missouri concluded that there was more risk associated with attempting to achieve the savings associated with MAP and instead decided that, after accounting for that risk, RAP had the lower risk-adjusted PVRR.<sup>17</sup> Ameren Missouri further explained that MAP is, by definition, "a hypothetical upper-boundary of achievable savings potential simply because it presumes conditions that are ideal and not typically observed in real-world experience."<sup>18</sup> For those reasons, Ameren Missouri did not further consider MAP as an alternative resource plan.

<sup>15</sup>

Mosenthal Rebuttal, Ex. 28, Pages 5-6

<sup>16</sup> 2011 IRP, Ex. 1, Chapter 10.1, Page 2-3. See also, Ameren Missouri's Response to Comments, Ex. 2, Exhibit A, Page 13.

<sup>17</sup> Ameren Missouri's 2011 IRP, Ex. 1, Chapter 9, Page 20.

<sup>18</sup> Ameren Missouri's Response, Ex. 2, Exhibit A, Page 12.

The NRDC parties contend Ameren Missouri's study should have given further consideration to the MAP alternative because the energy savings described in that alternative are achievable and because the unadjusted PVRR for MAP is lower than the RAP alternative. The Commission finds that the NRDC parties have described a disagreement with Ameren Missouri's study, not a deficiency in that study.

Ameren Missouri's study adequately explains why it concluded that the risk of not attaining the maximum energy savings contemplated in the MAP plan made that plan more risky than the RAP alternative. The NRDC parties are welcome to disagree with Ameren Missouri's conclusion, but as previously indicated, in reviewing Ameren Missouri's IRP, the Commission is not approving the conclusions reached by the study and is not pre-approving the resource plan that Ameren Missouri has adopted as a result of that study. There is no deficiency.

### **Life Expectancy and Costs of Continuing to Operate the Meramec Plant**

Among many other requirements, Commission rule 4 CSR 240-22.040 requires an electric utility to analyze "life extension and refurbishment at existing generating plants" and "enhancement of the emission controls at existing or new generating plants." The Meramec plant is the oldest and least efficient coal-fired plant in Ameren Missouri's generation fleet. Ameren Missouri's IRP sought to evaluate whether that plant would need to be retired or undergo extensive renovation, including installation of environmental controls, during the 20-year planning horizon. In some scenarios, depending largely upon future environmental requirements, Ameren Missouri would retire the Meramec plant as early as 2016. In other scenarios, Meramec would continue to operate throughout the planning horizon.

The NRDC parties contend the Meramec plant will be too old by 2030 to reasonably assume that it could remain in operation. However, Ameren Missouri offered a detailed response to the criticisms that persuasively defended the assumptions used in the IRP.<sup>19</sup> The Commission concludes that Ameren Missouri's evaluation of its options regarding the Meramec plant complies with the requirements of the Commission's IRP rules. There is no deficiency.

### **Consideration of the Cost of Environmental Retrofits at the Labadie and Rush Island Coal-Fired Plants**

As previously indicated, Meramec is the oldest and least efficient coal-fired plant in Ameren Missouri's generation fleet. As a simplifying assumption for the purposes of its IRP study, Ameren Missouri only evaluated the future costs associated with continuing to operate the Meramec plant throughout the planning horizon. It assumed that if the study showed that it was economical to continue to operate Meramec, it must also be economical to continue to operate the newer and more efficient Labadie and Rush Island coal-fired plants.<sup>20</sup>

<sup>19</sup> Ameren Missouri's Response, Ex. 2, Exhibit A, Pages 41-55.

<sup>20</sup> Ameren Missouri's Response, Ex. 2, Exhibit A, Page 43.

The NRDC parties complain that in analyzing the cost of environmental retrofits only for the Meramec plant, Ameren Missouri has analyzed those costs for the one electric plant it does not plan to retrofit. Since the cost of retrofitting the Labadie and Rush Island plants would be substantially higher than the cost of retrofitting Meramec,<sup>21</sup> they claim it is unreasonable to use Meramec as the test case for environmental retrofits.

The Commission finds the argument offered by the NRDC parties unpersuasive. Ameren Missouri's study showed that under an aggressive environmental scenario the cost results for Meramec represented a virtual toss-up when evaluating the options of pollution control retrofits, conversion to gas-fired boiler operation, and retirement.<sup>22</sup> Even though the costs to retrofit Labadie and Rush Island were higher in absolute terms, because those plants are more efficient, the cost per kilowatt to make those retrofits for those plants was significantly lower than the cost per kilowatt to retrofit Meramec.<sup>23</sup> As a result, for purposes of this study, it was reasonable for Ameren Missouri to assume that a study of Meramec's costs would yield similar results for Rush Island and Labadie. There is no deficiency.

### **High Natural Gas Price Assumptions**

The assumed price of natural gas played a role in the IRP study's determination of whether and when it would be expedient to retire the Meramec coal-fired generating plant.<sup>24</sup> If all other factors are held constant, lower natural gas prices would tend to result in lower electric power prices, which would diminish the value of continuing to operate the Meramec plant. As a result, the study is more likely to indicate that Ameren Missouri should retire that plant.<sup>25</sup>

After Ameren Missouri performed its study, natural gas price forecasts decreased dramatically. However, there was no indication that the forecasted natural gas prices were unreasonable at the time Ameren Missouri incorporated them into its study.

The NRDC parties suggest that this change in forecasted natural gas prices invalidates the entire study and suggest that Ameren Missouri be required to re-perform the study using more up-to-date natural gas price forecasts. Ameren Missouri acknowledged the forecasted decrease in natural gas prices and indicated it would incorporate those changes in its upcoming 2012 IRP annual update.<sup>26</sup>

<sup>21</sup> Transcript, Pages 165-167.

<sup>22</sup> Michels Surrebuttal, Ex. 5, Page 64, Lines 13-15.

<sup>23</sup> Transcript, Page 172, 8-12.

<sup>24</sup> Transcript, Page 199, Lines 15-17.

<sup>25</sup> Transcript, Page 201, Lines 2-11.

<sup>26</sup> Transcript, Page 200, Lines 2-13.

This issue illustrates the snapshot nature of Ameren Missouri's IRP study. That study is designed to capture a picture of the company's planning process at a particular moment in time. That planning process is on going and of course, the company's plans will change as circumstances change. It also illustrates the extensive amount of effort that must be put into preparing an IRP. Some aspects of the study must be prepared before subsequent aspects can be completed. As a result, it is not possible to keep all aspects of the study current until the date the study is filed with the Commission. For that reason, a change in circumstances that occurs during the study process does not mean that the study is deficient. It is appropriate for Ameren Missouri to update its IRP to take into account reduced natural gas prices. However, Ameren Missouri's failure to foresee those reduced natural gas prices does not create a deficiency in the 2011 IRP filing.

### **Analysis of Future Coal Prices**

Commission Rule 4 CSR 240-22.040(8) requires an electric utility to "develop ranges of values and probabilities for several important uncertain factors related to supply resources." One uncertain factor the rule requires the utility to analyze is fuel price forecasts, which would include forecasts about the future cost of coal. MDNR contends Ameren Missouri's IRP is deficient in that it failed to analyze future coal prices as an uncertain critical factor. In particular, MDNR claims Ameren Missouri's analysis leaves out the uncertainty that coal transportation costs and coal production costs would have on the possible range of future coal prices.<sup>27</sup>

Ameren Missouri's response to MDNR asserts that "by including coal prices based on the ten scenarios modeled by CRA in its analysis of risk associated with candidate resource plans, the Company has considered the effects of coal price uncertainty on the performance of candidate resource plans."<sup>28</sup> Ameren Missouri further explains that it will more extensively evaluate coal price uncertainty as a "special contemporary issue" in its IRP annual update, which is to be filed in March 2012.

After reviewing MDNR's concerns about Ameren Missouri's analysis of coal price uncertainty, the Commission accepts Ameren Missouri's response and finds that Ameren Missouri's analysis is not deficient.

### **Analysis of Accuracy of Previous CRA Forecasts**

Commission Rule 4 CSR 240-22.040(8)(A)2, in establishing the basis for a utility's analysis of important uncertain factors, states: "[t]he utility shall consider the accuracy of previous forecasts as an important criterion in selecting providers of fuel price forecasts." Ameren Missouri's IRP study relied on the fuel price forecasts prepared by Charles River Associates (CRA). MDNR contends Ameren Missouri's IRP is deficient in that it does not provide any specific information about how it determined that CRA's previous fuel price forecasts were accurate.

<sup>27</sup> Noller Rebuttal (Revised), Ex. 23, Page 30, Lines 1-12.

<sup>28</sup> Michels Surrebuttal, Ex. 5, Page 70, Lines 18-20.

Ameren Missouri counters MDNR's allegation by pointing to the IRP study's explanation that the forecasting model used by CRA has been extensively peer-reviewed and has been found to be reliable.<sup>29</sup> The utility further explains that, as CRA's model is "used to simulate myriad potential futures under a range of economic and political conditions for numerous clients and for various purposes, there is no single forecast that could be compared to historic prices."<sup>30</sup>

The Commission finds that the purpose of the rule's requirement is to require the electric utility to consider the reliability of the fuel-price forecasts offered by the expert analysts it employs. Ameren Missouri has accomplished that purpose by examining the reputation and reliability of the forecast model used by CRA. There is no deficiency.

### **Potential Opportunities for New Long-Term Power Purchases and Sales**

Commission Rule 4 CSR 240-22.040(5) requires an electric utility to "identify and evaluate potential opportunities for new long-term power purchases and sales, both firm and nonfirm, that are likely to be available over all or part of the planning horizon." Ameren Missouri explained that its experience from preparing its 2008 IRP filing revealed that it was difficult to obtain reliable information from potential trading partners for assessing potential long-term purchased power opportunities because potential trading partners were "reluctant to indicate terms and pricing through such generic means and with no probable prospects for signing a contract."<sup>31</sup> Instead, Ameren Missouri inquired of its affiliated trading organization and was told that there are no reasonable opportunities for long-term purchased power agreements to be included in the supply side analysis.<sup>32</sup> Thereupon, Ameren Missouri eliminated the option of long-term purchased power agreements from further consideration.

MDNR alleged that the purchased power agreement aspect of the IRP filing was deficient because Ameren Missouri did not provide a sufficient explanation of the basis for its decision to provide no further analysis of long-term purchased power options.<sup>33</sup> MDNR also complains that Ameren Missouri's October 25, 2011 change of its preferred resource plan makes the company reliant on purchased power agreements that it said were not available in its initial IRP filing.

The Commission finds that while Ameren Missouri did not provide a detailed analysis of the availability of long-term purchased power agreements, its explanation of why detailed information about hypothetical long-term agreements is not available was reasonable and satisfies the requirements of the regulation. Furthermore, MDNR's comment about Ameren Missouri's October 25, 2011 change of its preferred resource plan misunderstands the difference between long-term purchased power agreements and the short-term purchases and sales in the market upon which the company intends to rely under its revised preferred resource plan. There is no deficiency.

<sup>29</sup> Ameren Missouri's 2011 IRP, Chapter 2, Page 19.

<sup>30</sup> Ameren Missouri's Response, Ex. 2, Exhibit A, Page 86.

<sup>31</sup> Ameren Missouri's Response, Ex. 2, Exhibit A, Page 76.

<sup>32</sup> Ameren Missouri's Response, Ex. 2, Exhibit A, Page 76.

<sup>33</sup> Smith Rebuttal, Ex. 24, Page 4, Lines 49-60.

### Analysis of Wind Resources

Both Public Counsel and MDNR take issue with aspects of Ameren Missouri's analysis of potential wind resources. Public Counsel identified what it contends are three significant problems with the assumptions that Ameren Missouri used to model the potential for wind resources. All three problems are closely related.

First, in its model, Ameren Missouri allegedly overstates the cost of new wind resources by assuming that 346 MW of simple cycle combustion gas turbines (CTs) must be built along with every 800 MW of wind facilities to maintain sufficient capacity reserves.<sup>34</sup>

Second, Ameren Missouri applies a 205 MW (accredited capacity) build threshold to wind resources, allegedly ignoring the potential benefits of adding smaller wind resources to the system sooner.<sup>35</sup> In other words, Ameren Missouri's model does not consider adding additional wind resources to its system until that system requires an additional 205 MW of capacity. Third, Ameren Missouri modeled a single, average estimate of wind resource costs and capacity factors, resulting in a limited analysis of wind resource potential that may not optimize that potential.<sup>36</sup>

Ameren Missouri explains that it made its assumptions about wind energy because MISO currently credits wind generation at only 8 percent of its nameplate rating for capacity purposes. Ameren Missouri chose to model 800 MW of wind power, but that would only give it credit for 64 MW of capacity. For that reason, it also modeled an additional 346 MW of CT capacity to provide 400 MW of capacity for planning purposes.<sup>37</sup>

The Commission finds that the problem with Ameren Missouri's assumptions are that, as the Commission has previously found in this order, the need for additional capacity should not be the only basis for modeling additional wind power, other renewable energy resources, or energy efficiency measures. Wind resources may significantly reduce energy costs and thus may be able to reduce PVRR even when additional capacity is not needed for reliability purposes.<sup>38</sup>

The models may not indicate the advisability of adding wind generation capacity, and Ameren Missouri may still choose not to add wind resources for other reasons, but it is important that wind resources be appropriately modeled so that Ameren Missouri has access to all relevant facts when it makes its decisions. Ameren Missouri's modeling of wind resources is deficient.

MDNR also alleges that Ameren Missouri's modeling of wind resources is deficient, but bases its concerns on the stipulation and agreement that resolved some of the alleged deficiencies in Ameren Missouri's 2008 IRP filing. That stipulation and agreement in File No. EO-2007-0409, which Ameren Missouri signed, requires the company to take the following actions in preparing its 2011 IRP:

<sup>34</sup> Woolf Rebuttal, Ex. 47, Page 19, Lines 16-20.

<sup>35</sup> Woolf Rebuttal, Ex. 47, Page 22.

<sup>36</sup> Woolf Rebuttal, Ex. 47, Page 23, Lines 5-20.

<sup>37</sup> Michels Surrebuttal, Ex. 5, Page 79, Lines 1-21.

<sup>38</sup> Woolf Rebuttal, Ex. 47, Page 20, Lines 26-29.

- Demonstrate that its assumptions regarding capacity factors are consistent with the most recent data on capacity factors for the best commercially available wind sites;
- Demonstrate that its assumptions regarding the timing of transmission capacity upgrades, and the allocation of the costs associated with those upgrades, are based on the most recent system planning studies and currently effective transmission cost allocation principles;
- Present scenarios for acquiring wind resources that identify the region being considered utilizing multi-county areas, with a characterization of the wind resources available for each. To make a meaningful comparison of the regions under consideration, the information presented should include estimates at various turbine hub heights (e.g. 80, 100 or 120 meters, where practical) of wind density, transmission upgrades required and the levelized cost of energy per MWh under a Purchase Power Agreement and/or an ownership arrangement.<sup>39</sup>

MDNR contends Ameren Missouri did not fulfill the requirements of the stipulation and agreement.

In particular, MDNR complains that Ameren Missouri modeled an average of capacity factors across several Midwest states rather than considering the *best* commercially available wind sites, as it was required to do by the stipulation and agreement. According to MDNR, this generic modeling prevents Ameren Missouri from reliably analyzing all available wind resources.<sup>40</sup>

The testimony offered by Richard Hasselman of GDS Associates on behalf of MDNR<sup>41</sup> persuasively explains how Ameren Missouri's analysis of potential wind energy resources is overly generic and fails to comply with the more detailed requirements of the stipulation and agreement. Ameren Missouri failed to effectively rebut Hasselman's explanation. The Commission finds that Ameren Missouri has failed to comply with the requirements of the stipulation and agreement.

### **Analysis of Nuclear Units**

Commission rule 4 CSR 240-22.040(8) requires the electric utility to "develop ranges of values and probabilities for several important uncertain factors related to supply resources," before developing alternative resource plans and performing the integrated resource analysis. More specifically, 4 CSR 240-22.070(2)(F) requires the electric utility to assess uncertain factors related to "[c]onstruction costs and schedules for new generation and generation-related transmission facilities." Public Counsel and NRDC contend Ameren Missouri has seriously underestimated the likelihood of cost overruns associated with the possible construction of a second nuclear generating unit at the Callaway Plant.

<sup>39</sup>

Joint Filing and Partial Stipulation and Agreement, Case No. EO-2007-0409, Paragraph 14, Pages 3-4, August 12, 2008.

<sup>40</sup>

GDS Review of Ameren Missouri's IRP, Ex. 19, Pages 23-28. See *also*, Hasselman Rebuttal, Ex. 21, Pages 3-9.

<sup>41</sup>

Hasselman Rebuttal, Ex. 21, Pages 3-9.

Ameren Missouri's analysis assumed \$4,222/kw as the base value for the capital cost of building the unit, with \$3,563/kw as the low value and \$5,000/kw as the top of the likely range. The company also assumed it would take eight years to construct the unit.<sup>42</sup> Public Counsel and NRDC are concerned that these assumptions understate the risk that construction costs would far exceed the current estimates.

The problem with Ameren Missouri's assumptions is that there is no reliable track record by which Ameren Missouri, or any utility, can estimate the cost to construct a nuclear unit with any assurance of accuracy. No nuclear power plant with the design Ameren Missouri is considering has yet been completed anywhere in the world. Without such experience to draw upon, the estimated cost to construct a new nuclear unit is highly uncertain.<sup>43</sup> Furthermore, the history of cost overruns associated with the construction of nuclear power plants is not reassuring. For the last generation of nuclear plants constructed in the 1960s and 1970s, the average cost overrun for 75 nuclear units was 207 percent.<sup>44</sup> Even for the current generation of nuclear power plants currently under construction, cost overruns of 70 percent have already been reported.<sup>45</sup> Yet, Ameren Missouri's study assumes that there is less than a 0.1 percent chance that the project would over-run its original budget by 50 percent or more.<sup>46</sup>

This is not just a disagreement about how much a new nuclear plant will cost, the question is whether Ameren Missouri has properly evaluated the degree of risk that costs will soar far above current estimates. The commission has no basis in the record to say that Ameren Missouri's cost estimates are wrong. Therefore, the Commission cannot find that this aspect of the IRP is deficient. However, this is an area of genuine concern that the company will need to address in its next filing.

### **Modeling of Non-Dispatchable Demand Response (NDDR) in Evaluation of Industrial Demand Response Programs**

Non-dispatchable demand response (NDDR) programs are those that are aimed at providing a better price signal to customers to encourage them to use electricity more efficiently. It would include ideas such as time-of-use pricing.<sup>47</sup> Public Counsel accuses Ameren Missouri of failing to comply with the Commission's order in the previous IRP case, EO-2007-0409, to realistically evaluate its industrial demand response programs because it failed to model NDDR programs and instead examined only direct load control programs.<sup>48</sup> Ameren Missouri responded by stating that it in fact included NDDR programs in models for both its RAP and MAP portfolios.<sup>49</sup> The Commission accepts Ameren Missouri's explanation. There is no basis for any finding of deficiency in this area.

<sup>42</sup> Ameren Missouri Response, Ex. 2, Exhibit A, Page 73.

<sup>43</sup> Comments of NRDC, et al, Ex. 31, Page 52.

<sup>44</sup> Comments of NRDC et al, Ex. 31, Page 54.

<sup>45</sup> Comment of NRDC et al, Ex. 31, Page 55.

<sup>46</sup> Woolf Rebuttal, Ex. 47, Page 19, Lines 3-9.

<sup>47</sup> Ameren Missouri's 2011 IRP, Ex. 1, Chapter 7, Pages 46-47.

<sup>48</sup> Initial Post-Hearing Brief of the Office of the Public Counsel, Page 11.

<sup>49</sup> Ameren Missouri's Response, Ex. 2, Exhibit A, Page 22.

**Insufficient and Inaccurate Information to Board of Directors**

Public Counsel complains that Ameren Missouri displayed a bias against energy efficiency in its presentations to the Union Electric Board of Directors and the Ameren Board of Directors regarding the choice of a preferred resource plan.<sup>50</sup> Public Counsel argues that the Commission should cite the alleged bias as a contributing factor in a finding that Ameren Missouri's IRP fails to meet the policy objectives set forth in the rule. Ameren Missouri denied that it had mislead either board of directors, explaining that the actual decision about a choice of a preferred resource plan was made by Ameren Missouri's senior management and simply presented to the boards for their approval.<sup>51</sup>

The fundamental problem with Public Counsel's argument is that there is nothing in the Commission's IRP rule that would give the Commission authority to evaluate the interactions between Ameren Missouri's management and its board of directors. If the boards for Ameren Missouri and Union Electric believe that the management of those companies has misled them, they are quite capable of dealing with that problem without any involvement by this Commission. There is no basis for a finding of deficiency.

**CONCLUSIONS OF LAW**

The requirement that Missouri's investor-owned electric utilities engage in a formalized integrated resource planning process is entirely a creation of the Commission's rules. The applicable rules are found in Chapter 22, specifically 4 CSR 240-22.010 through 22.080.

The first section of Chapter 22, 4 CSR 240-22.010(1), explains that the Commission's policy goal embodied in the chapter is "to set minimum standards to govern the scope and objectives of the resource planning process ... to ensure that the public interest is adequately served." That section further states "[c]ompliance with these rules shall not be construed to result in commission approval of the utility's resource plans, resource acquisition strategies or investment decisions." In other words, the regulations require the utility to undertake a planning process. It does not require the utility to reach a particular result or even a result of which the Commission would approve.

The second section of Chapter 22, 4 CSR 240-22.010(2), requires that the "fundamental objective of the resource planning process at electric utilities shall be to provide the public with energy services that are safe, reliable and efficient, at just and reasonable rates, in a manner that serves the public interest." The remaining provisions of Chapter 22 provide detailed guidelines for how an electric utility is to collect and analyze information to meet that fundamental objective.

<sup>50</sup> Public Counsel's Technical Report, Ex. 43, Page 9. See also, Kind, Rebuttal, Ex. 48, Pages 18-21.

<sup>51</sup> Michels Surrebuttal, Ex. 5, Pages 43-46.

At the end of the process set forth in Chapter 22, the final provision of the regulation, 4 CSR 240-22.080(13), states:

[t]he commission will issue an order which contains findings that the electric utility's filing pursuant to this rule either does or does not demonstrate compliance with the requirements of this chapter, and that the utility's resource acquisition strategy either does or does not meet the requirements stated in 4 CSR 240-22.010(2)(A)-(C), (the fundamental objectives of the planning process) ...

However, the planning process does not end with the issuance of this order. The old version of Chapter 22 in effect at the time Ameren Missouri made this IRP filing, required each electric utility to make a new IRP filing every three years.<sup>52</sup> Therefore, the planning requirement is ongoing. The revised chapter 22 rules now in effect further emphasize the ongoing obligation to continue planning by requiring each electric utility to file annual updates by April 1 of each year in addition to the triennial IRP filing.<sup>53</sup> Ameren Missouri's next triennial IRP filing is due on April 1, 2014 and its next annual update is due by April 1, 2012.

Although the Commission has held a hearing regarding Ameren Missouri's IRP filing, this is not a contested case as defined by Section 536.010(4), RSMo (Supp. 2010).<sup>54</sup> The decision to hold a hearing to receive a more detailed analysis of Ameren Missouri's 2011 IRP filing was undertaken at the discretion of the Commission and was not required by the rule or any other provision of law.<sup>55</sup>

### DECISION

The most important thing to understand about this case is what the Commission is not doing. The Commission's IRP rule clearly and emphatically provides that in reviewing Ameren Missouri's IRP filing, the Commission is not preapproving Ameren Missouri's "resource plans, resource acquisition strategies or investment decisions."<sup>56</sup> Instead, the purpose of the IRP rule is to "set minimum standards to govern the scope and objectives of the resource planning process ... to ensure that the public interest is adequately served."<sup>57</sup> As the Commission indicated in its Order of Rulemaking by which with rule was promulgated, "the focus of the rules should appropriately be on the planning process itself rather than on the particular plans or decisions that result from the process."<sup>58</sup>

<sup>52</sup> 4 CSR 240-22.080(1).

<sup>53</sup> 4 CSR 240-22.080(1) and (3).

<sup>54</sup> "Contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."

<sup>55</sup> Commission Rule 4 CSR 240-22.080(9).

<sup>56</sup> Commission Rule 4 CSR 240-22.010(1).

<sup>57</sup> Commission Rule 4 CSR 240-22.010(1).

<sup>58</sup> Missouri Register, Vol. 18, No. 1, Page 91 (January 4, 1993).

The IRP rule states that the fundamental objective of the electric utility's planning process must be to "provide the public with energy services that are safe, reliable and efficient, at just and reasonable rates, in a manner that serves the public interest."<sup>59</sup> In other words, the rule requires Missouri's investor-owned electric utilities to adequately plan for the future. However, the rule does not attempt to give the Commission authority to take over management of the electric utility to dictate the manner in which the company meets that fundamental objective.

That means Ameren Missouri may satisfy the planning requirements of the rule even if it reaches a decision at the conclusion of the planning process that is not to the liking of outside parties, or even to the liking of the Commission. Nevertheless, the utility must live with the consequences of its planning decisions, and is without the protection it would be afforded if the Commission were to pre-approve its resource planning decisions. In a future rate proceeding, Ameren Missouri may be called to task by the Commission, and may face financial consequences, if its resource planning decisions do not result in just and reasonable rates or do not serve the public interest. But those matters are not before the Commission in this case and cannot be resolved at this time.

In examining the alleged deficiencies set forth by Staff, Public Counsel, and the other interested parties, the Commission has found that Ameren Missouri could have done a better job in certain particulars of its planning process. Specifically, the Commission found that Ameren Missouri's analysis should have allowed demand-side resources to compete on the basis of PVRR with existing supply-side resources as part of the IRP process. The Commission further found that Ameren Missouri's assumption of 18 months of regulatory lag was inconsistent with the one-year assumption required by the rule. In addition, the Commission found fault with Ameren Missouri's modeling of potential wind energy resources. Finally, the Commission found that Ameren Missouri's analysis of the cost uncertainties associated with building a new nuclear unit was flawed.

Thus, the Commission finds that Ameren Missouri's IRP plan is not flawless and should be improved. Planning and failure to plan have real world consequences that may affect both the public interest and the company's ability to recover future costs. Ameren Missouri must improve its planning process, but the question is how and when it must make those improvements.

Ameren Missouri's obligation to plan and the regulation's requirement that it report on those planning efforts are both ongoing. Some parties suggest the Commission require Ameren Missouri to go back and redo its 2011 IRP filing to correct the identified deficiencies. The Commission will not do so. Despite the deficiencies in Ameren Missouri 2011 IRP filing, it would be a waste of resources to require Ameren Missouri to look backward to use pre-2011 data to rerun its analysis to revise that filing. Instead, the Commission will direct Ameren Missouri to take the steps necessary to improve both its 2014 triennial IRP filing and the annual updates that will be due before then.

<sup>59</sup> Commission Rule 4 CSR 240-22.010(2).

**THE COMMISSION ORDERS THAT:**

1. The Commission finds that the 2011 Integrated Resource Planning filing submitted by Union Electric Company, d/b/a Ameren Missouri, does not demonstrate compliance with the requirements of Commission Rule 4 CSR 240-22 in certain respects described in the body of this order. Union Electric Company, d/b/a Ameren Missouri, shall correct those deficiencies in its 2014 triennial integrated resource planning filing and in upcoming annual updates as appropriate.

2. This order shall become effective on April 27, 2012.

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

Dated at Jefferson City, Missouri,  
on this 28<sup>th</sup> day of March, 2012

**The Staff of the Missouri Public Service Commission, Complainant, v. Union  
Electric Company, d/b/a Ameren Missouri, Respondent.**

**File No. EC-2011-0420**

**Evidence, Practice and Procedure. §27 Finality and conclusiveness.** The Commission approved a stipulation and agreement that resolved Staff's complaint against a utility, but refused to offer an advisory opinion about the proper interpretation of a Commission rule.

**ORDER APPROVING  
UNANIMOUS STIPULATION AND AGREEMENT**

Issue Date: March 28, 2012

Effective Date: April 27, 2012

**Syllabus:** In this order, the Commission approves the Stipulation and Agreement entered into between the Staff of the Missouri Public Service Commission and Union Electric Company d/b/a Ameren Missouri.

**Background**

Ameren owns and operates the Taum Sauk pumped storage facility, a hydroelectric generating station in Reynolds County, Missouri. In June of 2011, the facility automatically shut off. Ameren did not report the incident to the manager of the Energy Department of the Missouri Public Service Commission. After inspection and consultation over a two-week period, a decision was made to fully repair the unit at a cost of approximately \$11 million.

The governing rule is Commission rule 4 CSR 240-3.190 (3), which states:

Every electric utility shall report to the manager of the Energy Department of the commission, by the end of the first business day following discovery, the information in subsections (3)(A) - (E).

(A) Details of any accident or event at a power plant involving serious physical injury or death or property damage in excess of \$200,000;

(B) Forced outages of any nuclear generating unit that could reasonably be anticipated to last longer than 3 days.

(C) Forced outages of any fossil-fuel fired generating unit with an accredited capacity of greater than 100 megawatts that reasonably could be anticipated to last longer than 3 days, when the unit is forced out due to a common occurrence.

(D) Reduction of coal inventory below a 30-day supply and reductions of oil inventory below 50% of normal oil inventory; and

(E) Loss of transmission capability that could limit the output of a generating plant.

The Staff of the Commission and Ameren disagree on whether the above rule required Ameren to report the outage. Ameren argues that this was not an “accident or event” but rather a “forced outage” and thus falls under subsection “(B), above.” Thus, because the unit is hydroelectric rather than nuclear, there was no reporting requirement.

Staff, on the other hand, argues that the phrase “accident or event”, in subsection (A), is broad enough to encompass this type of incident. Notwithstanding, Staff reasons that under these circumstances penalties against Ameren Missouri are not warranted.

### **The Agreement**

The parties have stipulated to the facts and have filed an agreement. Although it maintains that it is not required to do so, Ameren agrees to provide reports in any future incidents at hydroelectric plants. Also, as part of the agreement, the parties requests that the Commission issue an order determining the proper interpretation of 4 CSR 240-3.190(3) and whether under the rule, Ameren should have reported the incident. And, if the Commission determines that the rule does not require reporting of this incident, then the parties would support an amendment to the rules.

### **Discussion**

The Office of the Public Counsel did not join in the Agreement. Commission rule 4 CSR 240-2.115 allows 7 days for a party to file an objection to a stipulation and agreement. If no objection is filed, the Commission may treat the agreement as unanimous.

Staff and the company filed this Agreement on December 29, 2011. More than 7 days have since expired. The Commission will therefore treat the Agreement as unanimous. Based upon the Commission’s independent and impartial review of the Agreement, the Commission finds the Agreement is just and reasonable and in the public interest. The Commission will approve the Agreement, direct the parties to abide by the terms therein and will incorporate the Stipulation and Agreement’s provisions into this Order.

This is a complaint case. The parties have resolved their dispute and the Staff of the Commission does not intend to seek penalties. Although the parties have resolved their dispute, they now ask the Commission to “hypothetically” offer an interpretation of its rule. The Commission will not do so. For the Commission to interpret the rule would serve no purpose other than to make an abstract policy statement that would have no binding effect on the parties or the Commission in future cases. If Staff or any other party believes the rule should be clarified, they are free to offer such rule revisions for the Commission’s consideration under established procedures.

THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION vs. UNION  
ELECTRIC COMPANY d/b/a AMEREN MISSOURI

22 Mo. P.S.C. 3d

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**THE COMMISSION ORDERS THAT:**

1. The Unanimous Stipulation and Agreement is approved and the parties are directed to abide by its terms.
2. This order shall become effective on April 27, 2012.
3. This file shall be closed on April 28, 2012.

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

Jones, 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 Highway H Utilities, Inc., for Authority to Sell Certain Water System Assets to the City of Waynesville, Missouri, and in Connection Therewith, Certain Other Related Transactions.**

**File No. WO-2012-0211**

**WATER. §4. Transfer, lease and sale.** The Commission approved the sale and transfer of assets of a water system to the City of Waynesville, Missouri, subject to certain conditions, after the Commission found that the sale would benefit the customers of the water system and is not detrimental to the public interest.

**ORDER APPROVING TRANSFER OF ASSETS**

Issue Date: April 11, 2012

Effective Date: April 25, 2012

On January 11, 2012, Highway H Utilities, Inc. ("Highway H") filed an application with the Missouri Public Service Commission ("Commission") seeking to sell and transfer a portion of its works and systems to the City of Waynesville, Missouri ("City").<sup>1</sup> Highway H currently operates a water system known as the Hunter's Pointe Water System located in Pulaski County, Missouri. Highway H and the City have entered into an Agreement for Sale of Water System ("Agreement") providing for the sale of all the assets, property and real estate connected with the Hunter's Pointe Water System to the City. A copy of the proposed Agreement was included with the Application.

Highway H currently provides water service to approximately 573 residential customers in the Hunter's Pointe service area. If the proposed sale and transfer is approved, those customers would receive their water service from the City. Sewer service in this area is currently provided by Pulaski County Sewer District #1 and would not be affected by the sale of the water system.

On January 12, 2012, the Commission issued notice and set an intervention deadline. No applications to intervene were filed. At Staff's request, a local public hearing was held on March 5, 2012 to receive comments from persons affected by the proposed transaction. Staff filed a recommendation on April 2, 2012 suggesting that the Commission approve the application with certain conditions, which Highway H and the Office of Public Counsel do not oppose. No party requested an evidentiary hearing in this matter and no law requires one, so the Commission may grant the applicant's request based upon the application and Staff's recommendation.<sup>2</sup> This action is not a contested case,<sup>3</sup> and the Commission need not separately state its findings of fact.

<sup>1</sup> The City of Waynesville, Missouri, is a municipality of the third class. The City currently owns and operates a water supply system that provides service to approximately 1,800 customers. Although the City is a party to the Agreement, it did not join in the application. Consequently, the Commission joined the City as a party to the case on January 12, 2012.

<sup>2</sup> See, *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

<sup>3</sup> Section 536.010(4), RSMo Supp. 2010.

Highway H is a water corporation under Missouri law<sup>4</sup> and as such, subject to the regulation, supervision and control of the Commission with regard to providing water service to the public. The Commission has jurisdiction to rule on the application because Missouri law requires that “[n]o ... water corporation or sewer corporation shall hereafter sell ...its ... works or system ... without having first secured from the commission an order authorizing it so to do.”<sup>5</sup> The Commission will only deny the application if approval would be detrimental to the public interest.<sup>6</sup>

The parties agree that the public interest will suffer no detriment from the sale under the terms set forth in the Agreement. Staff states in its recommendation that the City has been approved for an infrastructure loan from the Missouri Public Utility Alliance to fund improvements after completion of the proposed sale, including connection to the City distribution system, addition of chlorination capability, construction of additional water storage, and the addition of fire hydrants. These improvements would provide Hunter’s Pointe residents with better fire protection and a more reliable source of water. Staff estimates that upon transfer of the water system to the City, a Hunter’s Pointe customer who uses 5,000 gallons of water per month would incur an increase of \$2.45 per month in customer charges. As the planned improvements occur over three years, the Hunter’s Pointe residents would eventually pay the same for water service as City customers. The City has agreed to include at least one Hunter’s Pointe resident as a liaison to the City Utilities Committee.

Staff recommends that the Commission approve the application, granting Highway H the authority to sell the Hunter’s Pointe water assets to the City, conditioned upon the following additional requirements:

1. Highway H Utilities, Inc. shall submit notice to the Commission regarding evidence of the transfer of assets to the City of Waynesville within three (3) business days after the transfer to the City of Waynesville;
2. Highway H Utilities, Inc. shall file all necessary revisions to its tariff on file, including, but not limited to, 1st Revised Sheet No. 3 and Original Sheet No. 2A, to exclude entirely from its tariff the area being served by the water assets identified herein within five (5) business days after the assets have been transferred to the City of Waynesville; and
3. Highway H Utilities, Inc., shall, if closing on the assets has not occurred within thirty (30) days after the effective date of an order from the Commission approving this transfer of assets, to file a status report with the Commission thirty (30) 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 will not be completed, Highway H Utilities, Inc. shall file a pleading with the Commission stating such.

<sup>4</sup> Section 386.020(59), RSMo Supp. 2010.

<sup>5</sup> Section 393.190.1, RSMo 2000.

<sup>6</sup> *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. 1934).

Highway H states that it has no objection to the proposed conditions found in the Staff recommendation. The Office of Public Counsel also has no objection to the Staff recommendation or its conditions.

Based on the information provided in the verified application and upon the verified recommendation and memorandum of Staff, the Commission finds that the proposed transfer of assets is not detrimental to the public interest and should be approved.

**THE COMMISSION ORDERS THAT:**

1. Highway H Utilities, Inc.'s application for approval of the transfer of the assets to the City of Waynesville, Missouri, described in its application is granted, subject to the conditions recommended by the Commission's Staff which are delineated in the body of this order.
2. Highway H Utilities, Inc. is authorized to sell and transfer the Hunter's Pointe Water System located in Pulaski County, Missouri, to the City of Waynesville, Missouri, as more specifically described in the Agreement for Sale of Water System entered into between those parties and attached hereto as Exhibit A.
3. Highway H Utilities, Inc. is authorized to do and perform, or cause to be done and performed, such other acts and things, as well as make, execute and deliver any and all documents as may be necessary, advisable and proper to the end that the intent and purposes of the approved transaction may be fully effectuated.
4. This order shall become effective on April 25, 2012.
5. This file may be closed on April 26, 2012.

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

Bushmann, Regulatory Law Judge

**In the Matter of the Application of Union Electric Company for Authority to Continue the Transfer of Functional Control of Its Transmission System to the Midwest Independent Transmission System Operator, Inc.**

**File No. EO-2011-0128**

**Evidence, Practice and Procedure. §12 Depositions.** When one party reads a portion of a deposition the opposition may read some or all of the remainder to clarify the situation, rebut the inferences to be drawn, or explain its side of the controversy.

**Electric. §4 Transfer, lease and sale.** The Commission cannot impose conditions designed to make the transfer more beneficial for the public, but it can impose conditions designed to alleviate specific detriments that would otherwise result from the transfer, even if the transfer overall would not be detrimental to the public.

**REPORT AND ORDER**

**Issue Date: April 19, 2012**

**Effective Date: April 30, 2012**

**APPEARANCES**

**James B. Lowery** and **Michael R. Tripp**, SMITH LEWIS, LLC, Suite 200, City Centre Building, 111 South Ninth Street, P.O. Box 918, Columbia, Missouri 65205-0918

**Thomas M. Byrne**, Managing Associate General Counsel, Ameren Services Company, P.O. Box 66149, 1901 Chouteau Ave., St. Louis, Missouri 63166-6149.  
For Union Electric Company, d/b/a Ameren Missouri.

**Steven Dottheim**, Chief Deputy Staff Counsel, and **Meghan E. McClowry**, Legal Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102  
For the Staff of the Missouri Public Service Commission.

**Lewis R. Mills, Jr.**, Public Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102  
For the Office of the Public Counsel and the Public.

**Diana Vuylsteke**, BRYAN CAVE, LLP, One Metropolitan Square, Suite 3600, 211 N. Broadway, St. Louis, Missouri 63102 and **Carole L. Iles**, BRYAN CAVE, LLP, 221 Bolivar Street, Suite 101, Jefferson City, Missouri 65101.  
For Missouri Industrial Energy Consumers.

**Douglas L. Healy**, Healy and Healy, LLC, 939 Boonville, Suite A, Springfield, Missouri 65802  
For the Missouri Joint Municipal Electric Utility Commission

**Dean Cooper**, Brydon, Swearingen & England, P.C., P.O. Box 456, Jefferson City, Missouri 65102.  
For The Empire District Electric Company

**Karl Zobrist** and **Lisa A. Gilbreath**, SNR Denton US LLP, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111 and **Matthew R. Dorsett**, Attorney, Legal Department, Midwest Independent Transmission System Operator, Inc., 720 City Center Drive, Carmel, Indiana 46032.

For the Midwest Independent Transmission System Operator, Inc.

**David C. Linton**, 424 Summer Top Lane, Fenton, Missouri 63026 and **Erin E. Cullum**, Attorney at Law, Southwest Power Pool, 415 North McKinley Street, Suite 140, Little Rock, Arkansas, 72205.

**Mark W. Comley**, NEWMAN, COMLEY & RUTH, P.C., 601 Monroe Street, Suite 301, P.O. Box 537, Jefferson City, Missouri 65102-0537

For Southwest Power Pool, Inc.

**CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff**

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. 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 the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

**FINDINGS OF FACT  
PROCEDURAL HISTORY**

On November 2, 2010, Union Electric Company, d/b/a Ameren Missouri, filed an application seeking authority to continue the transfer of functional control of its electric transmission system to the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). Ameren Missouri filed an amended application on August 10, 2011. Ameren Missouri's existing authority is set to expire on April 30, 2012.

The Commission gave notice of Ameren Missouri's application and invited interested parties to intervene. The Commission allowed the following parties to intervene: Midwest ISO; The Empire District Electric Company; the Missouri Industrial Energy Consumers (MIEC); Southwest Power Pool, Inc.; and the Missouri Joint Municipal Electrical Utility Commission (MJMEUC).

The Commission established a procedural schedule that required the parties to prefile testimony and scheduled a hearing. The hearing was originally scheduled for November 21 and 22, 2011, but on November 17, 2011, Ameren Missouri, Midwest ISO, MIEC, and the Commission's Staff filed a non-unanimous stipulation and agreement that purported to resolve all disputed issues between the signatory parties. At Public Counsel's request, the Commission postponed the hearing to allow the parties time to adjust their positions in response the stipulation and agreement.

Ultimately, the Office of the Public Counsel and MJMEUC opposed the non-unanimous stipulation and agreement and the evidentiary hearing was held on February 9 and 10, 2012. Thereafter, the parties filed briefs on March 9 and March 23, 2012.

### Pending Motion

Before addressing the merits of Ameren Missouri's application, the Commission will address an evidentiary motion filed by Ameren Missouri on March 9, 2012. At the hearing, during its cross-examination of Ajay Arora, Ameren Missouri's witness, Public Counsel offered into evidence a portion of the transcript of the deposition of its witness, Ryan Kind.<sup>1</sup> Ameren Missouri objected that the portion of the deposition was hearsay and opposed its admission into evidence.<sup>2</sup> The presiding officer overruled Ameren Missouri's objection and admitted the offered portion of the deposition transcript as Exhibit 18.<sup>3</sup>

On March 9, 2012, Ameren Missouri filed a written pleading in which it renewed its objection to the admission of Exhibit 18 and asked the Commission to reverse the presiding officer's ruling and to strike Exhibit 18 as inadmissible hearsay. No party, including Public Counsel, has filed a response to Ameren Missouri's renewed objection and motion to strike.

Missouri law regarding the use of depositions at trial is clear, "when one party reads a portion of a deposition the opposition may read some or all of the remainder in explanation."<sup>4</sup> In that circumstance, the opposing party is "entitled to utilize the deposition to clarify the situation, rebut the inferences to be drawn from the plaintiff's exhibits, or explain its side of the controversy."<sup>5</sup>

In this case, Mr. Arora, in his prefiled supplemental surrebuttal testimony,<sup>6</sup> quoted from Mr. Kind's deposition to argue that Kind had agreed that his concerns about the impact of Midwest ISO's capacity market on Ameren Missouri's retail customers are only long-term concerns, not short-term concerns that would affect Ameren Missouri during the relatively short time it would be authorized to remain in the Midwest ISO under Ameren Missouri's proposal. Public Counsel offered additional portions of Kind's deposition to place the quotes extracted by Arora into context to rebut Arora's contention that Kind agreed that his concerns are only long-term concerns.

Public Counsel used the deposition of its witness in precisely the manner allowed under the law. The presiding officer appropriately allowed the exhibit into evidence. The Commission will deny Ameren Missouri's motion to strike that exhibit.<sup>7</sup>

<sup>1</sup> Ameren Missouri took Kind's deposition on November 8, 2011.

<sup>2</sup> Transcript, Page 108.

<sup>3</sup> Transcript, Page 110.

<sup>4</sup> *Nugent v. Owens-Corning Fiberglas, Inc.*, 925 S.W.2d 925, 929 (Mo. App. 1996), quoting *Burrous v. American Airlines, Inc.*, 639 S.W.2d 263 (Mo. App. 1982).

<sup>5</sup> *Nugent v. Owens-Corning Fiberglas, Inc.*, at 929. See also, *Saddleridge Estates, Inc. v. Ruiz*, 323 S.W.3d 427 (Mo. App. 2010).

<sup>6</sup> Exhibit 3, Page 7-8, Lines 10-22, 1.

<sup>7</sup> The dispute about the admission of Exhibit 18 is largely academic. No party cited to that exhibit in its briefs and the Commission has not relied on that exhibit in reaching its decision.

### **The Proposed Transfer of Control**

Ameren Missouri proposes to continue the transfer of functional control of its transmission system to the Midwest ISO. The Commission has previously authorized such a transfer of control until April 30, 2012. Ameren Missouri prepared a study in July 2011, which indicated a net present value benefit to customers from Ameren Missouri's continued participation in the Midwest ISO of approximately \$105 million from 2012 to 2014.<sup>8</sup> No party has challenged that calculation of net benefits.

### **The Uncontested Provisions of the Stipulation and Agreement**

The signatories to the nonunanimous stipulation and agreement, including Ameren Missouri, were able to agree that the Commission should impose numerous conditions on its approval of Ameren Missouri's continued participation in the Midwest ISO. Because the nonunanimous stipulation and agreement was opposed, the Commission cannot approve that document as a whole. However, according to the Commission's rule,<sup>9</sup> the nonunanimous stipulation and agreement continues to represent the joint position of the signatory parties unless they choose to renounce that position.

In this case, no party has opposed any of the conditions set forth in the nonunanimous stipulation and agreement. The parties that do object to the stipulation and agreement merely argue that some of the conditions should be modified and that an additional condition should be imposed. The unchallenged conditions are consistent with the testimony and evidence presented at the hearing and the Commission will include those conditions in this order.

### **The Contested Provisions of the Stipulation and Agreement**

The Commission will address in more detail the challenged conditions set forth in the nonunanimous stipulation and agreement.

### **Material Change**

The first challenged condition is paragraph 10.a of the stipulation and agreement. That paragraph indicates a stakeholder may request that the Commission establish an investigative case before November 15, 2015, "to investigate whether a material event occurring after this docket is of such a magnitude that it presents a substantial risk that continued participation in the Midwest ISO on the terms and conditions contained herein has become detrimental to the public interest." The paragraph also recognizes that the Commission can initiate such an investigation on its own motion.

Public Counsel and MJMEUC are concerned that the proposed language would restrict the ability of stakeholders to bring concerns to the Commission until they could show that actual harm has already occurred. They suggest that the language in the paragraph should be changed to clarify that a stakeholder can request an investigation if it believes that a change has occurred that is likely to harm the public interest in the future, even if that harm has not yet happened.

<sup>8</sup> Arora Direct, Ex. 1, Page 8, Lines 10-18.

<sup>9</sup> 4 CSR 240-2.115(2)(D).

In particular, Public Counsel and MJMEUC are concerned about how the FERC may deal with the Midwest ISO's proposed Resource Adequacy Requirements Tariff. The FERC is currently considering that proposed tariff and there is concern that the FERC will push the Midwest ISO to make changes in that tariff that will make the tariff and the forward capacity market harmful to Ameren Missouri's ratepayers.<sup>10</sup> If such changes are made to the tariff, Public Counsel and MJMEUC want to be able to bring those changes to the Commission's attention without waiting for actual harm to occur.

The dispute about the language of section 10.a of the stipulation and agreement has become essentially moot because of the opposition to that stipulation and agreement. While the signatories to the stipulation and agreement could agree among themselves about when it would be appropriate to bring a particular concern to the Commission's attention, the enforceability of that agreement vanished when the stipulation and agreement was opposed. Far from restricting the ability of interested persons and entities to bring their concerns to the Commission's attention, the Commission wants to encourage such actions. After hearing such concerns, the Commission will decide for itself what issues it believes should be investigated and when such investigations should take place. Since anyone can ask the Commission to investigate anything, at any time, and the Commission alone will decide whether such an investigation is appropriate, the restrictive language found in paragraph 10.a of the Stipulation and Agreement is not necessary and will not be included among the conditions imposed by this order.

#### **Separate Representation of Ameren Missouri at the Midwest ISO**

When multiple subsidiaries of a single holding company are members of the Midwest ISO, that body's governing structure allows them collectively a single vote. Currently, four Ameren operating companies are members of the Midwest ISO; Ameren Energy Marketing Company, Ameren Illinois Company, Ameren Missouri, and Ameren Transmission Company of Illinois.<sup>11</sup> Ameren Missouri's interests at the Midwest ISO, including its vote, as well as the interests of the other three member operating companies, are represented by employees of Ameren Services, whose costs are shared amongst the Ameren operating companies.<sup>12</sup>

Public Counsel is concerned that the various Ameren operating companies are involved in diverse business lines, subject to different regulatory frameworks. For that reason, they may have interests that diverge from those of Ameren Missouri and its ratepayers.<sup>13</sup> To deal with this possible divergence of interests, Public Counsel argues that the Commission should condition its approval of Ameren Missouri's continued membership on the Midwest ISO on Ameren Missouri obtaining separate representation at the Midwest ISO.<sup>14</sup>

<sup>10</sup> Wilson Rebuttal, Ex. 17, Page 28, Lines 6-9.

<sup>11</sup> Haro Surrebuttal, Ex. 4, Page 3, Lines 14-19.

<sup>12</sup> Haro Surrebuttal, Ex. 4, Page 4, Lines 1-7.

<sup>13</sup> Kind Rebuttal, Ex. 11, Page 15, Lines 16-22.

<sup>14</sup> Transcript, Page 252, Lines 21-24.

In his opening statement at the hearing, Public Counsel appeared to soften this position to ask the Commission to require Ameren Missouri to “make its best efforts to become the representative in MISO”.<sup>15</sup> Public Counsel’s witness did not advocate that position in his prefiled testimony, or at the hearing. However, in its reply brief, Public Counsel once again referred to a requirement that Ameren Missouri make its “best efforts” to obtain separate representation.<sup>16</sup> It is therefore difficult to discern what exactly Public Counsel is advocating.

However, Public Counsel’s witness conceded that it would be very difficult, if not impossible for Ameren Missouri to comply with a condition that would require it to change the Midwest ISO’s voting structure to give Ameren Missouri separate representation.<sup>17</sup> Staff’s witness, Adam McKinnie, also testified that it would be difficult for Ameren Missouri to require Midwest ISO to give it separate representation.<sup>18</sup> Furthermore, Public Counsel’s witness conceded that he could cite no particular example of any harm to Ameren Missouri or its ratepayers resulting from Ameren Services’ representation of Ameren Missouri at the Midwest ISO.<sup>19</sup>

Given the lack of evidence indicating actual harm to Ameren Missouri or its ratepayers, and given the practical barriers to Ameren Missouri’s ability to obtain separate representation at Midwest ISO, the Commission will not order Ameren Missouri to pursue separate representation at Midwest ISO as a condition of approving Ameren Missouri’s continued participation in the Midwest ISO.

As its alternative position, Public Counsel suggests the Commission order Ameren Missouri to make its best efforts to obtain separate representation at the Midwest ISO. The Commission shares Public Counsel’s concern about potential conflicts of interest between Ameren Missouri and its affiliates regarding capacity markets and construction of transmission resources. However, a condition that would require Ameren Missouri to make its best efforts would be inexcusably vague and ultimately unenforceable, although it could generate pointless litigation about whether the company has really tried its hardest. The Commission will not impose a condition, but encourages Ameren Missouri to explore means of protecting its particular interests at MISO, and will encourage Public Counsel and Staff to continue to closely watch the representation that Ameren Missouri receives at the Midwest ISO. If necessary, the Commission may revisit this question when Ameren Missouri’s authority to participate in the Midwest ISO expires in 2016.

<sup>15</sup> Transcript, Page 65, Lines 14-17.

<sup>16</sup> Public Counsel’s Reply Brief, 10<sup>th</sup> page.

<sup>17</sup> Borkowski, Supp. Surrebuttal, Ex. 6, Pages 10-11, Lines 14-30, 1-8, quoting the deposition of Public Counsel’s witness, Ryan Kind.

<sup>18</sup> Transcript, Page 171, Lines 4-14.

<sup>19</sup> Borkowski, Supp. Surrebuttal, Ex. 6, Page 10, Lines 1-6, quoting the deposition of Public Counsel’s witness, Ryan Kind.

### **Measures to Maintain Commission Authority Over the Transmission Component of Bundled Retail Rates**

Public Counsel, and other stakeholders, are concerned about the effect of changes in the way electric transmission projects to serve Ameren Missouri's customers are constructed. Under the traditional model, Ameren Missouri would build any transmission projects within its service territory needed to serve its customers. This Commission would then establish the rates by which Ameren Missouri would recover the cost of building the transmission project.

In 2010, Ameren Corporation formed a new subsidiary called Ameren Transmission Company (ATX).<sup>20</sup> Ameren Missouri's witness, Maureen Borkowski, testified that Ameren Missouri will continue to build transmission facilities in its service territory for reliability purposes related to serving its own retail load. However, ATX or another Ameren subsidiary would build other transmission in Missouri, including projects the Midwest ISO designates as Multi-Value Projects (MVPs), Market Efficiency Projects (MEPs) and Generation Interconnection and Transmission Service Projects built for customers other than Ameren Missouri. Those projects are included in the Midwest ISO's Transmission Expansion Plan for reasons other than the need to provide reliable service to Ameren Missouri's customers. Still, the Midwest ISO would allocate a part of the cost of those projects to Ameren Missouri, with the costs ultimately recovered from Ameren Missouri's ratepayers, although the costs would be shared with other entities.<sup>21</sup>

The rates that ATX or other Ameren subsidiary would be able to charge to recover the cost of constructing those transmission service projects would be established by the FERC, not this Commission. Because the FERC wants to provide an incentive for companies to build more transmission, it has been willing to provide more generous rate treatment than has been afforded in the past by this Commission. Thus, Ameren Corporation would have a financial incentive to allow ATX or another affiliate to build transmission that might otherwise be built by Ameren Missouri and thereby receive more favorable cost recovery under the FERC's transmission ratemaking authority.<sup>22</sup>

Ameren Missouri would, of course, seek to recover from its ratepayers the share of the cost to construct those projects that are allocated to it by the Midwest ISO. Under the "filed rate doctrine", this Commission would likely not be able to look behind those allocated costs to deny Ameren Missouri's recovery of ATX's FERC established rates. As a result, Ameren Missouri's ratepayers could pay more for their electricity than they would have if Ameren Missouri had built the transmission project under this Commission's authority.

<sup>20</sup> Dauphinais Rebuttal, Ex. 14, Page 5 Lines 10-20.

<sup>21</sup> Borkowski Surrebuttal, Ex. 5, Page 6, Lines 1-18.

<sup>22</sup> Dauphinais Rebuttal, Ex. 14, Page 6, Lines 4-20.

A provision of the stipulation and agreement is intended to deal with the concern that Ameren Missouri's customers could face higher rates if these transmission projects are built by an affiliate. Section 10.j of the stipulation and agreement, entitled "Rate Treatment – Affiliate-Owned Transmission" states:

With respect to transmission facilities located in Ameren Missouri's certificated service territory that are constructed by an Ameren affiliate and that are subject to regional cost allocation by the Midwest ISO: Ameren Missouri agrees that for ratemaking purposes in Missouri the costs allocated to Ameren Missouri by the Midwest ISO will be adjusted by an amount equal to the differences between: (i) the annual revenue requirement for such facilities that would have resulted if Ameren Missouri's MoPSC-authorized ROE and capital structure had been applied and there had been no CWIP (if applicable) applied to such facilities and (ii) the annual FERC-authorized revenue requirement for such facilities. The ratemaking treatment agreed to in this subparagraph j will, unless otherwise agreed, end with the MoPSC's next order (after its order resolving this docket) respecting Ameren Missouri's participation in the Midwest ISO, another RTO or operation as an ICT.

Furthermore, in section 10i of the stipulation and agreement, Ameren Missouri and ATX agree to participate in an investigatory case to investigate plans during the next 10 years for Ameren or another Ameren affiliate to build transmission in Ameren Missouri's service territory. Public Counsel is not satisfied with those provisions, arguing that they fail to adequately protect the interest of Ameren Missouri's ratepayers.

Public Counsel contends the Commission should impose a condition that would ensure that the Commission retains jurisdiction over the transmission component of bundled retail rates.<sup>23</sup> In making that argument, Public Counsel inadvertently misstates the issue. As Ameren Missouri points out,<sup>24</sup> the Commission has the jurisdiction that the legislature gives it through the controlling statutes. No agreement by the parties, or order of the Commission, can decrease or increase the Commission's jurisdiction. What Public Counsel is really trying to accomplish is to ensure that the transmission component of bundled retail rates remains subject to the Commission's existing jurisdiction. With that clarification, Public Counsel's goal is reasonable and is shared by the other parties and by the Commission.

To accomplish that goal, Public Counsel initially proposed that the Commission impose a condition that would require Ameren Missouri to construct and own any transmission projects proposed for Ameren Missouri's service territory unless this Commission approves the construction by another entity and grants a certificate of

<sup>23</sup> Initial Post-hearing Brief of The Office of the Public Counsel, Page 4

<sup>24</sup> Reply Brief of Ameren Missouri, Page 9, Footnote 10.

convenience and necessity to the entity that will construct the project.<sup>25</sup> MIEC initially proposed the same condition.<sup>26</sup> Subsequently, Public Counsel, in its Second Statement of Position, modified its proposed condition to require Ameren Missouri to “make diligent efforts to construct and own any and all transmission projects” proposed for its retail service territory.<sup>27</sup> Finally, in its initial brief, Public Counsel advocated for a condition proposed by its witness, Ryan Kind, in his supplemental rebuttal testimony. That proposed condition would provide that any FERC transmission rate incentives would never apply to the transmission component of rates set for bundled retail load by this Commission.<sup>28</sup>

There are problems with all of the conditions proposed by Public Counsel. First, the initial proposal that would require Ameren Missouri to construct and own all transmission projects in its service territory unless otherwise ordered by the Commission would be inconsistent with federal law as established by the FERC. Under FERC Order 1000, a utility with a certificated service territory, such as Ameren Missouri, no longer has a right of first-refusal to construct transmission projects within its service territory if the reliability projects are subject to regional cost allocation. That means other transmission companies not affiliated with Ameren Missouri may be allowed to develop such projects within Ameren Missouri’s service territory.<sup>29</sup>

Public Counsel recognized the changes imposed by FERC Order 1000 when it proposed a modified condition in its statement of positions. At that time, Public Counsel proposed that Ameren Missouri should “make diligent efforts” to own and construct transmission projects in its service territory. As the Commission previously indicated regarding the proposal that Ameren Missouri make its best efforts to obtain separate representation at MISO, such an indefinite requirement would be inherently vague and unenforceable and would be an invitation to future litigation about whether Ameren Missouri had complied with the condition.

The final version of the condition suggested by Public Counsel is also problematic. That provision would require Ameren Missouri to forever relinquish recovery of extra costs associated with the recovery of transmission rate incentives allowed by the FERC on transmission projects developed by any company, whether or not affiliated with Ameren Missouri. Such a condition would clearly be contrary to the filed-rate doctrine, which prevents a state regulatory agency from looking behind a federally approved rate to deny a state regulated utility’s recovery of costs incurred due to payment of that rate.

<sup>25</sup> Kind Rebuttal, Ex. 11, Page 13, Lines 22-28.

<sup>26</sup> Dauphinais Rebuttal, Ex. 14, Page 7, Lines 15-22.

<sup>27</sup> Second Statement of Positions of the Office of the Public Counsel, filed January 27, 2012.

<sup>28</sup> Kind Supplemental Rebuttal, Ex. 13, Page 13, Lines 12-20. Mr. Kind modified the language of the proposed condition at TR 229.

<sup>29</sup> Borkowski Surrebuttal, Ex. 5, Page 11, 1-12.

As previously described, Ameren Missouri and the other signatories to the stipulation and agreement were able to agree on two conditions to address the question of continued Commission authority over the transmission component of bundled retail rates. One condition would limit the amount of transmission costs Ameren Missouri could pass through to its ratepayers during the time that the extension of authority to remain in MISO granted in this order would remain in effect. The other condition would have the Commission open an investigative case to consider how those transmission costs might be recovered in the future.

Public Counsel criticizes the first condition found at section 10j of the stipulation and agreement as inadequate because it would limit Ameren Missouri's cost recovery only until 2016 when the extended authority to remain in the Midwest ISO expires. Certainly, the costs associated with new transmission projects could extend well beyond 2016. However, because the authority the Commission is granting will expire in 2016, the Commission will once again be able to examine this question before the authority expires. If the Commission finds that additional or more restrictive conditions are required to make the further extension of authority comport with the public interest, it may impose such conditions at that time. But it is unnecessary and ineffective for this Commission to seek to impose a condition that would attempt to bind that future Commission in its treatment of a possible further extension of authority.

Public Counsel also criticizes the limited number of possible FERC incentives that are described in the limitations imposed by section 10j of the stipulation and agreement. The limitations in that section would apply only to Ameren Missouri's Missouri Commission-authorized return on equity (ROE) and capital structure and to the exclusion of construction work in progress (CWIP). Public Counsel's witness points out that there are other possible FERC transmission rate incentives that could be passed through to Missouri ratepayers under this condition, including "abandoned plant recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses, and accelerated depreciation."<sup>30</sup>

There is no evidence in the record to demonstrate how much impact these additional FERC incentives could have on Missouri ratepayers. However, in her supplemental surrebuttal testimony, Ameren Missouri's witness, Maureen Borkowski, explained that Ameren Missouri agreed to the provisions of section 10j to "eliminate whatever very small rate impact the FERC rate treatment of an ATX investment in Missouri could have during the period of the extended permission to participate in the Midwest ISO..."<sup>31</sup> Since Ameren Missouri has agreed that its goal was to eliminate the entire rate impact of FERC rate treatment, the Commission will hold it to that agreement by adding restrictions on the recovery of the additional possible costs identified by Mr. Kind on behalf of Public Counsel.

<sup>30</sup> Kind Supp. Rebuttal, Ex. 13, Page 12, Lines 12-17.

<sup>31</sup> Borkowski Supp. Surrebuttal, Ex. 6, Page 4, Lines 8-11.

Finally, Public Counsel criticizes the geographical restrictions of the rate treatment provisions of section 10j of the stipulation and agreement in that the section would apply only to “transmission facilities located in Ameren Missouri’s certificated service territory” and not to transmission projects that ATX might develop outside Ameren Missouri’s service territory or even in another state.<sup>32</sup> Public Counsel does not explain why this Commission should attempt to assert control over, or limitations on, transmission projects that an unregulated company such as ATX might seek to develop outside Ameren Missouri’s service territory. The Commission finds no basis for such an assertion of authority and will not modify the condition in the manner proposed by Public Counsel.

After considering Public Counsel’s criticisms, the Commission finds that the stipulated conditions found in sections 10i and 10j of the stipulation and agreement are reasonable and are in the public interest as modified in this order. The Commission will adopt them as modified.

### **Additional Analysis Regarding Ameren Missouri’s Post-2016 Participation in the Midwest ISO**

In section 10b of the stipulation and agreement, the signatory parties agreed to a process by which Ameren Missouri would consult with various stakeholders to review the additional analysis necessary to determine whether Ameren Missouri should remain in the Midwest ISO beyond May 31, 2016. MJMEUC expressed concern that, since it is not a retail customer of Ameren Missouri, the stipulation and agreement did not allow it sufficient opportunity to participate in that review process.

At the hearing, Ameren Missouri’s witness, Ajay Arora, when asked whether Ameren Missouri would have any objection to MJMEUC being involved in the modeling analysis of the review process, testified that so long as the modeling analysis is controlled by Ameren Missouri’s management for the purpose of judging the benefits and costs to Ameren Missouri’s retail customers, the company is willing to consider suggestions from MJMEUC about topics for analysis. Ameren Missouri’s response satisfies MJMEUC’s concern and no modification of the stipulated condition is necessary.

### **CONCLUSIONS OF LAW**

1. Ameren Missouri is an “Electrical Corporation” as defined by Section 386.020(15), RSMo (Supp. 2010) and is subject to the general jurisdiction of the Commission pursuant to Section 393.140, RSMo 2000.

2. Pursuant to Section 393.190, RSMo 2000, Ameren Missouri must obtain permission from this Commission to continue the transfer of its transmission system to the control of the Midwest ISO.

3. In determining whether to allow a utility to sell or transfer its property, the Commission does not need to find that the proposed transfer will benefit the public. Rather, according to the Missouri Supreme Court:

It is not [the Commission’s] province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. ‘In the public interest,’ in such cases, can reasonably mean no more than ‘not detrimental to the public.’<sup>33</sup>

<sup>32</sup> Kind Supp. Rebuttal, Ex. 13, Page 12, Lines 18-25.

<sup>33</sup> *State ex rel. City of St. Louis v. Pub. Serv. Com’n*, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934), quoting, *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, 844 (1928).

Missouri's courts have consistently applied the not detrimental standard since 1934.<sup>34</sup>

4. Despite having agreed to several conditions in the stipulation and agreement, Ameren Missouri argues that the Commission has no authority to impose any conditions on the transfer of utility property unless there is evidence to establish that the benefits of the transaction are outweighed by the detriments. In other words, since the net monetary benefit of the proposed transaction in this case is \$105 million, according to Ameren Missouri, the Commission cannot impose any conditions on the transfer unless it finds that there are additional detriments amounting to more than \$105 million.

5. The Commission disagrees with Ameren Missouri's conclusion. Clearly, the Commission cannot impose conditions designed to make the transfer more beneficial for the public. However, the Commission is not limited to a simple thumbs up or thumbs down ruling on the transfer as a whole. If it is to adequately protect the public interest, the Commission must be able to impose conditions designed to alleviate specific detriments that would otherwise result from the transfer, even if the transfer overall would not be detrimental to the public.

6. Ameren Missouri and other parties have presented the Commission with a nonunanimous stipulation and agreement that would impose various conditions on the proposed transfer. Public Counsel and MJMEUC objected to that stipulation and agreement. Commission Rule 4 CSR 240-2.115(2)(D) provides:

A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.

Therefore, at this time, there is no stipulation and agreement for the Commission to approve or disapprove, merely a joint position of some of the parties. The Commission can accept some or all of those joint positions, depending upon the evidentiary record that has been presented.

7. The "filed-rate doctrine" holds that states may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. The United States Supreme Court has held:

The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. ... Such a 'trapping' of costs is prohibited.<sup>35</sup>

<sup>34</sup> For example, see, *State ex rel AG Processing v. Pub. Serv. Com'n*, 120 S.W.3d 732 (Mo. 2003).

<sup>35</sup> *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 970, 106 S.Ct. 2349, 2359 (1986).

For purposes of this case, the “filed-rate doctrine” means that this Commission will not be able to deny Ameren Missouri the ability to recover in rates the amounts that it must pay to transmission owners for FERC-established rates for power transmission, even if those FERC-established transmission rates are higher than would have been approved by this Commission. That will also be true even if the transmission owner with a FERC-established rate is affiliated with Ameren Missouri.

### DECISION

The Commission finds that Ameren Missouri’s continued participation in the Midwest ISO through May 31, 2016 is in the public interest, subject to the conditions described in this order.

#### THE COMMISSION ORDERS THAT:

1. Ameren Missouri’s Renewal of Objection and Motion to Strike is denied.
2. Ameren Missouri’s authority to continue the transfer of functional control of its transmission system to the Midwest Independent Transmission System Operator, Inc. is granted subject to the following conditions:
  - A. The Commission approves, on an interim basis, Ameren Missouri’s continued RTO participation in the Midwest ISO during a term ending May 31, 2016, provided that if the Commission has not by May 31, 2016, further extended its approval of Ameren Missouri’s participation in the Midwest ISO, Ameren Missouri shall be deemed to have Commission approval to continue its Midwest ISO participation for the additional time necessary to re-establish functional control of its transmission system so that it may operate the same as an ICT, or to transfer functional control of its transmission system to another RTO. The extended permission granted in this order is also subject to the provisions of paragraph 2.O of this order. (from paragraph 9 of the stipulation and agreement)
  - B. Assuming that Ameren Missouri has not earlier requested withdrawal or that withdrawal has not otherwise occurred, by September 30, 2014, Ameren Missouri shall contact and consult with interested persons or entities to review with those stakeholders the additional analysis Ameren Missouri believes is appropriate and necessary regarding Ameren Missouri’s continued participation in an RTO after May 31, 2016, or its operation as an ICT. Such study, at a minimum, shall examine continued participation in the Midwest ISO versus participation in Southwest Power Pool and continued participation in Midwest ISO versus operation as an ICT. Such study shall examine a period after May 31, 2016, of not less than five years or more than ten years. (from paragraph 10.b of the stipulation and agreement)
  - C. After taking into consideration in good faith the comments and input from the stakeholders regarding the tentative analysis, Ameren Missouri shall, by December 1, 2014, advise the stakeholders of the specific parameters, (including the minimum requirements provided for above) of the analysis Ameren Missouri intends to conduct. (from paragraph 10.b of the stipulation and agreement)

D. By November 15, 2015, Ameren Missouri shall file a pleading, along with the results of its actual analysis regarding its continued RTO participation or its possible operation as an ICT after May 31, 2016. That pleading shall also address, among other things, whether the Service Agreement or similar mechanism for the provision of transmission service to Missouri Bundled Retail Load should continue to remain in effect between Ameren Missouri and any RTO in which Ameren Missouri may participate after May 31, 2016. (from paragraph 10.b of the stipulation and agreement)

E. Ameren Missouri shall work with interested individuals and entities, and give them substantive input regarding the development of the specific methodology, inputs, outputs, and other features to be included in the November 15, 2015 actual analysis. Furthermore, Ameren Missouri shall advise and update the Midwest ISO and Southwest Power Pool regarding that actual analysis. (from paragraph 10.b of the stipulation and agreement)

F. To maintain its independence and control of the actual analysis, Ameren Missouri (or Ameren Services on its behalf) shall act as the project manager for such analysis and shall engage and direct the work of Ameren Missouri or Ameren Services employees or consultants assigned or retained to perform the actual analysis. (from paragraph 10.b of the stipulation and agreement)

G. Subject to any applicable privilege recognized by law and the provisions of the Commission's rule regarding confidential information, stakeholders shall be given meaningful and substantial access to data necessary for, and used in, preparing the actual analysis, shall have access to employees or consultants utilized by Ameren Missouri to perform the actual analysis, and shall be given the opportunity to have meaningful input in the preparation of the actual analysis. Furthermore, Ameren Missouri shall advise and update the Midwest ISO and Southwest Power Pool regarding that actual analysis. (from paragraph 10.b of the stipulation and agreement)

H. Ameren Missouri shall provide regular reports regarding the progress and, if requested, reasonable details of the actual analysis to any party to this case that requests such updates or information. (from paragraph 10.b of the stipulation and agreement)

I. If any difference of opinion regarding the scope, particular details or preliminary assumptions that are necessary to and part of any supporting analysis to be performed by Ameren Missouri arises, Ameren Missouri shall ultimately have responsibility for, and the burden of presenting an analysis in support of whatever position it deems appropriate and necessary at the time of its November 15, 2015 filing. Accordingly, Ameren Missouri is entitled to maintain a level of independence and control of any such analysis, while other parties retain their right to oppose Ameren Missouri's positions or to provide alternative positions. (from paragraph 10.b of the stipulation and agreement)

J. Ameren Missouri shall acknowledge that the Service Agreement's primary function is to ensure that the Missouri Public Service Commission continues to set the transmission component of Ameren Missouri's rates to serve its Bundled Retail Load. Consistent with Section 3.1 of the Service Agreement and its primary function, to the extent that the FERC offers incentive "adders" for participation in an RTO or in an ICT to the rate of return allowed for providing Transmission Service, as that term is defined in the Service Agreement, to wholesale customers within the Ameren zone, such incentive adders shall not apply to the transmission component of rates set for Bundled Retail Load by the Commission. (from paragraph 10.c of the stipulation and agreement)

K. Currently, FERC requires Bundled Retail Load served by Midwest ISO Transmission Owners to take Transmission Service under the Midwest ISO's Energy Markets Tariff (EMT). If, at some point, Ameren Missouri is not required to take Transmission Service for Bundled Retail Load under the EMT, the Service Agreement shall be terminated concurrently with the point in time when Ameren Missouri is no longer required to take Transmission Service for Bundled Retail Load under the EMT. Termination of the Service Agreement under this provision shall not affect Ameren Missouri's membership participation status in the Midwest ISO and the Commission shall continue to have jurisdiction over the transmission component of the rates set for Bundled Retail Load. As a participant in the Midwest ISO, Ameren Missouri may remain subject to charges from the Midwest ISO for Bundled Retail Load under the EMT that are assessed ratably to all load-serving utilities who are participants in the Midwest ISO, but who are not taking Transmission Service for their Bundled Retail Load under the EMT. No ratemaking treatment has been adopted for these changes. (from paragraph 10.d of the stipulation and agreement)

L. The Service Agreement (unless it is terminated pursuant to its terms) shall continue in its current form; provided that the Commission may rescind its approval of Ameren Missouri's participation in the Midwest ISO and may require Ameren Missouri to withdraw from participation in the Midwest ISO on any of the following bases:

- (i) The issuance by FERC of an order, or the adoption by FERC of a final rule or regulation, binding on Ameren Missouri, that has the effect of precluding the Commission from continuing to set the transmission component of Ameren Missouri's rates to serve its Bundled Retail Load; or
- (ii) The issuance by FERC of an order, or the adoption by FERC of a final rule or regulation, binding on Ameren Missouri, that has the effect of amending, modifying, changing, or abrogating in any material respect any term or condition of the Service Agreement previously approved by the Commission and by FERC

Ameren Missouri shall immediately notify the stakeholders if Ameren Missouri becomes aware of the issuance of any order, rule, or regulation amending, modifying, changing, or abrogating any term or condition of the Service Agreement. Any stakeholder is free to make a filing with the Commission as a result of an action by FERC as described in this provision, but must do so within 90 days after Ameren Missouri has provided notification under this provision of such FERC action. Any stakeholder not making a filing within the 90-day time frame shall be deemed to

have waived its right to make a filing with the Commission in response to such FERC action. (from paragraph 10.e of the stipulation and agreement)

M. Any order issued by the Commission that, on a basis provided for in paragraph L(i) or L(ii), terminates the Commission's approval of Ameren Missouri's participation in the Midwest ISO shall be effective when Ameren Missouri has re-established functional control of its transmission system as a transmission provider or transfers functional control to another entity depending on further orders of the Commission and the FERC. (from paragraph 10.e of the stipulation and agreement)

N. Notwithstanding any term or condition provided for in paragraphs L or M, any termination of the Service Agreement that might occur under Section 2.4 of the Service Agreement shall not constitute an action of the FERC described in L(i) and ii) and shall not trigger the Commission's right to require Ameren Missouri to withdraw from the Midwest ISO. (from paragraph 10.e of the stipulation and agreement)

O. If Ameren Missouri withdraws from Midwest ISO, or if the authority granted in this order is not extended beyond May 31, 2016, Ameren Missouri will have to re-establish functional control of its transmission system as a transmission provider, or, depending upon further orders of the Commission and the FERC, may have to transfer functional control of its transmission system to another entity. In either case, Ameren Missouri would have to give notice to the Midwest ISO of its withdrawal. Under Article Five of the Service Agreement, such notice shall not be effective before December 31 of the calendar year following the calendar year in which notice is given by Ameren Missouri to the Midwest ISO. For a possible withdrawal from the Midwest ISO to occur no later than May 31, 2016, the Commission will need to issue a decision with respect to Ameren Missouri's continued participation in Midwest ISO no later than December 15, 2015. (from paragraph 10.f of the stipulation and agreement)

P. If Ameren Missouri desires to securitize the revenues associated with its transmission system, it shall obtain additional prior permission and approval from the Commission. (from paragraph 10.g of the stipulation and agreement)

Q. If Ameren Missouri decides to seek any fundamental change in its membership participation or membership status in the Midwest ISO, it shall seek prior approval from the Commission no later than five business days after its filing with the FERC for authorization of that change. (from paragraph 10.h of the stipulation and agreement)

R. Ameren Missouri and Ameren Transmission Company (collectively Ameren) shall participate in an investigatory case that the Commission will initiate within 60 days after the effective date of this order. In that case, the Commission will investigate plans during the next 10 years for Ameren, or another Ameren affiliate, as defined in the Commission's affiliated transaction rules for electric utilities, to build transmission in Ameren Missouri's service territory. Ameren Missouri shall not object to discovery requests relating to plans during the next 10 years for Ameren or another Ameren affiliate to build transmission in Ameren Missouri's service territory on the grounds that: (i) the discovery does not seek information that is relevant to such transmission issues; or (ii) the data request seeks information that is not in Ameren's possession if the information is in the possession of an Ameren affiliate. By participating in the case, Ameren is not waiving any applicable privilege and retains the right to object if a discovery request asks for opinions (not facts or existing data), asks for legal conclusions, asks

Ameren to perform analyses that do not already exist, or is vague, unduly burdensome, or overly broad. The Commission will close the investigatory case no later than ten months after it is initiated. Neither ATX, nor any Ameren affiliate that provides information in connection with the investigatory case shall be deemed to have thereby conceded that the Commission has jurisdiction over them, or could otherwise compel them to participate in the investigatory case or to provide such information, absent their agreement to do so. (from paragraph 10.i of the stipulation and agreement)

S. For transmission facilities located in Ameren Missouri's certificated service territory that are constructed by an Ameren affiliate and that are subject to regional cost allocation by the Midwest ISO, for ratemaking purposes in Missouri, the costs allocated to Ameren Missouri by the Midwest ISO shall be adjusted by an amount equal to the difference between: (i) the annual revenue requirement for such facilities that would have resulted if Ameren Missouri's Commission-authorized ROE and capital structure had been applied and there had been no CWIP (if applicable), or other FERC Transmission Rate Incentives, including Abandoned Plant Recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses and accelerated depreciation, applied to such facilities and (ii) the annual FERC-authorized revenue requirement for such facilities. The ratemaking treatment established in this provision will, unless otherwise agreed or ordered, end with the Commission's next order regarding Ameren Missouri's participation in the Midwest ISO, another RTO, or operation as an ICT. (from paragraph 10.j of the stipulation and agreement)

3. This order shall become effective on April 30, 2012.

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

Dated at Jefferson City, Missouri,  
on this 19<sup>th</sup> day of April, 2012.

**In the Matter of the Application of Kansas City Power & Light Company and KCP&L  
Greater Missouri Operations Company for the Issuance of an Accounting Authority  
Order Relating to Their Electrical Operations**

**File No. EU-2012-0131**

**ELECTRIC. §4. Accounting authority orders.** The Commission approved an unopposed stipulation and agreement granting authority for two electric utilities to undertake certain accounting procedures in connection with their electrical operations in relation to the costs of compliance with Missouri's Renewable Energy Standard Law.

**ORDER APPROVING AND INCORPORATING  
STIPULATION AND AGREEMENT**

Issue Date: April 19, 2012

Effective Date: April 30, 2012

On December 30, 2011, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company ("Companies") filed an application with the Missouri Public Service Commission ("Commission") for an Accounting Authority Order ("AAO") that would allow the Companies to undertake certain accounting procedures in connection with their electrical operations in relation to the costs of compliance with Missouri's Renewable Energy Standard Law. The Commission directed notice and established an intervention deadline. On January 23, 2012, Praxair, Inc., Sedalia Industrial Energy Users' Association, and AG Processing, Inc. a Cooperative (collectively, the Midwest Energy Users' Association), filed a timely application to intervene, which was granted.

On April 3, 2012, the Companies and the Commission's Staff ("Signatories") filed a non-unanimous stipulation and agreement ("Agreement"). The remaining participants, Midwest Energy Users' Association and the Office of Public Counsel, are not signatories to the Agreement. The Signatories to the Agreement request that the Commission issue an order authorizing both Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company to:

- (a) record all incremental operating expenses associated with the cost of solar rebates, the cost to purchase renewable energy credits, the cost of the standard offer and other related costs incurred as result of compliance with Missouri's Renewable Energy Standard Law in USOA Account 182;
- (b) include carrying costs based on the Companies' short term debt rate on the balances in those regulatory assets; and
- (c) defer such amounts in a separate regulatory asset with the disposition to be determined in the Companies' next general rate cases.

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."<sup>1</sup> "The AAO technique protects the utility from earnings shortfalls and softens the blow which results from extraordinary construction programs."<sup>2</sup> "However, AAOs are not a guarantee of an ultimate recovery of a certain amount by the utility."<sup>3</sup> The AAO "simply allows for certain costs to be separately accounted for *possible* future recovery in a future ratemaking proceeding."<sup>4</sup> "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."<sup>5</sup> 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.<sup>6</sup>

The Commission has discretion in prescribing accounting methods and forms of accounts, records and memorandum kept by an electrical corporation without conducting a hearing.<sup>7</sup> Nevertheless, the Commission issued notice in this matter and allowed interested entities to intervene and request a hearing. No hearing was requested.<sup>8</sup> Instead, the Signatories filed the non-unanimous Agreement.

<sup>1</sup> *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.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *State ex rel. Office of Public Counsel v. Missouri Public Service Comm'n*, 301 S.W.3d 556, 570 (Mo. App. W.D. 2009).

<sup>5</sup> *Id.*

<sup>6</sup> 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).

<sup>7</sup> 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.*

<sup>8</sup> 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.*

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 participant to this matter objected within the seven day time period. Since no participant has filed a timely objection to the Agreement, it will be treated as a unanimous agreement. The Agreement waives any procedural requirements that would otherwise be necessary before final decision.<sup>9</sup> Also, because the settlement disposes of this action, the Commission need not separately state its findings of fact.<sup>10</sup>

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 will approve it. The Commission will incorporate the terms of the Agreement into this order.

**THE COMMISSION ORDERS THAT:**

1. The provisions of the Non-unanimous Stipulation and Agreement filed on April 3, 2012 are approved and incorporated into this order as if fully set forth herein. The Signatories shall comply with the terms of the Agreement. A copy of the Agreement is attached to this order as Appendix A.
2. This order shall become effective on April 30, 2012.
3. This file shall be closed on May 1, 2012.

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

Bushmann, 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.

<sup>9</sup> Section 536.060, RSMo 2000.

<sup>10</sup> Section 536.090, RSMo 2000.

**In the Matter of Application of Canyon Treatment Facility, LLC for Permission, Approval and a Certificate of Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Control, Manage, and/or Maintain a Sewer System for the Public Located in Stone County, Missouri**

**File No. SA-2010-0219**

**Sewer. §2 Certificate of convenience and necessity.** The Commission granted a certificate of convenience and necessity conditioned upon the Commission's Staff securing appointment of a receiver to manage or sell the sewer system.

**ORDER GRANTING CONDITIONAL CERTIFICATE OF  
CONVENIENCE AND NECESSITY**

Issue Date: May 1, 2012

Effective Date: May 31, 2012

**Syllabus:** In this order, the Commission grants a conditional Certificate of Convenience and Necessity to Canyon Treatment Facility, LLC. The effectiveness of the certificate is conditioned upon the Staff of the Commission securing a receiver to temporarily manage the company or upon a Commission-approved purchase of the company.

**Background**

The Staff of the Commission filed a complaint<sup>1</sup> against Canyon Treatment Facility, LLC because the company is operating as a public utility but does not have the required certificate. In an effort to resolve the complaint case, the company filed an application for a certificate; creating this file. Staff has been working with the company in this regard.

Upon investigation, Staff found that the company, as it is being operated, is a sewer corporation and should fall under the jurisdiction of this Commission. Staff further states that the company serves approximately 277 customers in Stone County. However, the current owner does not have the business acumen, technical knowledge or funding to operate a regulated sewer system. Staff therefore recommends that the company be granted a certificate on the "condition that a receiver be appointed to take over the day-to-day operations of the system . . . and continue discussions with potential purchasers of the system . . . ."

Canyon Treatment disagrees with Staff's characterization that the current owner does not have the necessary business acumen or technical knowledge. The company does not request a hearing, but agrees that it would be in the best interest of the customers for the system to be transferred to a receiver with the goal in mind of finding an entity that is able to permanently operate the company. The company also informs the Commission that negotiations for purchase are in place with Stone County Sewer District No. 1.

The Office of the Public Counsel also has concerns about Canyon being granted a certificate, but agrees with Staff's recommended course of action.

<sup>1</sup> Commission Case No. SC-2010-0161.

## Discussion

Canyon is a sewer corporation operating a sewer system and is therefore subject to the jurisdiction of the Commission.<sup>2</sup> Missouri law requires a sewer corporation to obtain a certificate from this Commission to operate as such.<sup>3</sup> The law also charges the Commission with the power to grant such approval upon a determination that it is necessary and convenient for the public service.<sup>4</sup> The Commission may also impose conditions upon the certificates it grants.

The certificate is evidence of the company's right to operate as such.<sup>5</sup> The certificate also serves as a statement from this Commission that the company has certain qualifications, discussed below, that ensure safe and adequate service to the public. It is the nature of its business that subjects it to the Commission's jurisdiction, not whether it has a certificate. By operating without a certificate, Canyon has violated the law. The Staff of the Commission filed a complaint<sup>6</sup> and the parties to that complaint now agree that the violation may be remedied by the company applying for a certificate. This file reflects that effort.

The Commission may grant a certificate of convenience and necessity after determining that the construction and operation are either "necessary or convenient for the public service."<sup>7</sup> The Commission has stated five criteria that it uses in making this determination:

- 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.<sup>8</sup>

The Commission finds that because there are currently 277 customers being served by the system, there is a need for service. However, based on Staff's recommendation, there are questions concerning Canyon's qualifications and financial ability. Although the company does not agree, it does not request a hearing<sup>9</sup> and agrees with Staff's recommended course of action.

Questions remain regarding Canyon's qualifications and financial ability. However, the Commission realizes that to burden a potential receiver or purchaser of the company with the task of applying for a certificate, may hamper efforts in that regard. Based on Staff's verified statements, the Commission finds that sewer service is both necessary and convenient for the public and will therefore grant a conditional certificate to the company; the effectiveness of which is dependent upon a receiver being appointed or upon a Commission-approved purchase of the company. The suitability of a receiver or purchaser will be appropriately determined in those separate dockets.

<sup>2</sup> Sections 386.020(48) and (49) and 386.250(4) RSMo.

<sup>3</sup> Section 393.170.1, RSMo.

<sup>4</sup> Section 393.170.3, RSMo.

<sup>5</sup> Section 393.170 RSMo.

<sup>6</sup> See Commission File No. SC-2010-0161.

<sup>7</sup> Section 393.170 RSMo.

<sup>8</sup> *In re Tartan Energy Company*, 3 Mo. P.S.C. 173, 177 (1994).

<sup>9</sup> *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm'n*, 776 S.W.2d 494, 495-496 (Mo. App. 1989)

**THE COMMISSION ORDERS THAT:**

1. A certificate of convenience and necessity is granted to Canyon Treatment Facility, LLC.
2. The effectiveness of the certificate is conditioned on either the appointment of a receiver to oversee the daily operations of the company or upon a Commission-approved purchase of the company.
3. The General Counsel of the Commission is authorized to petition the Circuit Court for the appointment of a receiver.
4. This order shall become effective on May 31, 2012.
5. This case shall be closed on June 1, 2012.

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

Jones, Senior Regulatory Law Judge

**In the Matter of the Revised Tariff Filing of Choctaw Telephone Company****File No. TR-2012-0298**

Tariff No. JI-2012-0441

**Telecommunications. §14 Rates.** The Commission denied Public Counsel's motion to suspend a telephone company's tariff revision needed to comply with FCC requirements. The tariff was approved.

**ORDER DENYING PUBLIC COUNSEL'S  
MOTION TO SUSPEND AND APPROVING TARIFF**

Issue Date: May 1, 2012

Effective Date: May 11, 2012

On March 14, 2012, Choctaw Telephone Company submitted a tariff to change its approved rates for local telephone service. Choctaw's tariff originally carried a May 1 effective date, but the company has since extended that effective date until July 1. The Office of the Public Counsel filed a motion on March 16, asking the Commission to suspend Choctaw's tariff. Public Counsel subsequently amended its motion on March 19.

Choctaw responded to oppose Public Counsel's motion to suspend on March 29. The Commission's Staff responded to Public Counsel's motion to suspend on March 30, contending that the rates proposed by Choctaw are just and reasonable. Staff advises the Commission to deny Public Counsel's motion to suspend and to either approve Choctaw's tariff or allow it to go into effect on its effective date. The Missouri Small Telephone Company Group<sup>1</sup> and FairPoint Communications Missouri, Inc., also filed pleadings on March 30 opposing Public Counsel's motion to suspend.

As may be surmised from the involvement of the other telephone companies, the Commission's decision regarding Choctaw's tariff will have an impact beyond a single company. Numerous small rural incumbent local exchange telephone companies have, or will shortly be filing similar tariffs. These tariff filings have been necessitated by an order issued on November 18, 2011, by the Federal Communications Commission (FCC).

The FCC's order determined that many rural telephone companies have been using Federal Universal Service funding to subsidize artificially low end-user rates. For that reason, the FCC ordered that, effective July 1, 2012, it would "reduce, on a dollar for dollar basis, high cost loop support to the extent that a carrier's local rates are below a specified urban local rate floor."<sup>2</sup> The FCC's order set that local rate floor at \$10 per month for the period of July 1, 2012 through June 30, 2013. The rate floor will rise to \$14 per month on July 1, 2013, and may be further increased in subsequent years.<sup>3</sup>

Choctaw currently charges a monthly local rate of \$5.25, a rate that has been in effect since January 1, 1983. Thus, Choctaw must increase its local rate to at least \$10 per month by July 1, 2012, or, pursuant to the FCC's order, lose Federal universal service support.

<sup>1</sup> The Small Telephone Company Group is an association of small, rural, telephone companies that are similarly situated to Choctaw.

<sup>2</sup> *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, et al., FCC 11-161, Paragraph 197, Page 76.

<sup>3</sup> *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, et al., FCC 11-161, Paragraph 239, Page 88.

Choctaw is an incumbent local exchange telephone carrier that serves approximately 416 telephone access lines in the single telephone exchange of Halltown. Historically, Choctaw was a monopoly service provider within its exchange and was regulated under a rate of return procedure by which the Commission would review the company's earnings and expenses and establish just and reasonable rates that the company could charge its customers. In recent years, competition has been allowed to develop in the telephone industry and the legislature has accordingly modified the means by which companies such as Choctaw are regulated.

Section 392.200.1, RSMo (Supp. 2010) continues to require that every telecommunications company impose "just and reasonable" charges on its customers. Under the old system of regulation, Section 392.240.1, RSMo 2000 gave the Commission authority to review a telephone company's earnings and expenses to determine whether the company was indeed charging "just and reasonable" rates. However, in 2008, the legislature modified Section 392.420, RSMo (Supp. 2010) to allow an incumbent local exchange company, such as Choctaw, to waive application of specified statutory provisions if the company was subject to competition within the exchange it serves. The statute specifically allows the company to waive application of the earnings review provision of Section 392.240.1.<sup>4</sup> Choctaw exercised its right to waive application of Section 392.240.1 when it filed a notice of its waiver elections on March 12, 2012.

Even though Choctaw has waived the earnings review provision of Section 392.240.1, it has not, and cannot, waive the "just and reasonable" requirements of Section 392.200.1. Thus, the Commission still must determine whether the revised rates Choctaw would charge under its revised tariffs are "just and reasonable".

Public Counsel contends the only way the Commission can determine whether the rates Choctaw would impose are "just and reasonable" is to undertake an earnings review of the sort previously authorized by Section 391.200.1. Undertaking such an earnings review would fly in the face of the legislation that specifically allows Choctaw to elect to waive application of such a requirement. Furthermore, such a review is not necessary to determine whether the rates Choctaw would impose are indeed "just and reasonable".

<sup>4</sup> In its motion to suspend, Public Counsel quotes a portion of Section 392.240, RSMo, but ignores the relevant portion of the statute. A portion not quoted by Public Counsel states:

Notwithstanding any other provision of law in this chapter and chapter 386, where an alternative local exchange telecommunications company is authorized to provide local exchange telecommunications services in an incumbent local exchange telecommunications company's authorized service area, the incumbent local exchange telecommunications company may opt into all or some of the above listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. In addition, where an interconnected voice over Internet protocol service provider is registered to provide service in an incumbent local exchange telecommunications company's authorized service area under section 392.550, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. ...

The preceding paragraph in Section 392.420 specifically lists 392.240.1 as a subsection that may be waived.

There is sufficient information available to the Commission to conclude that Choctaw's revised tariff will result in "just and reasonable" rates. First, as the FCC found in its order, the local rates currently charged by Choctaw are far below the local rates charged by urban telephone companies. The FCC's order requires Choctaw and similarly situated companies to raise those rates to an amount closer to average or lose USF funding.

Second, Choctaw will not see an overall increase in its revenues as a result of this tariff change. Staff's recommendation explains that Choctaw intends to increase its residential and business base rates in two steps to meet the FCC's required minimum rate. The residential rate will initially be increased to \$11.93 per month, rising a year later to the \$14 minimum required by the FCC. The business rate will also be increased to meet the \$14 minimum. Those changes will give Choctaw an extra \$18,817.20 in annual revenue. However, Choctaw will offset that extra revenue by decreasing charges for its MCA plan. That will reduce the company's annual revenue by \$18,835.44, resulting in an overall annual revenue decrease of \$18.24. Again, since Choctaw will not receive a net increase in its revenues, the Commission concludes that the new rates are "just and reasonable".

Third, even if an earnings review were undertaken, such a review would be unlikely to yield reliable information at this time. The problem is that the FCC's order does not just affect the small telephone companies' local rates. Another portion of that order requires the companies to reduce their intra-state access rates by July 1, 2012 and to move to a bill and keep regime for intra-MTA wireless traffic. These changes will have an impact on the revenue earned by the companies and would make a historical review of the companies' earnings essentially meaningless for determining their likely future earnings. Given these facts, the Commission concludes that these average rates are just and reasonable.

Choctaw has filed a tariff that will go into effect by operation of law on its July 1, 2012 effective date unless the Commission acts to suspend that tariff. This is a noncontested case and the Commission does not need to make findings of fact based competent and substantial evidence.<sup>5</sup> After reviewing Public Counsel's motion and the responses filed by Choctaw, Staff, and the other interested telephone companies, the Commission concludes that Public Counsel's motion to suspend the tariff to allow time to conduct a further investigation, including an earnings review, is unnecessary and should be denied.

The Commission will approve Choctaw's tariff to take effect on July 1, 2012, the effective date chosen by the company. Furthermore, the Commission will deny Public Counsel's pending motion to compel discovery as moot.

The Commission will make this order effective in ten days to allow Public Counsel an opportunity to promptly seek rehearing and possible judicial review.

<sup>5</sup> *State ex rel. Public Counsel v. Pub. Serv. Comm'n*, 210 S.W.3d 344 (Mo. App. W.D. 2006).

**THE COMMISSION ORDERS THAT:**

1. The Office of the Public Counsel's Amended Objection and Motion to Suspend is denied.
2. The tariff filed by Choctaw Telephone Company on March 14, 2012, assigned Tariff Tracking Number JI-2012-0441, is approved, as substituted, to become effective on July 1, 2012. The specific tariff sheets approved are:
  - P.S.C. Mo. No. 1**
  - 6<sup>th</sup> Revised Sheet No. 1, Cancelling 5<sup>th</sup> Revised Sheet No. 1
  - 1<sup>st</sup> Revised Sheet No. 1.4, Cancelling Original Sheet No. 1.4
3. Public Counsel's Motion to Compel Discovery is denied as moot.
4. This order shall become effective on May 11, 2012.

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

Woodruff, Chief Regulatory Law Judge

**In the Matter of the Revised Tariff Filing of MoKan Dial, Inc.****File No. TR-2012-0299**

Tariff No. JI-2012-0442

**Telecommunications. §14 Rates.** The Commission denied Public Counsel's motion to suspend a telephone company's tariff revision needed to comply with FCC requirements. The tariff was approved.

**ORDER DENYING PUBLIC COUNSEL'S  
MOTION TO SUSPEND AND APPROVING TARIFF**

Issue Date: May 1, 2012

Effective Date: May 11, 2012

On March 14, 2012, MoKan Dial, Inc., submitted a tariff to change its approved rates for local telephone service. MoKan Dial's tariff originally carried a May 15 effective date, but the company has since extended that effective date until July 1. The Office of the Public Counsel filed a motion on March 16, asking the Commission to suspend MoKan Dial's tariff. Public Counsel subsequently amended its motion on March 19.

MoKan Dial responded to oppose Public Counsel's motion to suspend on March 29. The Commission's Staff responded to Public Counsel's motion to suspend on March 30, contending that the rates proposed by MoKan Dial are just and reasonable. Staff advises the Commission to deny Public Counsel's motion to suspend and to either approve MoKan Dial's tariff or allow it to go into effect on its effective date. The Missouri Small Telephone Company Group<sup>1</sup> and FairPoint Communications Missouri, Inc., also filed pleadings on March 30 opposing Public Counsel's motion to suspend.

As may be surmised from the involvement of the other telephone companies, the Commission's decision regarding MoKan Dial's tariff will have an impact beyond a single company. Numerous small rural incumbent local exchange telephone companies have, or will shortly be filing similar tariffs. These tariff filings have been necessitated by an order issued on November 18, 2011, by the Federal Communications Commission (FCC).

The FCC's order determined that many rural telephone companies have been using Federal Universal Service funding to subsidize artificially low end-user rates. For that reason, the FCC ordered that, effective July 1, 2012, it would "reduce, on a dollar for dollar basis, high cost loop support to the extent that a carrier's local rates are below a specified urban local rate floor."<sup>2</sup> The FCC's order set that local rate floor at \$10 per month for the period of July 1, 2012 through June 30, 2013. The rate floor will rise to \$14 per month on July 1, 2013, and may be further increased in subsequent years.<sup>3</sup>

<sup>1</sup> The Small Telephone Company Group is an association of small, rural, telephone companies that are similarly situated to MoKan Dial.

<sup>2</sup> *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, et al., FCC 11-161, Paragraph 197, Page 76.

<sup>3</sup> *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, et al., FCC 11-161, Paragraph 239, Page 88.

MoKan Dial currently charges a monthly local rate of \$5.25, a rate that has been in effect since January 1, 1983. Thus, MoKan Dial must increase its local rate to at least \$10 per month by July 1, 2012, or, pursuant to the FCC's order, lose Federal universal service support.

MoKan Dial is an incumbent local exchange telephone carrier that serves approximately 639 telephone access lines in the single telephone exchange of Freeman, located in Cass County, Missouri. Historically, MoKan Dial was a monopoly service provider within its exchange and was regulated under a rate of return procedure by which the Commission would review the company's earnings and expenses and establish just and reasonable rates that the company could charge its customers. In recent years, competition has been allowed to develop in the telephone industry and the legislature has accordingly modified the means by which companies such as MoKan Dial are regulated.

Section 392.200.1, RSMo (Supp. 2010) continues to require that every telecommunications company impose "just and reasonable" charges on its customers. Under the old system of regulation, Section 392.240.1, RSMo 2000 gave the Commission authority to review a telephone company's earnings and expenses to determine whether the company was indeed charging "just and reasonable" rates. However, in 2008, the legislature modified Section 392.420, RSMo (Supp. 2010) to allow an incumbent local exchange company, such as MoKan Dial, to waive application of specified statutory provisions if the company was subject to competition within the exchange it serves. The statute specifically allows the company to waive application of the earnings review provision of Section 392.240.1.<sup>4</sup> MoKan Dial exercised its right to waive application of Section 392.240.1 when it filed a notice of its waiver elections on March 12, 2012.

Even though MoKan Dial has waived the earnings review provision of Section 392.240.1, it has not, and cannot, waive the "just and reasonable" requirements of Section 392.200.1. Thus, the Commission still must determine whether the revised rates MoKan Dial would charge under its revised tariffs are "just and reasonable".

Public Counsel contends the only way the Commission can determine whether the rates MoKan Dial would impose are "just and reasonable" is to undertake an earnings review of the sort previously authorized by Section 391.200.1. Undertaking such an earnings review would fly in the face of the legislation that specifically allows MoKan Dial to elect to waive application of such a requirement. Furthermore, such a review is not necessary to determine whether the rates MoKan Dial would impose are indeed "just and reasonable".

<sup>4</sup> In its motion to suspend, Public Counsel quotes a portion of Section 392.240, RSMo, but ignores the relevant portion of the statute. A portion not quoted by Public Counsel states:

Notwithstanding any other provision of law in this chapter and chapter 386, where an alternative local exchange telecommunications company is authorized to provide local exchange telecommunications services in an incumbent local exchange telecommunications company's authorized service area, the incumbent local exchange telecommunications company may opt into all or some of the above listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. In addition, where an interconnected voice over Internet protocol service provider is registered to provide service in an incumbent local exchange telecommunications company's authorized service area under section 392.550, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. ...

The preceding paragraph in Section 392.420 specifically lists 392.240.1 as a subsection that may be waived.

There is sufficient information available to the Commission to conclude that MoKan Dial's revised tariff will result in "just and reasonable" rates. First, as the FCC found in its order, the local rates currently charged by MoKan Dial are far below the local rates charged by urban telephone companies. The FCC's order requires MoKan Dial and similarly situated companies to raise those rates to an amount closer to average or lose USF funding.

Second, MoKan Dial will not see an overall increase in its revenues as a result of this tariff change. Staff's recommendation explains that MoKan Dial intends to increase its residential and business base rates in two steps to meet the FCC's required minimum rate. The residential rate will initially be increased to \$10 per month, rising a year later to the \$14 minimum required by the FCC. The business rate will also be increased to meet the \$14 minimum. Those changes will give MoKan Dial an extra \$58,561.80 in annual revenue. However, MoKan Dial will offset that extra revenue by decreasing charges for its MCA plan. That will reduce the company's annual revenue by \$58,570.44, resulting in an overall annual revenue decrease of \$8.64. Again, since MoKan Dial will not receive a net increase in its revenues, the Commission concludes that the new rates are "just and reasonable".

Third, even if an earnings review were undertaken, such a review would be unlikely to yield reliable information at this time. The problem is that the FCC's order does not just affect the small telephone companies' local rates. Another portion of that order requires the companies to reduce their intra-state access rates by July 1, 2012 and to move to a bill and keep regime for intra-MTA wireless traffic. These changes will have an impact on the revenue earned by the companies and would make a historical review of the companies' earnings essentially meaningless for determining their likely future earnings. Given these facts, the Commission concludes that these average rates are just and reasonable.

MoKan Dial has filed a tariff that will go into effect by operation of law on its July 1, 2012 effective date unless the Commission acts to suspend that tariff. This is a noncontested case and the Commission does not need to make findings of fact based competent and substantial evidence.<sup>5</sup> After reviewing Public Counsel's motion and the responses filed by MoKan Dial, Staff, and the other interested telephone companies, the Commission concludes that Public Counsel's motion to suspend the tariff to allow time to conduct a further investigation, including an earnings review, is unnecessary and should be denied.

The Commission will approve MoKan Dial's tariff to take effect on the July 1, 2012 effective date chosen by the company. Furthermore, the Commission will deny Public Counsel's pending motion to compel discovery as moot.

The Commission will make this order effective in ten days to allow Public Counsel an opportunity to promptly seek rehearing and possible judicial review.

<sup>5</sup> *State ex rel. Public Counsel v. Pub. Serv. Com'n*, 210 S.W.3d 344 (Mo. App. W.D. 2006).

**THE COMMISSION ORDERS THAT:**

1. The Office of the Public Counsel's Amended Objection and Motion to Suspend is denied.
2. The tariff filed by MoKan Dial, Inc. on March 14, 2012, assigned Tariff Tracking Number JI-2012-0442, is approved, as substituted, to become effective on July 1, 2012. The specific tariff sheets approved are:

**P.S.C. Mo. No. 2**

- 2<sup>nd</sup> Revised Sheet No. 2, Cancels 1<sup>st</sup> Revised Sheet No. 2  
Original Sheet No. 2.1
  - 3<sup>rd</sup> Revised Sheet No. 3.21, Cancels 2<sup>nd</sup> Revised Sheet No. 3.21  
1<sup>st</sup> Revised Sheet No. 3.26, Cancels Original Sheet No. 3.26
  - 1<sup>st</sup> Revised Sheet No. 3.21 B(1), Cancels Original Sheet No. 3.21 B(1)
3. Public Counsel's Motion to Compel Discovery is denied as moot.
  4. This order shall become effective on May 11, 2012.

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

Woodruff, Chief Regulatory Law Judge

**In the Matter of the Joint Application of Valley Woods Water Company, Inc. and Valley Woods Utility, LLC for Authority of Valley Woods Water Company, Inc. to Sell Certain Assets to Valley Woods Utility, LLC**

**File No. WM-2012-0288**

**Certificates. §1. Generally.** Having found that the factors for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Valley Woods Utility, LLC, to provide the water and sewer service to the customers currently being served by Valley Woods Water Company, Inc., the Commission finds that the public interest standards for approving a transfer of assets and granting a certificate of convenience and necessity have also been satisfied. Thus, the Commission approved the transfer of assets and granted the certificate with certain conditions.

**Water. §4. Transfer, lease and sale.** Having found that the factors for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Valley Woods Utility, LLC, to provide the water and sewer service to the customers currently being served by Valley Woods Water Company, Inc., the Commission finds that the public interest standards for approving a transfer of assets and granting a certificate of convenience and necessity have also been satisfied. Thus, the Commission approved the transfer of assets and granted the certificate with certain conditions.

**ORDER APPROVING TRANSFER OF ASSETS AND GRANTING  
CERTIFICATE OF CONVENIENCE AND NECESSITY**

Issue Date: May 9, 2012

Effective Date: May 18, 2012

**Background**

On March 7, 2012, Valley Woods Water Company, Inc. (“Valley Woods”) and Valley Woods Utility, L.L.C. (“VWU”), filed a joint application seeking authority for Valley Woods to sell certain assets to VWU. Valley Woods is a regulated water and sewer company providing water and sewer service to approximately 40 customers in and around the City of Highlandville, in Christian County, Missouri. VWU is not currently subject to the jurisdiction of the Commission, but will be acquiring assets that will be subject to the Commission’s jurisdiction. In order to approve the transfer of assets to VWU, the Commission will also need to determine if VWU satisfies the requirements for granting it a certificate of convenience and necessity (“CCN”).

The Commission issued notice, added VWU as a party, and set a deadline for intervention requests. No person or entity intervened, and no party requested an evidentiary hearing.

On April 20, 2012, the Commission’s Staff filed its recommendation to approve the transfer of assets and to grant VWU a CCN subject to certain conditions. No party opposed Staff’s recommendation and VWU affirmatively agreed to the conditions.

**Legal Standard to Approve a Transfer of Assets**

Section 393.190, RSMo 2000, which governs the transfer of assets, does not set forth a standard or test for the Commission's approval of the proposed transfer. However, when reviewing Section 393.190's predecessor, i.e. Section 5195, RSMo 1929, the Missouri Supreme Court determined that the standard for Commission approval of transactions pursuant to this statute is the "not detrimental to the public interest" standard.<sup>1</sup>

As the court explained:

The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"<sup>2</sup>

No Missouri court has deviated from this ruling in terms of it being the proper standard to apply for applications filed pursuant to Section 393.190, and this standard is further cemented by the Commission's own rules, which require an applicant for such authority to state in its application "[t]he reason the proposed sale [or transfer] of the assets is not detrimental to the public interest."<sup>3</sup> When applying this standard, "[t]he Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest."<sup>4</sup>

The Missouri Court of Appeals has stated of Section 393.190: "The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility."<sup>5</sup> "To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently."<sup>6</sup>

<sup>1</sup> *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934). See also *State of Missouri ex rel. Ag Processing, Inc., v Public Service Commission of the State of Missouri and Aquila, Inc., f/k/a Utilicorp United, Inc.*, 2003 WL 1906385\*6 (Mo. App. 2003) (overruled on other grounds).

<sup>2</sup> *City of St. Louis*, 73 S.W.2d at 400.

<sup>3</sup> Commission Rule 4 CSR 240-3.310(1)(D).

<sup>4</sup> *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

<sup>5</sup> *Id.*

<sup>6</sup> See *In the Matter of the Application of Central Jefferson County Utilities, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith, Certain Other Related Transactions*, Case No. SO-2007-0071, et al, Report and Order issued February 8, 2007; *In Re the Matter of the Joint Petition of Frimel Water System, Inc. and Lake Lorraine Property Owners' Association for Authority for Frimel Water System, Inc., to Transfer Its Assets and Cease Operations*, Case No. WM-2006-0459 (Report and Order issued November 7, 2006, 2006 WL 3371567 (Mo. P.S.C.); See also *In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM- 94-252 (Report and Order, issued October 12, 1994), 3 Mo. P.S.C. 3d 216, 220. See also *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that VWU will provide safe and adequate service to their customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the provision of water and sewer service less safe or less adequate, or which tends to make rates less just or less reasonable.<sup>7</sup> The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits.<sup>8</sup> The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.<sup>9</sup>

### **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.”<sup>10</sup> 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.

<sup>7</sup> *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108. See also *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*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *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).

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.

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."<sup>11</sup> The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost,"<sup>12</sup> and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.<sup>13</sup> 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.<sup>14</sup>

<sup>11</sup> 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.)

<sup>12</sup> *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).

<sup>13</sup> *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).

<sup>14</sup> *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).

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 water and sewer utility CCNs in Commission Rules 4 CSR 240-3.305 and 3.600, and the specific criteria to be used when evaluating CCN applications are as follows: (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.<sup>15</sup>

### **Analysis**

Section 393.190, governing the transfer of assets, does not require a hearing prior to the Commission rendering a decision. While Section 393.170, governing the grant of a CCN, 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'."<sup>16</sup> 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.<sup>17</sup> Ultimately, Valley Woods' and VWU's application did not result in a contested case proceeding.

The factors the Commission considers for approving a transfer of assets and granting a CCN are virtually identical. Based upon Staff's verified *Memorandum* the Commission finds: (1) the customers currently being served by Valley Woods need water and sewer service and after the transfer is complete VWU will continue providing those services; (2) VWU has adequate technical and managerial qualifications to operate the water and sewer systems; (3) VWU has the financial capacity to continue providing the water and sewer services; (4); the proposed transfer of assets is economically feasible; and (5) providing safe and adequate water and sewer services to these customers serves the public interest.

<sup>15</sup> *In the Matter of RDG Development, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage a Sewer System in Callaway County, Missouri*, File Number SA-2010-0096, 2009 WL 5069710 (Mo. P.S.C. 2009); *In re Central Jefferson County Utilities, Inc.*, File Number SO-2007-0071, 2007 WL 824040, 7-8 (Mo. P.S.C. 2007); *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991); *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, 1994 WL 762882, \*3 (Mo. P.S.C. 1994). These factors are sometimes referred to as the "Tartan Factors."

<sup>16</sup> *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).

<sup>17</sup> *Id.*

Additionally, Valley Woods is current on its annual assessments and with the filing of its annual reports. There are also no current violations or issues with the Department of Natural Resources that need immediate correction, and there are no deficiencies with respect to the water system. With respect to the sewer system, Valley Woods has had some minor effluent monitoring issues in the past, which can be resolved by monitoring and reporting on a going forward basis by VWU.<sup>18</sup>

### **Decision**

Because this is a non-contested case, the Commission acts on discretion or on evidence that is not formally adduced and preserved.<sup>19</sup> There is no evidentiary record.<sup>20</sup> Consequently, the Commission bases its decision on the parties' verified filings. Having found that the factors for approving a transfer of assets and granting a CCN have been satisfied, and having found that it is in the public interest for VWU to provide the water and sewer service to the customers currently being served by Valley Woods, the Commission finds that the public interest standards for approving a transfer of assets and granting a CCN have also been satisfied. Consequently, based on the Commission's independent and impartial review of the verified filings, the Commission will approve the transfer of assets and grant VWU a CCN.

In Valley Woods' most recent rate cases for its water and sewer operations, the Staff's Engineering and Management Services Unit ("EMSU") made a number of recommendations to Valley Woods, which were implemented and brought Valley Woods into conformance with Missouri Commission Rules, specifically 4 CSR 240-13 (Chapter 13). Since many of the recommendations involve day-to-day corporate operations and are of an ongoing nature, Staff recommends that VWU be ordered to continue implementing Staff's prior recommendations. Staff has included those recommendations as conditions for approving the transfer of assets. Because VWU 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.

<sup>18</sup> By the terms of the current discharge permit, this treatment facility will need to meet limits for ammonia beginning January 1, 2015. VWU will be required to state how the facility will meet the new limits by July 1, 2012. If treatment facility modifications will be necessary to meet the new ammonia limits, by the terms of the permit, VWU will need to submit construction plans for such modifications to DNR by that date. Any resulting changes in plant investment will be examined by Staff in a future rate case filed by VWU.

<sup>19</sup> *State ex rel. Public Counsel v. Public Service Comm'n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006).

<sup>20</sup> *Id.* The competent and substantial evidence standard of Article V, Section 18, does not apply to administrative cases in which a hearing is not required by law." *Id.*

**THE COMMISSION ORDERS THAT:**

1. The joint application for the sale and transfer of assets filed by Valley Woods Water Company, Inc. ("Valley Woods") and Valley Woods Utility, L.L.C. ("VWU"), is approved subject to the following conditions:

- a.) Valley Woods shall transfer all of its books and records including, but not limited to, the purchase orders, invoices, contracts and agreements relating to the Valley Woods operations, drawings and blue prints of the water and sewer systems, plant records, operations records, and expense records and all customer billing records to VWU upon the closing of the transfer of assets.
- b.) VWU shall adopt the Schedule of Rates, Rules and Regulations (Tariffs) that are currently on file and approved for Valley Woods for both water service and sewer service.
- c.) VWU shall file tariff adoption notices for each tariff it adopts, as well as revised index sheets to reflect the existence of the adoption notices, similar to the draft tariff sheets for the water and sewer tariffs attached to Staff's *Memorandum* as Attachments C and D. A copy of Staff's *Memorandum* shall be attached to this order as Attachment A.
- d.) VWU shall file the adoption notice tariff sheets, and revised index sheets, as 30-day tariff filings, within five days after closing of the transfer of assets.
- e.) VWU shall adopt the individual plant-in-service, depreciation reserve and contributions in aid of construction ("CIAC") account balances utilized by the Commission's Audit Staff valued as of March 31, 2012, for purposes of determining the appropriate rate base in this proceeding. These values shall be used as a starting point for plant-in-service, depreciation reserve and CIAC for the Valley Woods systems to be recorded in the books and records of VWU.
- f.) VWU shall maintain and retain proper plant in service, depreciation reserve, cost of removal, salvage, and CIAC records on a going forward basis.
- g.) VWU shall not recover any acquisition adjustment or acquisition premium in relation to this action.
- h.) VWU is authorized, upon closing of the transfer, to provide water and sewer service under the existing tariffs of Valley Woods on an interim basis until the effective date of the new tariff sheets.
- i.) VWU shall use the schedule of depreciation rates set out in Attachments A and B to Staff's *Memorandum*, which were prescribed by the Commission and used by Valley Woods, from the date of the transfer of assets forward, unless changed by any future order of the Commission.
- j.) VWU shall maintain utility plant records and all customer account records as acquired from VWU, and keep all books and records, including plant property records, in accordance with the Uniform System of Accounts as described in Staff's *Memorandum*.
- k.) VWU shall continue implementation of all recommendations made by EMSU Staff during the context of the most recent Valley Woods water and sewer rate cases, Case Nos. WR-2010-0139 and SR-2010-0140.

2. On the effective date of VWU's new tariff sheets, the Certificate of Convenience and Necessity granted to Valley Woods for the provision of water and sewer service shall be canceled

3. On the effective date of VWU's new tariff sheets, VWU is granted a Certificate of Convenience and Necessity for the provision of water and sewer service for the service areas described in the transfer of assets application and in Staff's *Memorandum* and recommendation.

4. Nothing in this order constitutes a finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters, including future expenditures, by VWU in any later proceeding.

5. This order shall become effective on May 18, 2012.

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

Stearley, Deputy Chief 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 Application of Union Electric Company for Authority to Continue the Transfer of Functional Control of Its Transmission System to the Midwest Independent Transmission System Operator, Inc.**

**File No. EO-2011-0128**

**Electric. §4 Transfer, lease and sale.** The Commission granted the company's unopposed motion to clarify certain conditions established in an earlier report and order.

**ORDER GRANTING AMEREN MISSOURI'S MOTION TO CLARIFY  
REPORT AND ORDER**

Issue Date: May 17, 2012

Effective Date: May 27, 2012

On April 19, 2012, the Commission issued a report and order that authorized Union Electric Company, d/b/a Ameren Missouri, to continue the transfer of functional control of its transmission system to the Midwest Independent Transmission System Operator, Inc., subject to several specified conditions. The conditions the Commission imposed on its grant of authority were based on the nonunanimous stipulation and agreement of some of the parties. Since that nonunanimous stipulation and agreement was opposed by some of the parties, the Commission could not approve the stipulation and agreement as submitted and instead modified and incorporated some of those conditions into its report and order in the manner described in its report and order.

The Commission's report and order became effective on April 30, and no party has requested rehearing of the report and order. However, on April 27, Ameren Missouri filed a motion asking the Commission to clarify and modify certain provisions of the report and order. More than ten days have passed since Ameren Missouri filed its motion and no other party has responded to that motion. The Commission will take up Ameren Missouri's motion as unopposed.

Ameren Missouri's motion explains that the nonunanimous stipulation and agreement carefully defined the term "Stakeholders" as including both the parties to this case that signed the nonunanimous stipulation and agreement - Ameren Missouri, Staff, Midwest ISO, and Missouri Industrial Energy Consumers (MIEC) - as well as the parties to this case who did not sign - Public Counsel, The Empire District Electric Company, Southwest Power Pool, Inc. (SPP) and the Missouri Joint Municipal Electric Utility Commission (MJMEUC). Ameren Missouri points out that the Commission's report and order requires it to work with and to give notice to "Stakeholders", but fails to incorporate the nonunanimous stipulation and agreement's definition of the term. Furthermore, the Commission substituted new terms for "Stakeholders" in two provisions that require Ameren Missouri to consult with "interested persons or entities" (paragraph 2B) and work with "interested individuals and entities" (paragraph 2E). Ameren Missouri explains that the term "Stakeholders" should be precisely defined so that the Company will be able to identify the parties with whom it must consult and who must receive notifications pursuant to the order.

In addition, the language of the report and order inadvertently changed the level of involvement and access to information that Ameren Missouri is required to give to the Midwest ISO and SPP. The nonunanimous stipulation and agreement requires Ameren Missouri to give Staff, Public Counsel and MIEC substantive input regarding the development of the specific methodology, inputs, outputs and other features to be included in the Actual Analysis. The nonunanimous stipulation and agreement also required Ameren Missouri to advise and update the Midwest ISO and SPP about the development of the features of the Actual Analysis but did not allow them substantive input.<sup>1</sup> The Commission's report and order blurred that distinction by substituting the phrase "interested individuals and entities" for "Staff, Public Counsel, and MIEC" as specified in the nonunanimous stipulation and agreement.

Finally, Ameren Missouri asks the Commission to order that any non-Staff and non- Public Counsel party that wishes to receive highly confidential or proprietary information as part of the process be required to agree that it will handle that information in accord with the Commission's rule on the handling of such information.

After reviewing Ameren Missouri's unopposed motion for clarification, the Commission finds that the modifications proposed in that motion are appropriate. The Commission will grant the motion for clarification and will make the proposed modifications.

**THE COMMISSION ORDERS THAT:**

1. Ameren Missouri's Motion for Clarification of Report and Order is Granted.
2. Ordered Paragraph 2 of the report and order issued in this case on April 19, 2012, is withdrawn and replaced with the following:

2. Ameren Missouri's authority to continue the transfer of functional control of its transmission system to the Midwest Independent Transmission System Operator, Inc. is granted subject to the following conditions:

A. The Commission approves, on an interim basis, Ameren Missouri's continued RTO participation in the Midwest ISO during a term ending May 31, 2016, provided that if the Commission has not by May 31, 2016, further extended its approval of Ameren Missouri's participation in the Midwest ISO, Ameren Missouri shall be deemed to have Commission approval to continue its Midwest ISO participation for the additional time necessary to re-establish functional control of its transmission system so that it may operate the same as an ICT, or to transfer functional control of its transmission system to another RTO. The extended permission granted in this order is also subject to the provisions of paragraph 2.O of this order. (from paragraph 9 of the stipulation and agreement)

<sup>1</sup> The distinction is necessary because Midwest ISO and SPP have a vested interested in analysis

B. Assuming that Ameren Missouri has not earlier requested withdrawal or that withdrawal has not otherwise occurred, by September 30, 2014, Ameren Missouri shall contact and consult with the Stakeholders to review with the Stakeholders the additional analysis Ameren Missouri believes is appropriate and necessary regarding Ameren Missouri's continued participation in an RTO after May 31, 2016, or its operation as an ICT. Such study, at a minimum, shall examine continued participation in the Midwest ISO versus participation in Southwest Power Pool and continued participation in Midwest SO versus operation as an ICT. Such study shall examine a period after May 31, 2016, of not less than five years or more than ten years. (from paragraph 10.b of the stipulation and agreement)

C. After taking into consideration in good faith the comments and input from the Stakeholders regarding the tentative analysis, Ameren Missouri shall, by December 1, 2014, advise the Stakeholders of the specific parameters, (including the minimum requirements provided for above) of the analysis Ameren Missouri intends to conduct. (from paragraph 10.b of the stipulation and agreement)

D. By November 15, 2015, Ameren Missouri shall file a pleading, along with the results of its actual analysis regarding its continued RTO participation or its possible operation as an ICT after May 31, 2016. That pleading shall also address, among other things, whether the Service Agreement or similar mechanism for the provision of transmission service to Missouri Bundled Retail Load should continue to remain in effect between Ameren Missouri and any RTO in which Ameren Missouri may participate after May 31, 2016. (from paragraph 10.b of the stipulation and agreement)

E. Ameren Missouri shall work with Staff, Public Counsel, and MIEC, and give them substantive input regarding the development of the specific methodology, inputs, outputs, and other features to be included in the November 15, 2015 actual analysis. Ameren Missouri shall advise and update the Midwest ISO and Southwest Power Pool regarding that actual analysis. (from paragraph 10.b of the stipulation and agreement)

F. To maintain its independence and control of the actual analysis, Ameren Missouri (or Ameren Services on its behalf) shall act as the project manager for such analysis and shall engage and direct the work of Ameren Missouri or Ameren Services employees or consultants assigned or retained to perform the actual analysis. (from paragraph 10.b of the stipulation and agreement) results that would favor Ameren Missouri's future participation in their organization.

G. Subject to any applicable privilege recognized by law and the provisions of the Commission's rule regarding confidential information, Staff, Public Counsel, and MIEC shall be given meaningful and substantial access to data necessary for, and used in, preparing the actual analysis, shall have access to employees or consultants utilized by Ameren Missouri to perform the actual analysis, and shall be given the opportunity to have meaningful input in the preparation of the actual analysis. Ameren Missouri shall advise and update the Midwest ISO and Southwest Power Pool regarding that actual analysis. (from paragraph 10.b of the stipulation and agreement)

H. Ameren Missouri shall provide regular reports regarding the progress and, if requested, reasonable details of the actual analysis to any party to this case that requests such updates or information. (from paragraph 10.b of the stipulation and agreement)

I. If any difference of opinion regarding the scope, particular details or preliminary assumptions that are necessary to and part of any supporting analysis to be performed by Ameren Missouri arises, Ameren Missouri shall ultimately have responsibility for, and the burden of presenting an analysis in support of whatever position it deems appropriate and necessary at the time of its November 15, 2015 filing. Accordingly, Ameren Missouri is entitled to maintain a level of independence and control of any such analysis, while other parties retain their right to oppose Ameren Missouri's positions or to provide alternative positions. (from paragraph 10.b of the stipulation and agreement)

J. Ameren Missouri shall acknowledge that the Service Agreement's primary function is to ensure that the Missouri Public Service Commission continues to set the transmission component of Ameren Missouri's rates to serve its Bundled Retail Load. Consistent with Section 3.1 of the Service Agreement and its primary function, to the extent that the FERC offers incentive "adders" for participation in an RTO or in an ICT to the rate of return allowed for providing Transmission Service, as that term is defined in the Service Agreement, to wholesale customers within the Ameren zone, such incentive adders shall not apply to the transmission component of rates set for Bundled Retail Load by the Commission. (from paragraph 10.c of the stipulation and agreement)

K. Currently, FERC requires Bundled Retail Load served by Midwest ISO Transmission Owners to take Transmission Service under the Midwest ISO's Energy Markets Tariff (EMT). If, at some point, Ameren Missouri is not required to take Transmission Service for Bundled Retail Load under the EMT, the Service Agreement shall terminate concurrently with the point in time when Ameren Missouri is no longer required to take Transmission Service for Bundled Retail Load under the EMT. Termination of the Service Agreement under this provision shall not affect Ameren Missouri's membership participation status in the Midwest ISO and the Commission shall continue to have jurisdiction over the transmission component of the rates set for Bundled Retail Load. As a participant in the Midwest ISO, Ameren Missouri may remain subject to charges from the Midwest ISO for Bundled Retail Load under the EMT that are assessed ratably to all load-serving utilities who are participants in the Midwest ISO, but who are not taking Transmission Service for their Bundled Retail Load under the EMT. No ratemaking treatment has been adopted for these changes. (from paragraph 10.d of the stipulation and agreement)

L. The Service Agreement (unless it is terminated pursuant to its terms) shall continue in its current form; provided that the Commission may rescind its approval of Ameren Missouri's participation in the Midwest ISO and may require Ameren Missouri to withdraw from participation in the Midwest ISO on any of the following bases:

- (i) The issuance by FERC of an order, or the adoption by FERC of a final rule or regulation, binding on Ameren Missouri, that has the effect of precluding the Commission from continuing to set the transmission component of Ameren Missouri's rates to serve its Bundled Retail Load; or
- (ii) The issuance by FERC of an order, or the adoption by FERC of a final rule or regulation, binding on Ameren Missouri, that has the effect of amending, modifying, changing, or abrogating in any material respect any term or condition of the Service Agreement previously approved by the Commission and by FERC

Ameren Missouri shall immediately notify the Stakeholders if Ameren Missouri becomes aware of the issuance of any order, rule, or regulation amending, modifying, changing, or abrogating any term or condition of the Service Agreement. Any Stakeholder is free to make a filing with the Commission as a result of an action by FERC as described in this provision, but must do so within 90 days after Ameren Missouri has provided notification under this provision of such FERC action. Any stakeholder not making a filing within the 90-day time frame shall be deemed to have waived its right to make a filing with the Commission in response to such FERC action. (from paragraph 10.e of the stipulation and agreement)

M. Any order issued by the Commission that, on a basis provided for in paragraph L(i) or L(ii), terminates the Commission's approval of Ameren Missouri's participation in the Midwest ISO shall be effective when Ameren Missouri has re-established functional control of its transmission system as a transmission provider or transfers functional control to another entity depending on further orders of the Commission and the FERC. (from paragraph 10.e of the stipulation and agreement)

N. Notwithstanding any term or condition provided for in paragraphs L or M, any termination of the Service Agreement that might occur under Section 2.4 of the Service Agreement shall not constitute an action of the FERC described in L(i) and L(ii) and shall not trigger the Commission's right to require Ameren Missouri to withdraw from the Midwest ISO. (from paragraph 10.e of the stipulation and agreement)

O. If Ameren Missouri withdraws from Midwest ISO, or if the authority granted in this order is not extended beyond May 31, 2016, Ameren Missouri will have to re-establish functional control of its transmission system as a transmission provider, or, depending upon further orders of the Commission and the FERC, may have to transfer functional control of its transmission system to another entity. In either case, Ameren Missouri would have to give notice to the Midwest ISO of its withdrawal. Under Article Five of the Service Agreement, such notice shall not be effective before December 31 of the calendar year following the calendar year in which notice is given by Ameren Missouri to the Midwest ISO. For a possible withdrawal from the

Midwest ISO to occur no later than May 31, 2016, the Commission will need to issue a decision with respect to Ameren Missouri's continued participation in Midwest ISO no later than December 15, 2015. (from paragraph 10.f of the stipulation and agreement)

P. If Ameren Missouri desires to securitize the revenues associated with its transmission system, it shall obtain additional prior permission and approval from the Commission. (from paragraph 10.g of the stipulation and agreement)

Q. If Ameren Missouri decides to seek any fundamental change in its membership participation or membership status in the Midwest ISO, it shall seek prior approval from the Commission no later than five business days after its filing with the FERC for authorization of that change. (from paragraph 10.h of the stipulation and agreement)

R. Ameren Missouri and Ameren Transmission Company (collectively Ameren) shall participate in an investigatory case that the Commission will initiate within 60 days after the effective date of this order. In that case, the Commission will investigate plans during the next 10 years for Ameren, or another Ameren affiliate, as defined in the Commission's affiliated transaction rules for electric utilities, to build transmission in Ameren Missouri's service territory. Ameren Missouri shall not object to discovery requests relating to plans during the next 10 years for Ameren or another Ameren affiliate to build transmission in Ameren Missouri's service territory on the grounds that: (i) the discovery does not seek information that is relevant to such transmission issues; or (ii) the data request seeks information that is not in Ameren's possession if the information is in the possession of an Ameren affiliate. By participating in the case, Ameren is not waiving any applicable privilege and retains the right to object if a discovery request asks for opinions (not facts or existing data), asks for legal conclusions, asks Ameren to perform analyses that do not already exist, or is vague, unduly burdensome, or overly broad. The Commission will close the investigatory case no later than ten months after it is initiated. Neither ATX, nor any Ameren affiliate that provides information in connection with the investigatory case shall be deemed to have thereby conceded that the Commission has jurisdiction over them, or could otherwise compel them to participate in the investigatory case or to provide such information, absent their agreement to do so. (from paragraph 10.i of the stipulation and agreement)

S. For transmission facilities located in Ameren Missouri's certificated service territory that are constructed by an Ameren affiliate and that are subject to regional cost allocation by the Midwest ISO, for ratemaking purposes in Missouri, the costs allocated to Ameren Missouri by the Midwest ISO shall be adjusted by an amount equal to the difference between: (i) the annual revenue requirement for such facilities that would have resulted if Ameren Missouri's Commission-authorized ROE and capital structure had been applied and there had been no CWIP (if applicable), or other FERC Transmission Rate Incentives, including Abandoned Plant Recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses and accelerated depreciation, applied to such facilities and (ii) the annual

FERC-authorized revenue requirement for such facilities. The ratemaking treatment established in this provision will, unless otherwise agreed or ordered, end with the Commission's next order regarding Ameren Missouri's participation in the Midwest ISO, another RTO, or operation as an ICT. (from paragraph 10.j of the stipulation and agreement)

T. For purposes of the conditions imposed in this order, the Stakeholders are defined as Union Electric Company, d/b/a Ameren Missouri, the Staff of the Commission, the Midwest Independent Transmission System Operator, Inc., the Missouri Industrial Energy Consumers, the Office of the Public Counsel, The Empire District Electric Company, the Southwest Power Pool, Inc., and the Missouri Joint Municipal Electric Utility Commission.

U. Any person or party who receives highly confidential or proprietary information as part of the process established in this order shall handle that information in accordance with Commission Rule 4 CSR 240-2.135.

3. This order shall become effective on May 27, 2012.

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

Woodruff, Chief Regulatory Law Judge

**In re: Union Electric Company's 2011 Utility Resource Filing Pursuant to 4 CSR 240 – Chapter 22.****File No. EO-2011-0271**

**Electric. §42 Planning and Management.** The Commission amended its previous report and order to address an overlooked alleged deficiency identified by Public Counsel.

**ORDER MODIFYING REPORT AND ORDER**

Issue Date: May 17, 2012

Effective Date: May 27, 2012

On March 28, 2012, the Commission issued a Report and Order regarding Union Electric Company, d/b/a Ameren Missouri's 2011 Integrated Resource Planning filing under the Commission's Integrated Resource Planning Rule. In that Report and Order, the Commission attempted to address each of the alleged deficiencies in that plan as identified by the Commission's Staff, the Office of the Public Counsel, and other interested parties. The Commission's Report and Order became effective on April 27, but before that date, Public Counsel and Ameren Missouri filed timely applications for rehearing.

Part of Public Counsel's application for rehearing complains that the Commission overlooked an alleged deficiency in Ameren Missouri's plan that Public Counsel had raised for the Commission's consideration. After considering Public Counsel's application, the Commission finds that Public Counsel is correct. The Commission's Report and Order failed to address the deficiency alleged by Public Counsel.

To correct that oversight, the Commission will modify the Findings of Fact section of its March 28 Report and Order to address the additional alleged deficiency. The Report and Order shall remain unchanged in all other regards.

The Commission will make this order effective in ten days to allow the parties an opportunity to request rehearing regarding this order. Once the opportunity to request rehearing of this order has passed, the Commission will address any new requests for rehearing along with the applications for rehearing previously filed regarding the March 28 Report and Order.

**THE COMMISSION ORDERS THAT:**

1. The Commission's March 28, 2012 Report and Order is modified to add the following section to the Findings of Fact set forth in that Report and Order:

**Analysis of Probable Environmental Costs**

Commission Rule 4 CSR 240-22.070(2) requires Ameren Missouri to "conduct a preliminary sensitivity analysis to identify the uncertain factors that are critical to the performance of the resource plan". Subsection (C) of that rule requires the utility to analyze "future changes in environmental law, regulations or standards" as one of those critical uncertain factors.

Public Counsel complains that Ameren Missouri chose to model its analysis of future changes in environmental law as distinct moderate and aggressive environmental scenarios as opposed to modeling those possible changes through the use of a risk analysis probability tree. Because the

scenarios are modeled in this way, Public Counsel complains the five moderate environmental scenarios cannot be properly compared to the nine aggressive environmental scenario candidate plans because they represent mutually exclusive futures.<sup>1</sup>

Ameren Missouri explained that it analyzed two distinct potential futures regarding coal-related environmental regulation in connection with its decision about whether or when its Meramec plant would need to be retired. Ameren Missouri concluded:

Because the two scenarios for environmental regulation require different mitigation at different times, and because some of the various mitigation options evaluated for Meramec have significantly different impacts on resource need than others, the only way to avoid conflict between the plans being evaluated and the environmental regulations being considered is to include the mitigation and associated resource impacts as part of alternative or candidate resource plans.<sup>2</sup>

Ameren Missouri further explains that under a probability decision tree, evaluation of plans for which mitigation measures are based on moderate environmental regulation would yield useless results for the half of the decision tree that assumes aggressive regulation and vice versa. The result would be that plans would be evaluated only for the environmental regulation scenario for which they were designed to comply, which is the equivalent of the analysis performed by Ameren Missouri.<sup>3</sup>

There is no evidence to demonstrate that Ameren Missouri's study would have reached a different conclusion if it had used a probability decision tree in the manner preferred by Public Counsel. In short, this alleged deficiency appears to be a disagreement about how best to analyze the problem. OPC's desire to run the analysis differently is not a deficiency in the plan. There is no deficiency.

2. This order shall become effective on May 27, 2012.

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

Woodruff, Chief Regulatory Law Judge

<sup>1</sup> Technical Report, Ex. 43, Pages 15-16.

<sup>2</sup> Ameren Missouri's Response, Ex. 2, Page 56.

<sup>3</sup> Ameren Missouri's Response, Ex. 2, Page 56.

**In the Matter of the Local Exchange Rate Tariff Filing of BPS Telephone Company To Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0374**

Tracking No. JI-2012-0708

Effective: July 1, 2012

**In the Matter of the Request of Alma Telephone Company for Expedited Treatment of Local Rate Increase**

**File No. IT-2012-0375**

Tracking No. JI-2012-0739

**In the Matter of the Revised Tariff Filing of Citizens Telephone Company of Higginsville, MO to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0377**

Tracking No. JI-2012-0709

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Ellington Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0378**

Tracking No. JI-2012-0710

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Farber Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0379**

Tracking No. JI-2012-0711

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Goodman Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0380**

Tracking No. JI-2012-0725

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Granby Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0381**

Tracking No. JI-2012-0728

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of K.L.M. Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0382**

Tracking No. JI-2012-0712

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Miller Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0383**

Tracking No. JI-2012-0719

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Oregon Farmers Mutual Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0384**

Tracking No. JI-2012-0713

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Ozark Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0385**

Tracking No. JI-2012-0726

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Peace Valley Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0386**

Tracking No. JI-2012-0715

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Seneca Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0387**

Tracking No. JI-2012-0727

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Steelville Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0388**

Tracking No. JI-2012-0721

Effective: July 1, 2012

**In the Matter of the Revised Tariff Filing of Stoutland Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor**

**File No. IT-2012-0389**

Tracking No. JI-2012-0714

Effective: June 28, 2012

**In the Matter of the Revised Tariff Filing of FairPoint Communications Missouri, Inc. d/b/a FairPoint Communications**

**File No. IT-2012-0390**

Tracking No. JI-2012-0720

Effective: July 1, 2012

**Telecommunications. §14.1. Universal Service Fund.** The circumstances created by the FCC's *Third Order on Clarification* constituted good cause to approve the Companies' tariffs and direct that they become effective on an expedited basis similar to the circumstances in File Nos. TR-2012-0298 and TR-2012-0299.

**ORDER APPROVING TARIFFS AND GRANTING MOTIONS FOR EXPEDITED TREATMENT**

Issue Date: May 24, 2012

Effective Date: June 1, 2012

**Background**

The tariff filings from the above captioned telephone companies (collectively “Companies”) have been necessitated by an order issued on November 18, 2011, by the Federal Communications Commission (FCC). On that date, the FCC issued its *USF/ICC Transformation Order (FCC USF/ICC Order)*.<sup>1</sup> Among other things, the FCC’s *USF/ICC Order* set a minimum \$10.00 local rate floor for residential service that all incumbent local exchange companies (ILECs) must meet or else lose federal High Cost Loop (HCL) Universal Service Fund (USF) support in the amount by which the rate floors exceed the company’s local rates. The plain language of the FCC’s *USF/ICC Order* appeared to require the local rates to be in effect on July 1, 2012 when it stated: “We will phase in this rate floor in three steps, **beginning with an initial rate floor of \$10 for the period July 1, 2012 through June 30, 2013.**” (Emphasis added).<sup>2</sup> The Companies reasonably relied on this language as they prepared their rate increase tariffs and customer notices to make the rates effective on July 1, 2012.

On May 14, 2012, the FCC released its *Third Order on Clarification*, (“*Third Order*”) addressing various effective dates and changing certain reporting dates and requirements.<sup>3</sup> Among other things, the *Third Order* established **June 1, 2012** as the reporting date for purposes of reporting whether the Companies’ basic local rates meet the FCC’s \$10.00 benchmark. As a result, the Companies will lose six months of USF HCL support if their local rates do not meet the \$10.00 rate floor by June 1, 2012 rather than July 1, 2012.

By the time the *Third Order* was issued on May 14, 2012, some of the Companies had already filed their FCC compliance tariffs with the Commission, while others were in the process of preparing those tariffs, believing they would have until the end of May to issue them with the required 30-day effective dates.<sup>4</sup> Subsequent to the issuance of the *Third Order*, on May 16 and 17, 2012, the Companies that needed to completed their tariff filings. All of the effective dates for the tariffs submitted by the Companies extend beyond the June 1, 2012 FCC requirement, and all of the Companies now seek to expedite the approval of their tariffs and expedite the effective date of their tariffs so they will become effective on June 1, 2012.

On May 23, 2012, the Commission’s Staff filed its verified recommendation and memorandum addressing all of the motions and associated tariffs. Staff recommends the tariffs be approved for setting just and reasonable rates, and that the motions for expedited treatment be granted.

<sup>1</sup> *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 et al., FCC 11-161. The FCC’s order determined that many rural telephone companies have been using Federal Universal Service funding to subsidize artificially low end-user rates. For that reason, the FCC ordered that it would “reduce, on a dollar for dollar basis, high cost loop support to the extent that a carrier’s local rates are below a specified urban local rate floor.” *Id.* at 197. The FCC’s order set that local rate floor at \$10 per month for the period of July 1, 2012 through June 30, 2013. The rate floor will rise to \$14 per month on July 1, 2013, and may be further increased in subsequent years. *Id.* at 239.

<sup>2</sup> *Id.* at 239.

<sup>3</sup> *Third Order on Reconsideration*, WC Docket No. 10-90 et al., FCC 12-5

<sup>4</sup> See Sections 392.220.2 and 392.230.5, RSMo Supp. 2010.

### **Jurisdiction and Discretionary Authority**

The Companies' requests for expedited treatment on their proposed tariffs are within the Commission's jurisdiction to decide pursuant to Chapter 392, RSMo 2000.<sup>5</sup> Because no law requires a hearing on these tariffs or the motions for expedited treatment these are non-contested cases.<sup>6</sup> Non-contested cases do not require formal proceedings or hearings before the Commission,<sup>7</sup> and as such, there is no contested case evidentiary record.<sup>8</sup> Being non-contested cases, the Commission "acts on discretion or on evidence not formally adduced and preserved."<sup>9</sup> The competent and substantial evidence standard of Article V, Section 18, Mo. Const., does not apply to administrative cases in which a hearing is not required by law.<sup>10</sup> Consequently, the Commission will exercise its discretion based upon the parties' verified filings. There is no requirement for the Commission to make findings of fact when it exercises its discretion in a non-contested case.<sup>11</sup>

### **Tariff Approval**

The Commission has recently dealt with two other cases facing similar if not identical circumstances: (1) File Number TR-2012-0298: In the Matter of the Revised Tariff Filing of Choctaw Telephone Company; and, (2) File Number TR-2012-0299: In the Matter of the Revised Tariff Filing of MoKan Dial, Inc. A similar analysis for approval of the FCC compliance tariffs in an expedited fashion in these matters applies to the current cases that are the subject of this order.

<sup>5</sup> See in particular Sections 392.200, 392.220.2 and 392.230.5, RSMo Supp. 2010.

<sup>6</sup> Section 536.010(4), RSMo Supp. 2010, defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."

<sup>7</sup> "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.*

<sup>8</sup> *Sapp v. City of St. Louis*, 320 S.W.3d 159, 163 (Mo. App. 2010). "The key to the classification of a case as contested or noncontested is the requirement of a hearing. The term "hearing," as used in section 536.010(4) means a proceeding at which a 'measure of procedural formality' is followed. Procedural formalities in contested cases generally include: notice of the issues (section 536.067); oral evidence taken upon oath or affirmation and the cross-examination of witnesses (section 536.070); the making of a record (section 536.070); adherence to evidentiary rules (section 536.070); and written decisions including findings of fact and conclusions of law (section 536.090)." (Internal citations omitted). *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 507 (Mo. banc 2009). Being a non-contested case, there is no evidence, no record, and no written and separately stated findings of fact. *State ex rel. Public Counsel v. Public Service Comm'n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006); Section 536.090. The decision reached by the Commission is totally a matter of the exercise of its discretion. *Id.* In a non-contested case, judicial review is restricted to determining only whether or not the Commission abused its discretion in denying a hearing (if a hearing was denied) and whether or not the commission's order was lawful. *Id.*

<sup>9</sup> *Public Counsel*, 210 S.W.3d at 353.

<sup>10</sup> *Id.* Moreover, the Companies are the only parties holding a substantive right that could be affected by the Commission's decision. Thus, no other party has a substantive due process right requiring a pre-deprivation evidentiary hearing. Utility customers have no vested property rights in utility rates that are protected by the Fifth and Fourteenth Amendments. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 -32 (Mo. banc 1975).

<sup>11</sup> *Public Counsel*, 210 S.W.3d at 355.

Section 392.200.1, RSMo Supp. 2010, requires that every telecommunications company impose “just and reasonable” charges on its customers. Under the old system of regulation, Section 392.240.1, RSMo 2000, gave the Commission authority to review a telephone company’s earnings and expenses to determine whether the company was indeed charging “just and reasonable” rates. However, in 2008, the legislature modified Section 392.420, RSMo Supp. 2010, to allow an incumbent local exchange companies to waive application of specified statutory provisions if the company was subject to competition within the exchange it serves. The statute specifically allows the Companies to waive application of the earnings review provision of Section 392.240.1, RSMo 2000.<sup>12</sup> The Companies have exercised their right to waive the application of Section 392.240.1;<sup>13</sup> however, the Companies cannot, waive the “just and reasonable” requirements of Section 392.200.1. Thus, the Commission still must determine whether the revised rates the Companies would charge under its revised tariffs are “just and reasonable”.

There is sufficient information available to the Commission to conclude that the Companies’ revised tariff filings will result in “just and reasonable” rates. As the FCC found in its order, the local rates currently charged by the Companies are far below the local rates charged by urban telephone companies. The FCC’s order requires the Companies to raise those rates to an amount closer to average or lose USF funding. Additionally, Staff has completed an analysis and comparisons demonstrating that the tariff rates proposed are reasonable in light of the rates charged for local telephone service by other small, rural, incumbent local telephone companies. It is reasonable to conclude that average and comparable rates are “just and reasonable” rates.<sup>14</sup>

After reviewing Staff’s verified recommendation and memorandum, the Companies’ filings, and the FCC’s ordered changes, the Commission independently and impartially finds and concludes that the tariffs filed by the Companies set just and reasonable rates.

<sup>12</sup> Section 392.420, RSMo Supp. 2010, provides in pertinent part:

Notwithstanding any other provision of law in this chapter and chapter 386, where an alternative local exchange telecommunications company is authorized to provide local exchange telecommunications services in an incumbent local exchange telecommunications company’s authorized service area, the incumbent local exchange telecommunications company may opt into all or some of the above listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. In addition, where an interconnected voice over Internet protocol service provider is registered to provide service in an incumbent local exchange telecommunications company’s authorized service area under section 392.550, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. ...

The preceding paragraph in Section 392.420 specifically lists 392.240.1 as a subsection that may be waived.

<sup>13</sup> Staff Recommendation Page 4.

<sup>14</sup> As the Commission noted in File Number TR-2012-0298(Choctaw) and File Number TR-2012-0299 (MoKan Dial), even if an earnings review were undertaken, such a review would be unlikely to yield reliable information at this time. The problem is that the FCC’s order does not just affect the small telephone companies’ local rates. Another portion of that order requires the Companies to reduce their intra-state access rates by July 1, 2012 and to move to a bill and keep regime for intra-MTA wireless traffic. These changes will have an impact on the revenue earned by the Companies and would make a historical review of the companies’ earnings essentially meaningless for determining their likely future earnings.

### **Motions for Expedited Treatment**

All of the Companies have sought expedited treatment on their FCC compliance tariffs noting that they are responding as quickly as possible in relation to the issuance of the FCC's *USF/ICC Order*. Because the Companies have already begun the billing process, June bills and the customer notice are already being processed and may in some cases have already gone out to customers. Consequently, the Companies requested that the Commission issue an order no later than May 23, 2012 approving the Company's tariffs to be effective June 1, 2012, with the understanding that the proposed rate changes will not be implemented until July 1, 2012.

The Companies assert that expedited relief will prevent harm to both the Companies and their customers. Specifically the Companies state that expedited relief will: (1) allow the Companies to comply with the FCC's *USF/ICC Order*; (2) prevent the company from losing six months of USF HCL resulting in substantial harm and revenue losses to the Companies that can impair their ability to continue providing service in high-cost, low-density rural areas; (3) the Companies' customers will see no rate changes on their bills until July 1, 2012 as originally intended; and (4) the Companies' customers will receive 30 days customer notice of the changes without the need for a confusing second customer notice.

Section 392.220.2, RSMo Supp. 2012, provides, in pertinent part: "The Commission for good cause shown may allow changes in rates, charges or rentals without requiring thirty days' notice, under such circumstances as it may prescribe." "Good cause," is defined as showing a "legally sufficient ground or reason" under the circumstances.<sup>15</sup> Good cause means a good faith request for reasonable relief.<sup>16</sup> To constitute good cause, the reason "must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical, and good faith is an essential element."<sup>17</sup> Commission Rule 4 CSR 240-2.080(14) lists additional requirements when a utility requests expedited treatment and it provides:

- (14) Any request for expedited treatment shall include the words "Motion for Expedited Treatment" in the title of the pleading. The pleading shall also set out with particularity the following:
  - (A) The date by which the party desires the commission to act;
  - (B) The harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect, or that there will be no negative effect, on the party's customers or the general public, if the commission acts by the date desired by the party; and
  - (C) That the pleading was filed as soon as it could have been or an explanation why it was not.

<sup>15</sup> *Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo.1963); *Black's Law Dictionary*, 6th ed., West Group, 1990, p. 692.

<sup>16</sup> *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App. 1996).

<sup>17</sup> *Schuenemann v. Route 66 Rail Haven, Ltd.*, 353 S.W.3d 691, 696 (Mo. App. 2011), *citing to*, *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. 1977).

The unique circumstances created by the *FCC's Third Order* constitute good cause to approve the Companies' tariffs and direct that they become effective on an expedited basis. The Commission independently and impartially finds and concludes that the Companies have satisfied all of the statutory and rule requirements to receive expedited treatment on their proposed tariffs. The Commission also independently and impartially finds and concludes that good cause has been shown to waive the thirty-day notice requirements of Sections 392.220.2 and 392.230.5, RSMo, Supp. 2012 and to direct the tariffs to become effective on an expedited basis.

**THE COMMISSION ORDERS THAT:**

1. The tariff filed by BPS Telephone Company in File Number IT-2012-0374, assigned Tariff Tracking Number JI-2012-0708, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. BPS Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

2. The tariff filed by Alma Telephone Company in File Number IT-2012-0375, assigned Tariff Tracking Number JI-2012-0739, bearing an issue date of May 16, 2012 and an effective date of June 15, 2012 is approved. Alma Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

3. The tariff filed by Citizens Telephone Company of Higginsville, Missouri in File Number IT-2012-0377, assigned Tariff Tracking Number JI-2012-0709, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. Citizens Telephone Company of Higginsville, Missouri's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

4. The tariff filed by Ellington Telephone Company in File Number IT-2012-0378, assigned Tariff Tracking Number JI-2012-0710, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. Ellington Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

5. The tariff filed by Farber Telephone Company in File Number IT-2012-0379, assigned Tariff Tracking Number JI-2012-0711, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. Farber Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

6. The tariff filed by Goodman Telephone Company in File Number IT-2012-0380, assigned Tariff Tracking Number JI-2012-0725, bearing an issue date of May 15, 2012 and an effective date of July 1, 2012 is approved. Goodman Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

7. The tariff filed by Granby Telephone Company in File Number IT-2012-0381, assigned Tariff Tracking Number JI-2012-0728, bearing an issue date of May 15, 2012 and an effective date of July 1, 2012 is approved. Granby Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

8. The tariff filed by K.L.M. Telephone Company in File Number IT-2012-0382, assigned Tariff Tracking Number JI-2012-0712, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. K.L.M. Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

9. The tariff filed by Miller Telephone Company in File Number IT-2012-0383, assigned Tariff Tracking Number JI-2012-0719, bearing an issue date of May 10, 2012 and an effective date of July 1, 2012 is approved. Miller Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

10. The tariff filed by Oregon Farmers Mutual Telephone Company in File Number IT-2012-0384, assigned Tariff Tracking Number JI-2012-0713, bearing an issue date of May 11, 2012 and an effective date of July 1, 2012 is approved. Oregon Farmers Mutual Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

11. The tariff filed by Ozark Telephone Company in File Number IT-2012-0385, assigned Tariff Tracking Number JI-2012-0726, bearing an issue date of May 15, 2012 and an effective date of July 1, 2012 is approved. Ozark Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

12. The tariff filed by Peace Valley Telephone Company in File Number IT-2012-0386, assigned Tariff Tracking Number JI-2012-0715, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. Peace Valley Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

13. The tariff filed by Seneca Telephone Company in File Number IT-2012-0387, assigned Tariff Tracking Number JI-2012-0727, bearing an issue date of May 15, 2012 and an effective date of July 1, 2012 is approved. Seneca Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

14. The tariff filed by Steelville Telephone Company in File Number IT-2012-0388, assigned Tariff Tracking Number JI-2012-0721, bearing an issue date of May 11, 2012 and an effective date of July 1, 2012 is approved. Steelville Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

15. The tariff filed by Stoutland Telephone Company in File Number IT-2012-0389, assigned Tariff Tracking Number JI-2012-0714, bearing an issue date of May 9, 2012 and an effective date of June 28, 2012 is approved. Stoutland Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

16. The tariff filed by FairPoint Communications Missouri, Inc. d/b/a FairPoint Communications in File Number IT-2012-0390, assigned Tariff Tracking Number JI-2012-0720, bearing an issue date of May 11, 2012 and an effective date of July 1, 2012 is approved. FairPoint Communications Missouri, Inc. d/b/a FairPoint Communications' motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

17. The thirty-day notice requirements of Sections 392.220.2 and 392.230.5, RSMo Supp. 2012, are waived with respect to all tariffs approved in paragraphs 1 through 16 above, and as delineated in the body of this order.

18. The Staff of the Missouri Public Service Commission's May 23, 2012 verified Recommendation and Memorandum, as amended on May 24, 2012, is attached to this order as Attachment A.

19. This order shall become effective on June 1, 2012.
20. These files shall be closed on June 2, 2012.

Harold Stearley, Deputy Chief Regulatory  
Law Judge, by delegation of authority  
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri  
on this 24<sup>th</sup> day of May, 2012.

**Application of Kansas City Power & Light Company for Approval of the Transfer of Existing Common Facilities and Permit Interests, and Materials and Supplies Inventory Administration at the Iatan Generating Station**

**Case No. EO-2011-0334**

**Electric. §46 Relations between connecting companies generally.** The Commission granted the company's unopposed motion to apportion interests related to the Iatan Generating Station among the utilities that own Iatan.

**ORDER GRANTING APPLICATION**

Issue Date: June 20, 2012

Effective Date: June 30, 2012

The Missouri Public Service Commission is granting the Application and authorizing the transactions that are the subject of the application. Those transactions will apportion interests related to Iatan Generating Station ("Iatan") among the owners of Iatan. Three interests are at issue: facilities common to Iatan's Units 1 and 2 ("common facilities"), permits, and inventory.

A. Procedure

Kansas City Power & Light Company ("KCPL") filed the application.<sup>1</sup> The Commission ordered notice of the application<sup>2</sup> including notice to affected political subdivisions.<sup>3</sup> The Commission received applications to intervene from The Empire District Electric Company ("Empire"),<sup>4</sup> Kansas Electric Power Cooperative, Inc. ("KEPCo"),<sup>5</sup> and Missouri Joint Municipal Electric Utility Commission ("MJMEUC"),<sup>6</sup> all of which the Commission granted.<sup>7</sup> Staff filed its recommendation<sup>8</sup> in favor of the application subject to certain conditions.

The Commission received no response to the recommendation within the time set by regulation.<sup>9</sup> No law requires an evidentiary hearing on the unopposed application, and no person has sought one, so<sup>10</sup> this action is not a contested case<sup>11</sup> and the Commission need not separately set forth its findings of fact.

<sup>1</sup> On March 9, 2012.

<sup>2</sup> Order date March 14, 2012.

<sup>3</sup> Order dated March 26, 2012.

<sup>4</sup> On March 13, 2012.

<sup>5</sup> On March 26, 2012.

<sup>6</sup> On March 28, 2012.

<sup>7</sup> Orders dated March 26 and April 12, 2012.

<sup>8</sup> On June 4, 2012.

<sup>9</sup> 4 CSR 240-2.080(15).

<sup>10</sup> *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

<sup>11</sup> Section 536.010(4), RSMo Supp. 2010.

The application is within the Commission's jurisdiction under the following provision:

No . . . electrical corporation . . . shall hereafter . . . lease, transfer, . . . or otherwise dispose of . . . any part of its . . . 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 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.<sup>[12]</sup>

The Commission will deny the application only if approval would be detrimental to the public interest.<sup>13</sup>

### B. Merits

The transactions at issue address relationships among Iatan's owners as altered by the agreement to build Unit 2 at Iatan. Iatan includes:

- Unit 1, an older unit owned by KCPL, KCP&L Greater Missouri Operations ("GMO"), and Empire ("Unit 1 owners").
- Unit 2, a newer unit owned by KCPL, GMO, Empire, MJMEUC, and KEPCo ("Unit 2 owners").
- Common facilities, facilities that commonly serve both Unit 1 and Unit 2, but owned only by KCPL, GMO, and Empire.

The common facilities at issue in this action are only those in existence as of May 19, 2006, when the Unit 2 owners agreed to build Unit 2 ("existing common facilities").

#### *1. Existing Common Facilities*

KCPL, GMO, and Empire own the existing common facilities in proportion to their Unit 1 ownership, and MJMEUC and KEPCo have no ownership in the existing common facilities. KCPL, GMO, and Empire, MJMEUC, and KEPCo have agreed that all of them shall own the existing common facilities in proportion to their ownership in Units 1 and 2

#### *2. Unit 2 Permits*

KCPL secured the permits required to build Unit 2. The Unit 2 owners agreed to contribute toward the permits, and receive ownership of the permits, in proportion to their ownership of Unit 2. All Unit 2 owners have made their contributions and KCPL now asks to distribute interests in the permits to the other Unit 2 owners.

<sup>12</sup> Section 393.190.1, RSMo 2000.

<sup>13</sup> *State ex rel. City of St. Louis v. Public Serv. Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. 1934).

### 3. Inventory

In the Unit 2 accounting manual, inventories of materials and supplies for Unit 1, Unit 2, and Unit 3 are separate. In practice, the owners account for all latan inventory collectively in proportion to their ownership interests because that practice is more economical. In case those transactions are within the statute cited above, KCPL asks permission for such transactions.

### C. Ruling

The verified filings show that the transactions will cause no detriment to the public interest. Therefore, the Commission will approve the application. The unopposed resolution of this action constitutes good cause for this order's effective date to be less than 30 days from this order's issuance date.<sup>14</sup>

#### THE COMMISSION ORDERS THAT:

1. The *Application* is granted.
2. The transactions that are the subject of the *Application* are authorized.
3. This order shall become effective on June 30, 2012.
4. This file shall close on July 2, 2012.

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

Daniel Jordan, Senior Regulatory Law Judge

<sup>14</sup> Section 386.490.2, S.B. 48, 96<sup>th</sup> Gen. Assem., 2<sup>nd</sup> Reg. Sess.

**Joint Application of Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company and The Empire District Electric Company for Authority to Enter Into Certain Leases and Agreements Regarding Existing Common Facilities at the Iatan Generating Station**

**File No. EO-2012-0015**

**Electric. §46 Relations between connecting companies generally.** The Commission granted the company's unopposed motion to apportion interests related to the Iatan Generating Station among the utilities that own that station.

**ORDER GRANTING APPLICATION**

Issue Date: June 20, 2011

Effective Date: June 30, 2011

The Missouri Public Service Commission is granting the application,<sup>1</sup> and authorizing the transactions that are the subject of the application, with clarifications suggested by Staff.

A. Procedure

Kansas City Power & Light Company ("KCP&L"), KCP&L Greater Missouri Operations Company ("GMO"), and The Empire District Electric Company ("Empire") filed the application.<sup>2</sup> The Commission ordered notice of the application<sup>3</sup> including notice to affected political subdivisions.<sup>4</sup> The Commission received applications to intervene from Kansas Electric Power Cooperative, Inc. ("KEPCo"),<sup>5</sup> and Missouri Joint Municipal Electric Utility Commission ("MJMEUC"),<sup>6</sup> both of which the Commission granted.<sup>7</sup> Staff filed its recommendation<sup>8</sup> in favor of the application subject to certain conditions.

The Commission received no response to the recommendation within the time set by regulation.<sup>9</sup> No law requires an evidentiary hearing on the unopposed application, and no person has sought one, so<sup>10</sup> this action is not a contested case<sup>11</sup> and the Commission need not set out its findings of fact separately.

<sup>1</sup> *Joint Application of Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company and The Empire District Electric Company.*

<sup>2</sup> On March 9, 2012.

<sup>3</sup> Order date March 14, 2012.

<sup>4</sup> Order dated March 26, 2012.

<sup>5</sup> On March 26, 2012.

<sup>6</sup> On March 28, 2012.

<sup>7</sup> Order dated April 12, 2012.

<sup>8</sup> On June 4, 2012.

<sup>9</sup> 4 CSR 240-2.080(15).

<sup>10</sup> *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

<sup>11</sup> Section 536.010(4), RSMo Supp. 2010.

The application is within the Commission's has jurisdiction under the following provision:

No . . . electrical corporation . . . shall hereafter . . . lease, transfer, . . . or otherwise dispose of . . . any part of its . . . 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 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. [<sup>12</sup>]

The Commission will deny the application only if approval would be detrimental to the public interest.<sup>13</sup>

#### B. Merits

The transactions at issue address relationships among Iatan's owners as altered by the agreement to build Unit 2 at Iatan. Iatan now includes:

- Unit 1, an older unit owned by KCPL, KCP&L Greater Missouri Operations ("GMO"), and Empire ("Unit 1 owners").
- Unit 2, a newer unit owned by KCPL, GMO, Empire, MJMEUC, and KEPCo ("Unit 2 owners").
- Common facilities, facilities that commonly serve both Unit 1 and Unit 2.
- The land initially acquired for Iatan ("site"), owned by the Unit 1 owners, as tenants in common.

In addition, adjacent to the site is:

- The Nower Property, owned solely by KCPL.

The transactions include payment for the rights transferred and proportionate shares of costs associated with the land and facilities at issue.

<sup>12</sup> Section 393.190.1, RSMo 2000.

<sup>13</sup> *State ex rel. City of St. Louis v. Public Serv. Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. 1934).

### 1. Unit 2 Site Lease

The Unit 2 owners hold no interest in the site. The Unit 1 owners will lease portions of the site covering Unit 2, and the common facilities, to the Unit 1 owners and Unit 2 owners. The result will be ownership and leasehold in the site, as to Unit 2 and common facilities, in the same proportion as ownership of Unit 2. In addition, the Unit 2 Site Lease will convey easements from the Unit 1 owners to the Unit 2 owners for access to Unit 2 and the common facilities.

### 2. Nower Property Lease

KCPL will lease the Nower property to the other Unit 2 owners for use as an ash landfill for latan and possibly other facilities. The result will be ownership and leasehold in the Nower Property in the same proportion as the "existing common facilities"<sup>14</sup> after the transfer authorized in file no. EO-2011-0334. Possible use for other facilities is among the sources of Staff's concerns and clarifications as to accounting and ratemaking treatment set forth in the ordered paragraphs.

### C. Ruling

The public interest will suffer no detriment from the transactions, according to the verified filings, and Staff's clarifications merely reserve any ruling related to accounting and rate-making. Therefore, the Commission will approve the application with Staff's clarifications. The unopposed resolution of this action constitutes good cause for this order's effective date to be less than 30 days from this order's issuance date.<sup>15</sup>

### **THE COMMISSION ORDERS THAT:**

1. The Joint Application of Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company and The Empire District Electric Company ("application") is granted.
2. The leases and related transactions that are the subject of the application are authorized.
3. This order does not determine any matter related to accounting or ratemaking in File No. ER-2012-0174, File No. ER-2012-0175, and the next general rate action of The Empire District Electric Company. As to those actions, this order also does not restrict the Commission's staff ("Staff") from making any argument related to accounting or ratemaking. This paragraph includes the pro forma journal entries set forth in Kansas City Power & Light Company's response to Staff's data requests.
4. This order shall become effective on June 30, 2012.
5. This file shall close on July 2, 2012.

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

Daniel Jordan, Senior Regulatory Law Judge

<sup>14</sup> Those in existence as of May 19, 2006, when the Unit 2 owners agreed to build Unit 2.

<sup>15</sup> Section 386.490.2, S.B. 48, 96<sup>th</sup> Gen. Assem., 2<sup>nd</sup> Reg. Sess.

**Danielle Leach, Complainant vs. Laclede Gas Company, Respondent****File No. GC-2012-0120**

**Evidence, Practice and Procedure. §33 Defaults.** Dismissal of complaint without prejudice was appropriate where the complainant failed to respond to multiple orders from the Commission.

**ORDER DISMISSING COMPLAINT**

Issue Date: June 20, 2012

Effective Date: July 19, 2012

On October 18, 2011, Danielle Leach filed a letter with the Commission, which appeared to be a complaint against Laclede Gas Company. This complaint file was opened, a notice of the complaint was issued, and Laclede was directed to file an answer. On October 25, complainant informed the undersigned judge that the letter was intended to be a complaint against personnel at the Commission but that she also intended to pursue a complaint against Laclede. Rather than close this complaint file, the Commission issued an order staying this matter and relieving Laclede of filing an answer until Ms. Leach filed formal complaint forms.

Immediately, on two occasions, the Commission's Consumer Services Division mailed formal complaint forms to Ms. Leach to be filed in this case. Ms. Leach did not return the forms. The Commission then issued an order directing Ms. Leach to file a statement, no later than May 24, 2012, of her intention to pursue this complaint. In the order, the Commission informed Ms. Leach that if she failed to respond to the order this case may be dismissed. Ms. Leach has yet to respond to the Commission's order.

Commission rule 4 CSR 240-2.116(3) states that a party may be dismissed from a case for failure to respond to a Commission order. Further, Commission rule 4 CSR 240-2.116(2) states that a case may be dismissed for lack of prosecution if no action has occurred in the case for 90 days. Because Ms. Leach has failed to respond to a Commission order, the Commission will dismiss her as a party. Also, even considering Ms. Leach's statement to the judge in October of 2011 that she intended to pursue this matter, there has been no action in this file for well over 90 days. The Commission will therefore dismiss the case and the file shall be closed.

If Ms. Leach wishes to bring her concerns about Laclede to the Commission's attention, this order does not prevent her from filing a formal complaint. If she chooses to do so, a separate case file will be opened.

**THE COMMISSION ORDERS THAT:**

1. This case is dismissed for lack of prosecution on July 19, 2012.
2. This case shall be closed on July 20, 2012.

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

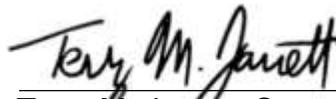
Jones, Senior Regulatory Law Judge

**Danielle Leach, Complainant vs. Laclede Gas Company, Respondent****File No. GC-2012-0120****CONCURRING OPINION OF COMMISSIONER TERRY M. JARRETT  
IN ORDER DISMISSING COMPLAINT**

This matter was designated as a “complaint” case with a “GC” denomination in the EFIS system. However, based upon the letter submitted by Ms. Leach and the remainder of the file, this matter does not represent a complaint against Laclede Gas Company (“Laclede”). Ms. Leach, according to her own filing and representations she made to the regulatory law judge, had intended to file a complaint against the Commission Staff, and any complaint against Laclede would be submitted at a later time. That time never arrived. Because this Commission keeps track of complaints made against the utilities it regulates, it is vitally important that matters which are not real complaints are not characterized as such.

While I concur in the result reached in this matter, I write separately to distinguish that despite the EFIS file number given here, this matter is not and never was a complaint against Laclede. Therefore, Staff should not include this file in their tracking of complaints filed against Laclede.

Respectfully submitted,



\_\_\_\_\_  
Terry M. Jarrett, Commissioner

Dated in Jefferson City,  
Missouri, on this 20<sup>th</sup> day of  
June, 2012.

**In the Matter of the Assessment Against the Public Utilities in the State of Missouri  
for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2012**

**Case No. AO-2012-0424**

**Public Utilities. §1 Generally.** The Commission established the assessment amount for fiscal year 2013.

**ASSESSMENT ORDER FOR FISCAL YEAR 2013**

Issue Date: June 20, 2012

Effective Date: July 1, 2012

Pursuant to 386.370, RSMo 2000, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2012. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to \$19,204,332. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups \$10,152,900. In addition to the separately identified costs for each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of \$9,051,432.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$540,852. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2012, is estimated to be \$1,543,374. The Commission deducts these amounts and estimates its Fiscal Year 2013 Assessment to be \$17,120,106. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all groups' gross intrastate operating revenue for the calendar year of 2011, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at <http://www.psc.mo.gov>.

The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

Electric .....	\$ 8,349,273
Gas .....	\$ 4,075,456
Steam/Heating .....	\$ 240,939
Water .....	\$ 1,894,982
Sewer .....	\$ 414,496
Telephone.....	\$ 2,144,960
Total .....	\$17,120,106

The Commission will collect an assessment for the Office of Public Counsel which is included in the total assessment amount of \$17,120,106.

The Commission allocates a proportionate share of the \$17,120,106 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Director of Administration and Regulatory Policy shall render a statement of such assessment to each public utility on or before July 1, 2012. The assessment shall be due and payable on or before July 15, 2012, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2012, October 15, 2012, January 15, 2013, and April 15, 2013. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission  
Budget and Fiscal Services Department  
P.O. Box 360  
Jefferson City, MO, 65102-0360

**IT IS ORDERED THAT:**

1. The assessment for fiscal year 2013 shall be as set forth herein.
2. The Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.
3. On behalf of the Commission, the Commission's Director of Administration and Regulatory Policy shall render a statement of such assessment to each public utility on or before July 1, 2012.
4. Each public utility shall pay its assessment as set forth herein.
5. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.
6. This order shall become effective on July 1, 2012.

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

Woodruff, Chief Regulatory Law Judge

**In the Matter of Lincoln County Sewer & Water, LLC For a Certificate of Convenience And Necessity Authorizing it to Own, Operate, Maintain, Control and Manage Water Systems in Lincoln County, Missouri**

**File No. WA-2012-0018, et al.**

**Certificates. §1. Generally. Water. §4. Transfer, lease and sale. Sewer. §4. Transfer, lease and sale.** Having found that the factors for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Lincoln County Sewer & Water, LLC, to provide the water and sewer service to the customers currently being served by the unregulated systems at the developments of Rockport and Bennington, the Commission found that the public interest standards for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied. Thus, the Commission approved the transfer of assets and granted the certificate.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT,  
APPROVING TRANSFER OF ASSETS AND GRANTING CERTIFICATES OF  
CONVENIENCE AND NECESSITY**

Issue Date: June 27, 2012

Effective Date: July 6, 2012

**Background**

On July 19, 2011, Lincoln County Sewer & Water, L.L.C. (“LCSW”) filed two applications with the Commission seeking certificates of convenience and necessity (“CCNs”) to own, operate, maintain, control and manage water and sewer systems in Lincoln County, Missouri.<sup>1</sup> The areas generally encompassed by the requested CCNs would require approving a transfer of assets of the systems serving two existing developments (Rockport and Bennington) to LCSW. Those water and sewer systems are not currently regulated by the Commission.<sup>2</sup> The combined water and sewer systems serve approximately 112 residential customers.<sup>3</sup>

The commission issued notice and set a deadline for intervention requests. No person or entity sought to intervene. At Staff’s request, the Commission held a Local Public Hearing on August 25, 2011.

On February 10, 2012, Staff filed its recommendation to approve the transfer of assets and to grant LCSW the CCNs subject to certain conditions. LCSW and the Office of the Public Counsel opposed Staff’s recommendation. The parties attempted to negotiate a settlement, but eventually requested a procedural schedule culminating with an evidentiary hearing to be held on August 16-17, 2012. However, on June 7, 2012, the parties filed a Unanimous Stipulation and Agreement (“Agreement”) purporting to resolve all issues in this matter.

<sup>1</sup> File Numbers WA-2012-0018 and SA-2012-0019 were consolidated on August 3, 2011.

<sup>2</sup> The applications were apparently filed in response to two complaint actions filed by the Commission’s Staff on February 10, 2011, alleging the entities and individuals operating those systems were unlawfully operating as water and sewer entities that should be under the jurisdiction of the Commission (File Numbers WC- 2011-0253 and SC-2011-0254). LCSW was created as a Limited Liability Company for the purpose of receiving the transfer of the water and sewer assets.

<sup>3</sup> The systems are described in complete detail in Staff’s Recommendation filed on February 10, 2012.

### **The Agreement**

The parties agree that LCWS has satisfied all legal requirements for the Commission to approve the transfer of assets and grant the CCNs for the water and sewer systems serving the areas described in the Agreement. The parties have also agreed to the systems' rate base, rate base exclusions, rates for customers, depreciation rates, records maintenance, provisions for outdoor water usage, documentation of insurance coverage and computer equipment, a meter installation plan, and for the use of time sheets. Additionally, there are provisions addressing future rate adjustments, follow-up reviews, a deadline for filing tariffs, and requiring compliance with the Commission's rules.<sup>4</sup>

### **Analysis and Decision**

The legal standards for approving a transfer of assets and for granting CCNs are fully articulated in Commission File Number WM-2012-0288, and the Commission incorporates the discussion of those standards by reference in this order.<sup>5</sup> And, while the procedural posture of this case evolved into that of a contested nature, contested matters may be resolved informally by agreement.<sup>6</sup> The parties have now retracted their request for an evidentiary hearing and this matter is now of the nature of a non-contested case. Because this is a non-contested case, the Commission acts on discretion or on evidence that is not formally adduced and preserved.<sup>7</sup> There is no evidentiary record.<sup>8</sup> Consequently, the Commission bases its decision on the parties' verified filings.

Based on the Commission's independent and impartial review of the verified filings, the Commission finds and concludes that all legal requirements for approving the requested transfer of assets and granting the requested CCNs have been satisfied. The water and sewer service to the customers currently being served in the Rockport and Bennington developments subject to the conditions set forth in the Agreement.<sup>9</sup> And, without further discussion, the Commission incorporates all provisions of the Agreement, as if fully set forth, into this order.

<sup>4</sup> Staff has also agreed to dismiss, with prejudice, its outstanding complaint actions referenced in Footnote No. 2.

<sup>5</sup> See File Number WM-2012-0288, Order Approving Transfer Of Assets And Granting Certificate Of Convenience And Necessity, issued on May 9, 2012 and effective on May 18, 2012.

<sup>6</sup> The Agreement waives procedural requirements that would otherwise be necessary before final decision. Section 536.060, RSMo 2000. Pursuant to 536.010(4), a contested case "means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Section 393.190, governing the transfer of assets, does not require a hearing prior to the Commission rendering a decision. While Section 393.170, governing the grant of a CCN, 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'." *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 was met in this matter when the opportunity for a hearing was provided and no party requested the opportunity to present evidence. *Id.* Ultimately, the parties agreed to forego a contested case proceeding after being provided the opportunity for an evidentiary hearing.

<sup>7</sup> *State ex rel. Public Counsel v. Public Service Comm'n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006).

<sup>8</sup> *Id.* The competent and substantial evidence standard of Article V, Section 18, does not apply to administrative cases in which a hearing is not required by law.*Id.*

<sup>9</sup> Also, because the settlement being approved disposes of this action, the Commission need not separately state its findings of fact. Section 536.090, RSMo 2000.

**THE COMMISSION ORDERS THAT:**

1. The Unanimous Stipulation and Agreement (“Agreement”), filed by the parties on June 7, 2012, is approved. The provisions of the Agreement are incorporated into this order, as if fully set forth, unconditionally and without modification. The signatory parties shall comply with the terms of the Agreement. A copy of the Agreement shall be attached to this order as “Attachment A.”

2. The transfer of assets and certificates of convenience and necessity requested by Lincoln County Sewer & Water, L.L.C. are granted.

3. Lincoln County Sewer & Water, L.L.C. shall file its tariffs per the schedule delineated in the Agreement.

4. Nothing in this order constitutes a finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters by Lincoln County Sewer & Water, L.L.C. in any later proceeding.

5. This order shall become effective on July 6, 2012.

Gunn, Chm., Jarrett, Kenney, and  
Stoll, 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 Missouri-American Water Company for a Certificate of Convenience and Necessity Authorizing it to Install, Own, Acquire, Construct, Operate, Control, Manage, and Maintain Water and Sewer Systems in Christian and Taney Counties, Missouri.**

**File No. WA-2012-0066, et al.**

**Certificates. §1. Generally. Water. §2. Certificate of convenience and necessity.** Having found that the factors for granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Missouri-American Water Company, to provide the water and sewer service to the customers in the incorporated Village of Saddlebrooke located in Christian and Taney Counties, Missouri.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT**

Issue Date: July 11, 2012

Effective Date: July 21, 2012

**Procedural History**

On August 26, 2011, Missouri-American Water Company (“MAWC”) filed two applications with the Missouri Public Service Commission seeking the grant of Certificates of Convenience and Necessity (“CCNs”).<sup>1</sup> Specifically, MAWC requests that the Commission grant it authority to install own, acquire, construct, operate, control, manage, and maintain water and sewer systems for the public in the incorporated village of Saddlebrooke located in Christian and Taney Counties, Missouri.<sup>2</sup>

The Commission issued notice and set an intervention deadline. AG Processing, Inc. (“AGP”) was granted intervention.<sup>3</sup> The Commission’s Staff filed a recommendation to conditionally grant the CCN and a recommendation on setting initial rates for water and sewer service. The Office of the Public Counsel (“Public Counsel”) and AGP opposed the recommendation, and the Commission convened a local public hearing to hear public comments.<sup>4</sup> Ultimately, a procedural schedule was set culminating with an evidentiary hearing to be held on June 28-29, 2012.<sup>5</sup>

On June 28, 2012, at the start of the evidentiary hearing, the parties requested a recess to negotiate a possible settlement. On June 29, 2012, at the parties request, the procedural schedule was suspended, and later that day, they filed a Unanimous Stipulation and Agreement (“Agreement”) purporting to resolve all issues in this matter.<sup>6</sup>

<sup>1</sup> The applications were filed pursuant to Sections 393.140 and 393.170, RSMo 2000, and Commission Rules 4 CSR 240-2.060, 4 CSR 240-3.305, and 4 CSR-3.600.

<sup>2</sup> The water and sewer files (File Numbers WA-2012-0066 and SA-2012-0067, respectively) were consolidated on October 17, 2011. File Number WA-2012-0066 was designated as the lead case. A full description of the water and sewer systems appears in Staff’s Recommendation filed on January 6, 2012; i.e. EFIS Docket Entry No. 13, *Staff Recommendation*, pp. 2-3. EFIS is the Commission’s Electronic Information and Filing System

<sup>3</sup> AGP late filed its application on February 12, 2012. No party objected and intervention was granted on February 27, 2012.

<sup>4</sup> EFIS Docket Entry No. 35, *Order Setting Local Public Hearing, Directing Notice and Modifying Procedural Schedule*, issued and effective on April 2, 2012. The Local Public Hearing was held in: Branson, Missouri on May 1, 2012.

<sup>5</sup> EFIS Docket Entry No. 28, *Order Setting Procedural Schedule*, issued and effective on March 15, 2012.

<sup>6</sup> EFIS Docket Entry No. 66, *Unanimous Stipulation and Agreement*, filed on June 29, 2012.

### **The Agreement**

The agreement includes provisions addressing: (1) transfer of ownership; (2) approval of the CCN; (3) rate base issues; (4) depreciation rates; (5) tariff sheets with customer and commodity charges; (6) future rate adjustments; (7) future rate filings; (8) a commitment for a cost allocation study; (9) compliance with the Commission's rules; (10) records maintenance; (11) follow-up reviews; (12) compliance with the Agreement; and (13) rate-making principles. Further, in the event the Commission accepts the terms of the Agreement, the signatories agree that all prefiled testimony not yet admitted into evidence shall be received into evidence without the necessity of the witnesses taking the stand. And finally, the Agreement contains a contingent waiver of rights. If the Commission unconditionally approves the Agreement without modification, the signatories agree to waive their respective rights to present oral argument and written briefs pursuant to §536.080.1, RSMo 2000; their respective rights to the reading of the transcript by the pursuant to §536.500, RSMo 2000; and their respective rights to judicial review pursuant to §386.510, RSMo 2000.<sup>7</sup>

### **Standards for Approving a CCN and for Setting Initial Rates**

Section 393.170.3 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed grant is "necessary or convenient for the public service."<sup>8</sup> 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.<sup>9</sup> The Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN,<sup>10</sup> and the Commission has articulated the specific criteria to be used when evaluating CCN applications as follows: (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.<sup>11</sup>

<sup>7</sup> Section 386.510 was revised in 2011 with the passage and signing into law of S.B. 48, although the revisions have not yet appeared in a Cumulative Supplement.

<sup>8</sup> 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). The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost," *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), and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.<sup>8</sup> *Id.*; *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

<sup>9</sup> *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).

<sup>10</sup> Section 386.170.3.

<sup>11</sup> *In the Matter of RDG Development, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage a Sewer System in Callaway County, Missouri*, File Number SA-2010-0096, 2009 WL 5069710 (Mo. P.S.C. 2009); *In re Central Jefferson County Utilities, Inc.*, File Number SO-2007-0071, 2007 WL 824040, 7-8 (Mo. P.S.C. 2007); *In re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991); *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, 1994 WL 762882, \*3 (Mo. P.S.C. 1994). These factors are sometimes referred to as the "Tartan Factors."

The Commission also has exclusive jurisdiction to establish public utility rates,<sup>12</sup> and the rates it sets have the force and effect of law.<sup>13</sup> A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's,<sup>14</sup> subject to judicial review on the question of reasonableness.<sup>15</sup> A “just and reasonable” rate is one that is fair to both the utility and its customers.<sup>16</sup> It is no more than is sufficient to “keep public utility plants in proper repair for effective public service, [and]. . . to insure to the investors a reasonable return upon funds invested.”<sup>17</sup> The Commission must consider the “public interest” when it makes its determination as to whether the proposed rates are just and reasonable,<sup>18</sup> and it is within the discretion of the Commission to determine when the evidence indicates the public interest would be served.<sup>19</sup>

### **Analysis and Decision**<sup>20</sup>

While the procedural posture of this case evolved into that of a contested nature, contested matters may be resolved informally by agreement.<sup>21</sup> The parties have now retracted their request for an evidentiary hearing, have requested approval of their Agreement to resolve all issues, and have requested the Commission to enter all pre-filed testimony into the record.<sup>22</sup>

<sup>12</sup> *May Department Stores Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41, 57 (Mo.1937).

<sup>13</sup> *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

<sup>14</sup> *May Dep't Stores*, 107 S.W.2d at 50.

<sup>15</sup> *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (1918); *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 210 S.W. 381 (1919); *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

<sup>16</sup> *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

<sup>17</sup> *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 272 S.W. 971, 973 (Mo. banc 1925).

<sup>18</sup> *In re Rahn's Estate*, 291 S.W. 120, 123 (Mo. 1926); *Morrhead v. Railways Co.*, 96 S.W. 261, 271 (Mo. banc 1907); *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974).

<sup>19</sup> *State ex rel. Intercon Gas, Inc. v. Public Service Comm'n of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App.1993).

<sup>20</sup> Section 386.420.2, RSMo 2000 requires a report of the Commission's conclusions.

<sup>21</sup> The Agreement waives procedural requirements that would otherwise be necessary before final decision. Section 536.060, RSMo 2000. Any requirement for a hearing was met in this matter when the parties agreed to forego a contested case proceeding after being provided the opportunity for an evidentiary hearing. *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).

<sup>22</sup> See Paragraph 28 of the Agreement. With the admission of the testimony, the record thus contains substantial and competent evidence. The competent and substantial evidence standard is not a standard of proof but, rather, is a standard of judicial review of an administrative agency's decision pursuant to section 536.140.2, RSMo Cum.Supp.2010; *Schnell v. Zobrist*, 323 S.W.3d 403, 412 (Mo. App. 2010).

The Commission recognizes that the Agreement for the grant of the CCNs and for setting initial rates resulted from negotiations between many parties with diverse interests. The signatories agree that the grant of the CCNs is necessary and convenient for the public service and that the proposed revenue requirement and rate design set out in the Agreement are just and reasonable. The exemplar tariffs filed with the Agreement demonstrate that the proposed initial rates mirror those of the nearby Stonebridge subdivision. Indeed, at the Local Public Hearing in Branson, which was attended by approximately half of the customers to be served, the testimony demonstrates that the residents favor MAWC's acquisition of the assets to provide water and sewer service<sup>23</sup> and that the rates existing for the Stonebridge subdivision were fair and acceptable.<sup>24</sup>

Based on the Commission's independent and impartial review of the verified filings and the testimony entered into the record, the Commission finds and concludes that all legal requirements for granting the requested CCNs have been satisfied.

The Commission has also compared the substantial and competent evidence on the whole record with the Agreement as to setting initial rates and the design for implementing those rates between rate classes.<sup>25</sup> The Commission independently and impartially finds and concludes that the rates proposed in the Agreement, and the rate design determining how those rates are collected among the individual rate classes, are just and reasonable and in the public interest.

Further, the Agreement's proposed terms support the provision of safe and adequate service. The initial rates approved by the Commission today are concluded to be no more than what is sufficient to keep MAWC's utility plants in proper repair for effective public service, and insure to MAWC's investors an opportunity to earn a reasonable return upon funds invested.

The parties expressly ask for an order approving all of the specific terms and conditions of the Agreement.<sup>26</sup> And, without further discussion, the Commission incorporates all provisions of the Agreement, as if fully set forth, into this order.

<sup>23</sup> The Village of Saddlebrooke has entered into a franchise agreement with MAWC for provision of these services. See EFIS Docket Entry No. 12, *Supplement to Application*, filed on December 22, 2011 and Schedule DRW -2, attached to the Direct Testimony of Dennis Williams for MAWC.

<sup>24</sup> Transcript, Volume 2.

<sup>25</sup> Although the Agreement is commonly referred to as a "Black Box Settlement," and the signatories parties do not stipulate to a specific capital structure, rate base, return on equity and over-all rate of return, the revenue requirement agreed upon by the parties falls within the ranges advocated in the parties' testimony.

<sup>26</sup> The Agreement waives procedural requirements that would otherwise be necessary before final decision. Section 536.060, RSMo 2000. Also, because the settlement being approved disposes of this action, the Commission need not separately state its findings of fact. Section 536.090, RSMo 2000.

**THE COMMISSION ORDERS THAT:**

1. The Unanimous Stipulation and Agreement (“Agreement”) filed on June 29, 2012 is approved. The provisions of the Agreement are incorporated into this order, as if fully set forth, unconditionally and without modification. The signatory parties shall comply with the terms of the Agreement. A copy of the Agreement shall be attached to this order as “Attachment A.”

2. The parties’ prefiled testimony, already filed in the Commission’s Electronic Filing and Information System (“EFIS”), is hereby admitted into evidence. A notation in EFIS for the issuance of this order shall stand in lieu of a notation in EFIS for any exhibit’s entry into the record.

3. Missouri American Water Company shall file tariff sheets consistent with this order.

4. The Commission’s Staff shall file a recommendation regarding approving Missouri American Water Company’s compliance tariffs no later than seven days after the tariff sheets referenced in Paragraph 3 are filed.

5. This order shall become effective on July 21, 2012.

Gunn, Chm., Jarrett, Kenney,  
and Stoll, 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 the Application of Entergy Arkansas, Inc. for a Certificate of Convenience and Necessity Authorizing It to Own, Acquire, Construct, Operate, Control, Manage, and Maintain Certain Electric Plant Consisting of Electric Transmission and Distribution Facilities Within Dunklin, New Madrid, Oregon, Pemiscot and Taney Counties, Missouri and/or for Other Relief**

**File No. EA-2012-0321**

**Electric. §3 Certificate of convenience and necessity.** An unopposed certificate of convenience and necessity was granted to the applicant.

**ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY**

Issue Date: July 11, 2012

Effective Date: July 21, 2012

**Procedural History**

On March 27, 2012<sup>1</sup>, pursuant to Section 393.170, RSMo 2000, and Commission Rules 4 CSR 240-2.060, and 4 CSR 240-3.105, Entergy Arkansas, Inc., (hereafter "EAI") filed an application (as captioned in the style above) with the Missouri Public Service Commission. EAI requests that the Commission grant it authority to own, acquire, construct, operate, control, manage, and maintain electric plant in the above-referenced counties. Specifically, EAI provides wholesale services to cities and cooperatives in Missouri, and one of these cooperatives has requested a new inter-connection point in Pemiscot County.

The Commission issued notice of the application, and gave the general public and interested parties until April 16 to request intervention. The Commission received no intervention requests.

On June 26, the Commission's Staff (hereafter "Staff") filed a Recommendation that asks the Commission to approve the application, and to grant certain waivers requested by EAI. Commission Rule 4 CSR 240-2.080(15) allows parties ten days to respond to pleadings. No party responded to Staff's Recommendation; therefore, the Commission finds that no party objects to the Commission granting EAI the certificate.

**Decision**

The Commission may grant an electric corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either "necessary or convenient for the public service."<sup>2</sup> The Commission has stated five criteria that it will use:

<sup>1</sup> Calendar references are to 2012 unless otherwise noted.

<sup>2</sup> Section 393.170, RSMo 2000.

- 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.<sup>3</sup>

Based on the verified application and the verified recommendation of Staff, the Commission finds that granting EAI's application for a certificate of convenience and necessity to provide electrical service meet the above listed criteria.<sup>4</sup> The application will be granted. Because the application is unopposed, and because the Commission does not wish to cause undue delay, this order will be given a ten-day effective date.

**THE COMMISSION ORDERS THAT:**

1. Entergy Arkansas, Inc., is granted permission, approval, and a certificate of convenience and necessity to construct, install, own, operate, control, manage, and maintain electrical plant for its existing facilities in Missouri and its new facilities in Missouri, as more particularly described in its application and Staff Recommendation.
2. As requested by Entergy Arkansas, Inc., and agreed upon by Staff, the Commission waives the 60-day notice requirement of Commission Rule 4 CSR 240-4.020, and the reporting requirements of Commission Rule 4 CSR 240-3.175 (depreciation) and Commission Rule 4 CSR 240-3.190(1), (3) (generation).
3. This order shall become effective on July 21, 2012.
4. This case shall be closed on July 22, 2012.

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

Pridgin, Senior Regulatory Law Judge

<sup>3</sup> *In re Tartan Energy Company*, 3 Mo.P.S.C. 173, 177 (1994).

<sup>4</sup> The requirement for a hearing is met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. No party requested a hearing in this matter; thus, no hearing is necessary. *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm'n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

**In the Matter of Emerald Pointe Utility Company for a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System and Sewer Line in Taney County, Missouri**

**File No. SA-2012-0362**

**SEWER. §2. Certificate of convenience and necessity.** The Commission granted a sewer corporation a certificate of convenience and necessity authorizing it to construct and operate a sewer system and sewer line to obtain access to an alternate wastewater treatment plant.

**ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY**

Issue Date: July 11, 2012

Effective Date: July 21, 2012

On May 1, 2012, Emerald Pointe Utility Company (“Emerald”) filed an application with the Missouri Public Service Commission (“Commission”) requesting that the Commission grant it a Certificate of Convenience and Necessity (“CCN”) to construct, install, own, operate, control, manage and maintain a sewer system and sewer line in Taney County, Missouri. The requested CCN would allow Emerald to obtain access to an alternate wastewater treatment plant owned and operated by the City of Hollister, Missouri. On May 2, 2012, the Commission directed notice and set a deadline for persons to request intervention. The Commission received no intervention requests.

On June 22, 2012, the Commission’s Staff filed a recommendation that asks the Commission to approve the application, subject to certain conditions relating to depreciation rates. The Commission subsequently ordered Emerald to respond to the Staff’s conditions, and on June 29, 2012, Emerald filed its response stating that it does not object to the conditions in the Staff recommendation. The Office of Public Counsel states that it has no opposition to Staff’s recommendation and its suggested conditions.

Emerald is a sewer corporation operating a sewer system and is, therefore, subject to the jurisdiction of the Commission.<sup>1</sup> Missouri law requires a sewer corporation to obtain a certificate from this Commission in order to operate as such.<sup>2</sup> The Commission may grant a sewer corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either “necessary or convenient for the public service.”<sup>3</sup> The Commission has stated five criteria that it will use in making that determination:

<sup>1</sup> Sections 386.020(49) and (50), and 386.250(4) RSMo.

<sup>2</sup> Section 393.170, RSMo.

<sup>3</sup> *Id.*

- 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.<sup>4</sup>

In its recommendation, Staff concludes that Emerald's application satisfies the five criteria stated above. Emerald's existing sewage treatment facility is operating near capacity and will soon need to be expanded. However, it is more desirable to eliminate the facility and instead use the available treatment facility operated by the City of Hollister. The proposed pipeline project to deliver sewage to the City's facility and the additional service area would benefit Emerald's current and future customers. Emerald has the financial ability to complete the project, and the plan is economically feasible. Emerald's proposal as stated in the application is beneficial to current customers, future customers, and other residents of the Table Rock Lake area.

Based on the Commission's independent and impartial review of the verified application and the verified recommendation of Staff, the Commission finds that granting Emerald's application for a certificate of convenience and necessity to provide sewer service would be in accordance with the above-listed criteria.<sup>5</sup> Consequently, the application will be granted, subject to the schedule of depreciation rates attached to the Staff recommendation in Attachment A.

The Commission reminds Emerald that failure to comply with its regulatory obligations may result in the assessment of penalties against it. These regulatory obligations include, but are not limited to, the following:

A) The obligation to file an annual report, as established by Section 393.140(6), RSMo 2000. Failure to comply with this obligation will make the utility liable for a penalty of \$100 and an additional \$100 per day that the violation continues. Commission Rule 4 CSR 240-3.335 requires sewer utilities to file their annual report on or before April 15 of each year.

B) The obligation to pay an annual assessment fee established by the Commission, as required by Section 386.370, RSMo 2000. Because assessments are facilitated by order of the Commission, failure to comply with the order will subject the company to penalties ranging from \$100 to \$2,000 for each day of noncompliance pursuant to Section 386.570, RSMo 2000.

C) The obligation to provide safe and adequate service at just and reasonable rates, pursuant to Section 393.130, RSMo Supp. 2010.

D) The obligation to comply with all relevant state and federal laws and regulations, including but not limited to, rules of this Commission, the Department of Natural Resources, and the Environmental Protection Agency.

<sup>4</sup> *In re Tartan Energy Company*, 3 Mo.P.S.C. 173, 177 (1994).

<sup>5</sup> The requirement for a hearing is met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. No party requested a hearing in this matter; thus, no hearing is necessary. *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm'n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

E) The obligation to comply with orders issued by the Commission. If the company fails to comply it is subject to penalties for noncompliance ranging from \$100 to \$2,000 per day of noncompliance, pursuant to Section 386.570, RSMo 2000.

F) The obligation to keep the Commission informed of its current address and telephone number. The certificate is granted conditioned upon the compliance of the company with all of these obligations, as well as the obligations listed below in the ordered paragraphs.

If the Commission finds, upon conducting a hearing, that the company fails to provide safe and adequate service, or has defaulted on any indebtedness, the Commission shall petition the circuit court for an order attaching the assets, and placing the company under the control of a receiver, as permitted by Section 393.145, RSMo. As a condition of granting this certificate, the company hereby consents to the appointment of a temporary receiver until such time as the circuit court grants or denies the petition for receivership.

The company is also placed on notice that Section 386.310.1, RSMo, provides that the Commission can, without first holding a hearing, issue an order in any case "in which the commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property."

Furthermore, the company is reminded that, as a corporation, its officers may not represent the company before the Commission. Instead, the corporation must be represented by an attorney licensed to practice in Missouri.

**THE COMMISSION ORDERS THAT:**

1. Emerald Pointe Utility Company is granted permission, approval, and a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a sewer system and sewer line in Taney County, Missouri, as more particularly described in its application.

2. This certificate of convenience and necessity is granted upon the conditions set out in the body of this order, including Emerald's compliance with the schedule of depreciation rates described in Attachment A to the Staff recommendation and incorporated herein by reference in its entirety.

3. Emerald Pointe Utility Company must submit amended tariff sheets describing its revised service areas within 30 days after the date of this order, with the tariff sheets to bear an effective date that is at least 30 days from the date the tariff sheets are submitted to the Commission.

4. Emerald Pointe Utility Company shall maintain utility plant, customer account, and plant property records in accordance with the Uniform System of Accounts, version 1973 for water, as revised in 1976, and version 1976 for sewer.

5. Emerald Pointe Utility Company shall comply with all Missouri statutes and Commission rules.

6. Nothing in the Staff recommendation or this order shall bind the Commission on any ratemaking issue in any future rate proceeding.

7. This order shall become effective on July 21, 2012.
8. This matter may be closed on July 22, 2012.

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

Bushmann, Regulatory Law Judge

**In the Matter of Application of Canyon Treatment Facility, LLC for permission, approval and a Certificate of Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Control, Manage or Maintain a Sewer System for the Public located in Stone County, Missouri**

**File No. SA-2010-0219**

**SEWER. §2. Certificate of convenience and necessity.** The Commission granted a sewer corporation a certificate of convenience and necessity authorizing it to construct and operate a sewer system and sewer line to obtain access to an alternate wastewater treatment plant.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT  
AND AUTHORIZING TRANSFER OF ASSETS**

Issue Date: July 17, 2012

Effective Date: July 23, 2012

**Background**

On May 1, 2012, the Missouri Public Service Commission issued its Order Granting Conditional Certificate of Convenience and Necessity to Canyon Treatment Facility, LLC. The certificate is conditioned on either the appointment of a receiver to oversee the day-to-day operations of the company or upon a Commission-approved purchase of the company. These conditions were put in place in light of concerns set out in a complaint the Staff of the Commission has against the company.<sup>1</sup>

On May 24, 2012, Stone County Sewer District No. 1, with all of the parties to this case, entered into an agreement to purchase the company. On July 12, the parties filed the Agreement and in their pleading point out that Stone County intends to provide service to residential customers at the monthly rate of \$45.00. This is the same amount the District charges its other customers. Additionally, the District intends to undertake the necessary engineering and construction to increase the system's capacity to meet current and future needs. The parties further point out that the District has not had any significant problems with the Missouri Department of Natural Resources and agree that the transfer is in the public interest.

Finally, with the Agreement, the Staff of the Commission filed a motion for expedited treatment. And, on July 13, Canyon Treatment filed a motion in support of Staff's. Canyon points out that it is in the position to close on the Sale Agreement and a tentative closing date of July 23 has been established. The Office of the Public Counsel has no objection to expedited treatment of the Agreement and transfer of assets.

<sup>1</sup> Commission Case No. SC-2010-0161.

**Discussion**

Section 393.190, RSMo 2000, requires sewer companies to seek Commission approval prior to transferring any assets that are necessary or useful in the performance of its duties to the public. The parties have not filed an application as is routinely done in transfer cases. However, through the Unanimous Stipulation and Agreement, the parties are requesting that the Commission approve the transfer.

This Agreement represents the condition imposed by the Commission in its order granting the company a Certificate; that a purchase of the company be approved by the Commission. The Agreement facilitates that condition.

Because this request was not made as an application, Commission rule 4 CSR 240-3.310 has not been followed. This rule requires that a regulated sewer company seeking to transfer its assets provide certain information upon filing its request. Because this matter has been open since January of 2010, and the parties have worked since that time to this proposed end, requiring compliance with the above Commission rule would at best produce redundant information. The Commission will therefore waive this rule.

The Commission has reviewed the Unanimous Stipulation and Agreement and finds that it has not been shown to be detrimental to the public interest. The Commission will therefore approve the Agreement and the intended sale of assets to Stone County Sewer District No. 1. Upon the transfer being closed, the Commission will cancel the certificate granted to Canyon Treatment and dismiss Staff's Complaint; File No. SC-2010-0161.

**THE COMMISSION ORDERS THAT:**

1. The Unanimous Stipulation and Agreement is approved and incorporated into this order by reference, and the parties shall abide by the terms set out therein.
2. Commission rule 4 CSR 240-3.310 is waived.
3. The Commission approves the transfer of assets Canyon Treatment Facility, LLC, to Stone County Sewer District No. 1.
4. The Staff of the Commission shall notify the Commission when the transfer is complete.
5. This order shall become effective on July 23, 2012.

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

Jones, 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 Summit Natural Gas of Missouri, Inc., for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Distribution System to provide Gas Service in Benton, Morgan, Camden and Miller Counties in Missouri, as a Certificated Area**

**File No. GA-2012-0285**

**Gas. §3 Certificate of convenience and necessity.** The Commission granted a certificate of convenience and necessity to provide natural gas service to the Lake of the Ozarks area.

**ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY**

Issue Date: July 17, 2012

Effective Date: July 27, 2012

**Background**

On March 2, 2012, Summit Natural Gas of Missouri, Inc., filed an application with the Missouri Public Service Commission requesting authority to construct and operate a gas system and provide gas service to customers in Benton, Morgan, Camden and Miller Counties. On March 6, the Commission issued notice of the application and on June 1, the Staff of the Commission filed a recommendation to approve the application and grant the company a certificate of convenience and necessity

Although there were no requests to intervene in response to the notice, Michaele McDuffey, an individual, on June 4 requested intervention after receiving information from the company. The Commission granted her request on June 27. Thereafter, the Commission immediately set this matter for a prehearing conference, which was held on July 11.

During the prehearing conference, Michaele McDuffey stated that she does not oppose the application but wanted only to express certain concerns with the process. On July 12, she filed a statement of those concerns and a motion to withdraw as a party. Her concerns are:

- That there was a lack of notification of the application to residents and property owners;
- There was no opportunity for public input;
- There was no notification of the application to owners of the private rights-of-way for the proposed 6" gas main;
- There is a lack of transparency in the application and approval process;
- The general use of private rights-of-way.

Further details of her concerns are set out in her *Position of Application of Summit Natural Gas for a Certificate of Convenience and Necessity*.<sup>1</sup>

<sup>1</sup> Item No. 20 in this Docket.

**Staff Recommendation**

Staff recommends that the Commission approve the application and grant to Summit the requested certificate. However, Staff asserts that the certificate should be subject to the following conditions:

1. Summit has the operational capability to provide gas service in its requested area;
2. The requested Certificate of Convenience and Necessity (CCN) area for gas service would not jeopardize natural gas service to the company's existing customers;
3. Summit's shareholders shall be responsible for the success of this project, with no liability or responsibility put on its customers;
4. Summit shall keep separate books and records for the proposed service area;
5. Summit shall file separate class cost of service studies and revenue requirements for this new service area at the time it files its next rate case that includes this service territory in its rate case request;
6. The Lake of the Ozarks system must support the rate structure on a stand-alone basis;
7. Summit shall use the rates identified in its amended application for its Lake of the Ozarks system;
8. The Lake of the Ozarks system's Allowance for Funds Used during Construction rate shall use 10 percent as the common equity calculation;
9. Summit shall not capitalize any portion of its sales advertising and promotion payroll for this company;
10. Summit shall use the same operation and maintenance expense ratio for payroll that they agreed to in the MGU rate case, File No. GR-2008-0060 Unanimous Stipulation and Agreement, for Lake for the Ozarks' first rate case, unless the company can demonstrate through timesheets and time reporting that some other ratio is more appropriate;
11. Summit shall use the depreciation rates outlined in Appendix C; 12.
12. Summit shall not file a rate increase request for this service territory until after 42 months of the effective date of the Commission order granting the CCN in this proceeding;
13. Summit shall obtain adequate capacity on the pipeline to reliably serve all customers in this area, including capacity necessary to serve any future growth;
14. Summit shall file revised tariff sheets reflecting this proposed CCN in this case within 30 days of the Commission's order approving this application.

**Discussion**

The Commission may grant a certificate of convenience and necessity to a gas corporation upon determining that such grant of authority is “necessary or convenient for the public service.”<sup>2</sup> The Commission has relied on the following criteria in making this determination:

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.<sup>3</sup>

Based on the verified application and the verified Staff Recommendation, the Commission finds that granting Summit a Certificate of Convenience and Necessity meets the above- listed criteria and is therefore necessary and convenient for the public service.

The law requires the Commission to make this determination “after due hearing.”<sup>4</sup> There was no request for an evidentiary hearing. The requirement for a hearing is met when the opportunity for hearing is provided and no party requests the opportunity to present evidence.<sup>5</sup> The Commission therefore need not hold an evidentiary hearing.

Having found that granting this certificate is necessary and convenient for the public service, the Commission will grant the request relief. Summit has not opposed the conditions set out by Staff in its Recommendation. The certificate will therefore be subject to those conditions. Finally, because the Commission does not wish to delay Summit’s endeavor, the order will be given a 10-day effective date.

**THE COMMISSION ORDERS THAT:**

1. Summit Natural Gas of Missouri, Inc. is granted Certificate of Convenience and Necessity to construct, install, own, operate, control, manage and maintain a gas distribution system to provide gas service in Benton, Morgan, Camden and Miller Counties in Missouri.
2. The certificate granted in ordered paragraph 1 is subject to the conditions recommended by the Staff of the Commission and set out in the body of this order.
3. This order shall become effective on July 27, 2012.

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

Jones, Senior Regulatory Law Judge

<sup>2</sup> Section 393.170, RSMo 2000.

<sup>3</sup> *In re Tartan Energy Company*, 2 Mo. P.S.C. 173, 177 (1994).

<sup>4</sup> Section 393.170.3, RSMo 2000.

<sup>5</sup> *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm’n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

**In the Matter of The Empire District Electric Company's 2012 Update Summary Report being Filed Pursuant to rule 4 CSR 240-22.080****File No. EO-2012-0294**

**Electric. §40. Reports, records and statements.** The requests of the Staff of the Missouri Public Service Commission, the Missouri Department of Natural Resources, and Dogwood Energy, L.L.C., are appropriate given the continuous nature of The Empire District Electric Company's integrated resource plan (IRP) filings, and the varying conditions surrounding some of the concerns. The Commission directed The Empire District Electric Company to comprehensively address the alleged deficiencies and concerns identified by the participants to this file in its next triennial IRP.

**ORDER REGARDING 2012 INTEGRATED RESOURCE PLANNING ANNUAL UPDATE SUMMARY**

Issue Date: July 17, 2012

Effective Date: July 17, 2012

**Background**

On March 20, 2012, The Empire District Electric Company ("Empire") filed its 2012 Integrated Resource Plan ("IRP") Annual Update.<sup>1</sup> A number of stakeholder meetings were held, and ultimately, the Commission's Staff filed a report alleging two deficiencies.<sup>2</sup> Comments were filed by the Missouri Department of Natural Resources ("MDNR") and Dogwood Energy, L.L.C. ("Dogwood").

Staff alleges that Empire:

- 1.) Failed "to robustly explore the cost effectiveness of performing its load analysis and load forecast at the class cost-of-service level, as required by prior agreements, with a goal of achieving compliance with 4 CSR 240-22.020(37) and 4 CSR 240-22.030(7)(A), from which Empire has repeatedly sought waivers;" and
- 2.) Failed "to utilize a 20 year planning horizon for its capacity planning, consistent with 4 CSR 240-22.020(43), 4 CSR 240-22.020(51), 4 SR 240-22.020(52), 4 CSR 240-22.080(2)(D) and 4 CSR 240-22.080(3)(B)."

MDNR concurs with Staff's position and also expressed a concern that Empire should have more fully considered two bills on file in the Missouri General Assembly (HB 14878 and SB 759) and analyzed any federal proposals being considered by the U.S. Congress that differ from those in Empire's most recent triennial IRP compliance filing. Dogwood asserts that Empire "should obtain more comprehensive information on its supply alternatives, fully examine purchase power and other supply alternatives, and improve its assessment of integration of intermittent supply sources such as wind and its overall risk valuation process."<sup>3</sup>

<sup>1</sup> The annual update was filed pursuant to Commission Rule 4 CSR 240-20.080(3)

<sup>2</sup> Staff's original report identified four alleged deficiencies; however, after conferring with Empire, Staff filed a revised report alleging only two deficiencies

<sup>3</sup> Empire states that Dogwood is specifically interested in Empire's response to a proposal Dogwood sent to Empire on April 18, 2012, describing an option to purchase an ownership share in the Dogwood Energy Facility.

**Empire's Response**

With regard to Staff's alleged deficiencies, Empire claims that it *did* perform the load forecast at the class cost of service level that Staff desires in its 2007 IRP, but found that the added granularity of rate class level forecasting increased the difficulty due to customers switching rate classes and provided no advantage with respect to forecasting accuracy. Empire explains that it preferred to keep the forecast method consistent with the internal budgeting approach, and it believes that no variance is required to utilize this approach in its 2013 IRP due to the flexibility of the revised rules and the communications within its IRP Stakeholder Advisory Group. Empire also contends that to adequately expand the planning horizon for the IRP annual update to 20 years, as Staff suggests, would essentially convert the annual update into a triennial compliance filing and that the annual update should be an update based on the Company's normal ongoing business planning process.

In regard to MDNR's additional concern, Empire replies that it did provide a detailed analysis of the potential impact of an initiative petition to amend Chapter 393 RSMo which was currently being circulated in Missouri. Further, Empire noted at a Stakeholder Update Session that the particular legislative proposals mentioned by MDNR were actively being modified, so it focused its time and resources and provided a detailed analysis of the potential impact on the initiative petition to amend Chapter 393.

As for Dogwood's comments, Empire contends that those comments concern its upcoming triennial compliance filing to be made in 2013 and that they do not appear to be pertinent to Empire's 2012 Update Summary Report and the Stakeholder Update Session.

**Analysis and Decision**

The Commission's rules outline the procedure for the IRP annual update process. There are no requirements for a hearing on these filings and, in fact, no Commission action is required in relation to these proceedings. Consequently, this is a non-contested case, and the Commission may dispose of this matter informally at its discretion.

Staff, MDNR and Dogwood essentially request that the Commission direct Empire to make a commitment to address the alleged deficiencies and concerns in its next triennial IPR compliance filings. These requests are appropriate given the continuous nature of the IRP filings, and the varying conditions surrounding some of the concerns. Allowing Empire to address these concerns in its next IRP filing, as opposed to having them file an updated annual report, will also prevent diversion of Empire's resources away from preparing a more comprehensive triennial filing that is due in less than a year.

**THE COMMISSION ORDERS THAT:**

1. The Empire District Electric Company shall comprehensively address the alleged deficiencies and concerns identified by the participants to this file in its next triennial Integrated Resource Plan.
2. This order shall become effective on July 17, 2012.
3. This file shall be closed on July 18, 2012.

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

Stearley, Deputy Chief Regulatory Law Judge

**In the Matter of Union Electric Company d/b/a Ameren Missouri's Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA****File No. EO-2012-0142**

**Electric. §13.1 Energy efficiency.** The Commission approved a stipulation and agreement implementing the utility's energy efficiency program under the Missouri Energy Efficiency Investment Act (MEEIA).

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT  
RESOLVING AMEREN MISSOURI'S MEEIA FILING AND APPROVING  
STIPULATION AND AGREEMENT BETWEEN AMEREN MISSOURI AND  
LACLEDE GAS COMPANY**

Issue Date: August 1, 2012

Effective Date: August 11, 2012

This order approves a stipulation and agreement among the parties regarding Union Electric Company, d/b/a Ameren Missouri's application filed under the Missouri Energy Efficiency Investment Act (MEEIA). The order also approves a separate stipulation and agreement between Ameren Missouri and Laclede Gas Company regarding cooperation between the utilities on energy efficiency programs.

MEEIA is designed to encourage Missouri's investor-owned electric utilities to whole-heartedly offer energy efficiency programs and projects designed to reduce the amount of electricity used by the utility's customers. The law recognizes that under traditional regulation, a utility has a strong financial incentive to sell as much electricity to its customers as possible because more sales result in greater profits. MEEIA creates an opportunity to change that financial incentive to better align the utility's financial interest with the public interest in encouraging the efficient use of energy.

On January 20, 2012, as it was allowed to do under MEEIA, Ameren Missouri filed an application asking the Commission to approve certain energy efficiency and other demand-side programs described in a MEEIA Report attached to the application. Ameren Missouri also asked the Commission to approve a Technical Resource Manual (TRM) and a Demand-Side Investment Mechanism (DSIM), both intended to allow the company to more efficiently recover the costs of those programs and to mitigate the throughput disincentive that would otherwise discourage the company's investment in energy efficiency.

Ameren Missouri's MEEIA application was of great interest to various stakeholders, and the Commission allowed the following parties to intervene: Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (KCPL/GMO); Laclede Gas Company; Missouri Department of Natural Resources; Sierra Club, Earth Island Institute d/b/a Renew Missouri, and the Natural Resources Defense Council; Barnes-Jewish Hospital; and the Missouri Industrial Energy Consumers. After the parties prefiled testimony regarding Ameren Missouri's application, the Commission convened an evidentiary hearing on May 23 and 24. At that time, the parties announced their agreement in principle to resolve their disagreements regarding Ameren Missouri's MEEIA application. The evidentiary hearing was canceled.

On July 5, Ameren Missouri; the Commission's Staff; the Office of the Public Counsel; the Missouri Department of Natural Resources; the Natural Resources Defense Council, Sierra Club, and Earth Island Institute d/b/a Renew Missouri; the Missouri Industrial Energy Consumers; and Barnes-Jewish Hospital filed what they described as a Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing. KCPL/GMO and Laclede did not sign the stipulation and agreement, but they did not object within seven days of its filing. Therefore, pursuant to Commission rule 4 CSR 240-2.115, the Commission will treat the stipulation and agreement as unanimous.

The stipulation and agreement asks the Commission to approve Ameren Missouri's three-year demand-side program plan. That plan consists of the eleven demand-side programs described in Ameren Missouri's January 20, 2012 MEEIA Report; the demand-side programs investment mechanism (DSIM) described in the MEEIA Report, as modified by the stipulation and agreement; and a Technical Resource Manual (TRM) proposed by Ameren Missouri.

Wishing to question the parties about the stipulation and agreement, the Commission convened an on-the-record presentation on July 16. At that proceeding, the parties further explained the provisions of the stipulation and agreement. In particular, the parties indicated that the stipulation and agreement's provision that asks the Commission to include a specified amount of energy efficiency program costs in Ameren Missouri's revenue requirement for the company's pending rate case, ER-2012-0166, and in subsequent rate cases, does not bind the Commission to make a particular determination in those rate cases. The stipulation and agreement binds the signatory parties to support the inclusion of those costs in the company's revenue requirement in the future cases, but approval of the stipulation and agreement does not attempt to bind the Commission to approve those costs. Instead, the Commission remains free to fully consider and accept or reject any evidence and argument offered by any party regarding those costs.

Having considered Ameren Missouri's January 20, 2012 MEEIA Application and Report and the stipulation and agreement filed on July 5, 2012, the Commission determines that the stipulation and agreement should be approved.

Apart from the July 5, 2012 stipulation and agreement, Ameren Missouri and Laclede filed a distinct stipulation and agreement on May 11, 2012. Only Ameren Missouri and Laclede signed that stipulation and agreement, but no other party objected to it and pursuant to Commission rule 4 CSR 240-2.115, the Commission will treat the stipulation and agreement as unanimous.

The Ameren Missouri – Laclede Stipulation and Agreement commits those two companies to explore joint gas-electric energy efficiency and conservation programs, provided that those programs will promote energy efficiency in a manner not designed to induce a customer to choose one fuel (electric or natural gas) over the other. The Commission finds the Ameren Missouri – Laclede Stipulation and Agreement to be reasonable and determines that it should be approved.

Because there is no remaining controversy among the parties and because this order needs to take effect promptly, the Commission will make this order effective in ten days.

**THE COMMISSION ORDERS THAT:**

1. The Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing, filed on July 5, 2012, is approved.

2. The Ameren Missouri – Laclede Stipulation and Agreement, filed on May 11, 2012, is approved.

3. The signatories to the stipulations and agreements shall comply with the terms of the stipulations and agreements.

4. Both stipulations and agreements are incorporated into this order. The Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing is attached to this order as Attachment A. The Ameren Missouri – Laclede Stipulation and Agreement is attached to this order as Attachment B.

5. As the terms and conditions of the Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing may be inconsistent with certain Commission rules, the Commission grants Ameren Missouri a variance from the rules listed in paragraph 23 of the Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing.

6. The testimony of all witnesses whose testimony was pre-filed in this case (including the MEEIA Report filed on January 20, 2012) is received into evidence.

7. This order shall become effective on August 11, 2012.

8. This file shall be closed on August 12, 2012.

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

Woodruff, 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.

**Halo Wireless, Inc., Complainant, v. Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Goodman Telephone Company, Granby Telephone Company, Iamo Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Miller Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Alma Communications Company, d/b/a Alma Telephone Company, Choctaw Telephone Company, MoKan Dial, Inc., Peace Valley Telephone Company, Inc., and Southwestern Bell Telephone Company, d/b/a AT&T Missouri, Respondents.**

**File No: TC-2012-0331**

**Evidence, Practice and Procedure. §26. Burden of proof.** Halo Wireless, Inc., failed to meet its burden to prove its allegations by a preponderance of the evidence. Southwestern Bell Telephone Company, d/b/a AT&T Missouri, on the other hand, has met its burden to prove the allegations within its counterclaim by the preponderance of the evidence.

**Telecommunications. §46. Interconnection Agreements.** The substantial and competent evidence in the record as a whole supports the conclusion that Halo Wireless, Inc., violated the Missouri Enhanced Records Exchange Rule and materially breached its interconnection agreement with Southwestern Bell Telephone Company, d/b/a AT&T Missouri.

**Telecommunications. §3. Certificate of convenience and necessity.** Halo Wireless, Inc., and Transcom Enhanced Services, Inc., were legally required to be certificated in Missouri prior to the transport of landline telephone calls. Consequently, the Commission directed the Staff of the Missouri Public Service Commission to complete an investigation into any unlawful actions by Halo and Transcom and to file a complaint seeking penalties if the results of Staff's investigation support such action.

**REPORT AND ORDER**

**Issue Date:** August 1, 2012

**Effective Date:** August 13, 2012

**APPEARANCES**

**APPEARING FOR HALO WIRELESS, INC.:**

**Louis A. Huber, III, and Daniel R. Young**, Schlee, Huber, McMullen & Krause P.C., 4050 Pennsylvania, Suite 300 Kansas City, Missouri 64171, and

**Steven H. Thomas, Troy P. Majoue, and Jennifer M. Larson**, McGuire, Craddock & Strother, P.C., 2501 N. Harwood St., Suite 1800, Dallas, TX 75201. and

**W. Scott McCollough**, McCollough Henry, P.C., 1250 South Capital of Texas Highway, Building 2, Suite 235, West Lake Hills, Texas 78746

**APPEARING FOR SOUTHWESTERN BELL TELEPHONE COMPANY, D/B/A AT&T MISSOURI:**

**Leo J. Bub, Robert J. Gryzmala, and Jeffrey E. Lewis**, 909 Chestnut Street, Room 3518, St. Louis, Missouri 63101,

and

**Dennis G. Friedman**, Mayer Brown, L.L.P., 71 South Wacker Drive, Chicago, Illinois 60606.

**APPEARING FOR ALMA TELEPHONE COMPANY, CHOCTAW TELEPHONE COMPANY AND MoKAN DIAL, INC.:**

**Craig S. Johnson**, Johnson & Sporleder, L.L.P., 304 East High Street, Suite 200, P.O. Box 1670, Jefferson City, Missouri 65102.

**APPEARING FOR CRAW-KAN TELEPHONE COOPERATIVE, ET AL.<sup>1</sup>:**

**W.R. England, III**, and **Brian T. McCartney**, Brydon, Swearingen & England, P.C., 312 East Capitol, P.O. Box 456, Jefferson City, MO 65102.

**APPEARING FOR THE OFFICE OF THE PUBLIC COUNSEL AND THE PUBLIC:**

**Christina Baker**, Senior Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102.<sup>2</sup>

**APPEARING FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

**Colleen M. Dale**, Senior 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

## **INTRODUCTION AND SUMMARY**

This is a complaint case filed by Halo Wireless, Inc. (“Halo”) against the Respondent local exchange telecommunications carriers (“LECs”) providing local and exchange access service in the state of Missouri. The Respondents sought to block Halo’s telecommunications traffic under the Missouri Public Service Commission’s Enhanced Record Exchange (ERE) Rule upon allegations of three independent violations of the ERE Rule: (1) non-payment for compensable traffic, (2) improper delivery of interLATA wireline<sup>3</sup> traffic over the LEC-to-LEC network; and/or (3) failure to provide appropriate originating caller identification information. Halo’s complaint seeks to prohibit the Respondents from blocking Halo’s traffic under the ERE Rule.

As a part of its response to Halo’s complaint, AT&T Missouri filed a counterclaim seeking to cease performance under its interconnection agreement (“ICA”) with Halo, and thus in effect to block Halo’s traffic, because Halo allegedly materially breached the terms of that agreement by delivering landline traffic. AT&T Missouri also seeks a finding that Halo is liable to AT&T Missouri for access charges on the interexchange landline traffic that Halo delivered to AT&T Missouri for termination to AT&T Missouri’s end user customers.

This case was also consolidated solely for purposes of hearing with a complaint case, File No. TO-2012-0035, filed by a group of small rural LECs including Alma Telephone, et al.<sup>4</sup> seeking a Commission ruling that the effect of Halo’s ICA with AT&T Missouri on other Missouri carriers is discriminatory and contrary to the public interest.

<sup>1</sup> The Craw-Kan Respondents include: Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Goodman Telephone Company, Granby Telephone Company, Iamo Telephone Company, McDonald County Telephone Company, Miller Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, and Peace Valley Telephone Company, Inc.

<sup>2</sup> On June 22, 2012, Public Counsel filed its position statement and requested to be excused from the evidentiary hearing. That request was granted that same day. See EFIS Docket Entry No. 94, *Order Granting the Office of the Public Counsel's Motion to be Excused*, issued June 22, 2012. EFIS is the Commission’s Electronic Information and Filing System.

<sup>3</sup> In this order, the terms “wireline” and “landline” traffic will be used interchangeably to describe calls that are both originated and terminated by landline customers. “Wireless traffic” describes calls that are originated by a wireless customer and terminated to a landline customer.

<sup>4</sup> The Alma Respondents include: Alma Communications Company d/b/a Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial, Inc.

In this order, the Commission finds and concludes that Halo has committed a material breach of the ICA with AT&T Missouri by delivering substantial amounts of landline-originated traffic and therefore authorizes and directs AT&T Missouri to immediately cease performance under the ICA with Halo. In addition, Halo is liable to AT&T Missouri for access charges on the interexchange landline traffic that Halo delivered to AT&T Missouri and that AT&T Missouri delivered to its end user customers.

The Commission also finds and concludes that Halo has violated the ERE Rule by: (1) failing to pay or, in AT&T Missouri's case, substantially underpaying the Respondents for compensable traffic, (2) improperly delivering interLATA wireline traffic over the LEC-to-LEC network; and (3) failing to provide appropriate originating caller identification information. Accordingly, this order authorizes and directs the Respondents to immediately begin blocking Halo's traffic pursuant to the ERE Rule.

Because this order grants the relief requested by the RLEC Respondents,<sup>5</sup> at this time the Commission does not need to address Alma, et al.'s claims in File No. TO-2012-0035 that the effect of Halo's ICA with AT&T Missouri has been discriminatory and contrary to the public interest.

## **BACKGROUND AND PROCEDURAL HISTORY**

### **A. Historical Background of Halo Dispute**

#### **1. Prior Blocking of Halo Traffic**

In late 2010 and early 2011, small rural LECs ("RLECs") in Missouri became aware that Halo was delivering what appeared to be landline-originated interexchange calls to their exchanges over the LEC-to-LEC network without an approved agreement and without paying the Commission-approved tariff rates for such calls.<sup>6</sup> Although Halo claimed that all of its traffic was intraMTA wireless traffic, another group of Missouri RLECs were suspicious of this claim because the amount of traffic Halo was delivering was disproportionately large for a new wireless carrier when compared to the amount of traffic they were receiving from established, national wireless carriers.

Several Missouri RLECs undertook their own analysis of Halo's traffic and found that a substantial portion of the traffic appeared to be landline-originated interexchange traffic.<sup>7</sup> Given the nature of this traffic and Halo's refusal to enter into negotiations to establish an interconnection agreement, in February of 2011 these Missouri RLECs commenced the blocking process for Halo's traffic under the ERE Rule for non-payment.<sup>8</sup> At that time, Halo filed a request with the FCC to address the blocking on an expedited resolution docket, but the FCC declined.<sup>9</sup> As a result, numerous other small RLECs blocked Halo's traffic in 2011 pursuant to the ERE Rule with the assistance of AT&T Missouri.<sup>10</sup>

<sup>5</sup> The RLEC Respondents include both the Craw-Kan Respondents and the Alma Respondents. See Footnotes 1 and 4, *supra*.

<sup>6</sup> EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, p. 4; EFIS Docket Entry No.222, Alma et al Exhibit 1, Direct Testimony Molina, p. 5; EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit No. 1, pp. 4-7.

<sup>7</sup> EFIS Appeal Case No. AP11-00682, U.S. District Court for the Western District of Missouri, *Halo Wireless, Inc. v. Citizens Telephone Company of Higginsville, Missouri, et al.*, Docket Entry No. 1, Exhibit 12, pp. 2-3.

<sup>8</sup> E FIS Docket Entry No. 223, Alma et al Exhibit 2, Direct Testimony Loges, p. 7; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, p. 8.

<sup>9</sup> EFIS Appeal Case No. AP11-00682, *Halo Wireless, Inc. v. Citizens Telephone Company of Higginsville, Missouri, et al.*, Docket Entry No. 60, Suggestions in Support of Defendants Citizens Telephone Company of Higginsville, Missouri et al.'s Motion to Abstain or Dismiss, Attachment A, Letter from FCC Enforcement Bureau, dated June 6, 2011.

<sup>10</sup> *Id.*

## 2. MoPSC Complaint Case Proceedings

In June of 2011, nearly all of Missouri's small RLECs filed two complaint cases against Halo with the Commission. Among other things, those complaint cases sought a determination that Halo's traffic was subject to the appropriate intrastate access rates and the blocking provisions of the ERE Rule. The Commission dismissed those two cases without prejudice after Halo filed the instant complaint case.<sup>11</sup>

Alma et al. also filed a complaint case seeking a determination by the Commission that the transit provisions in Halo's ICA with AT&T Missouri were discriminatory and contrary to the public interest because they allowed Halo to use rural network facilities without an agreement or compensation arrangements. Craw-Kan et al. intervened in the case, designated as TO-2012-0035, which was consolidated with the instant case solely for purposes of hearing.

## 3. Federal Court Proceedings in Missouri

In response to the RLECs' Commission complaint cases, Halo filed two lawsuits against the RLECs in the United States District Court for the Western District of Missouri. On July 11, 2011, Halo filed the first federal lawsuit seeking a declaratory judgment that the issues related to Halo's activities and operations were within the exclusive jurisdiction of the FCC. Halo's lawsuit sought injunctive relief to prevent the Missouri RLECs from pursuing their claims before this Commission rather than the FCC. Halo's lawsuit was followed on August 11, 2011 by Halo's Suggestions of Bankruptcy and Notice of Stay. The RLECs filed their motions to dismiss on August 19, 2011. On August 22, 2011, Judge Gaitan issued an *Order* ruling that the case was not stayed by Halo's Bankruptcy because the Code's automatic stay does not apply to judicial proceedings, such as Halo's suit, "that were initiated by the debtor."<sup>12</sup> On September 6, 2011, shortly after Judge Gaitan's order was issued, Halo filed a notice of dismissal.

On August 28, 2011, Halo filed notices of removal of the Missouri RLECs' Commission complaint cases to the Western District of Missouri in Case Nos. 11-cv-04218, 11-cv-04220, and 11-cv-04221. The RLECs filed motions to remand the cases to the Commission which were granted by Judge Laughrey on December 21, 2011. Judge Laughrey's *Orders* stated:

The Commission has the authority to regulate the subject matter of this dispute, and the Court does not have jurisdiction over Plaintiff's claims until the Commission has rendered a decision for the Court to review. To the extent Defendant argues that Plaintiff's claims should first be decided by the FCC, this argument is mooted by the FCC's recent rulemaking decision rejecting Defendant's position and reaffirming that the power to regulate these issues lies with state agencies.<sup>13</sup>

<sup>11</sup> *Alma Tel. et al. v. Halo Wireless, Inc.*, File No. IC-2011-0385 and *BPS Tel. et al. v. Halo Wireless, Inc.*, File No. TC-2011-0404, *Order Dismissing Complaints without Prejudice*, issued April 25, 2012.

<sup>12</sup> EFIS Docket Entry No. 150, *Halo Wireless v. Citizens Telephone Co. of Higginsville, Mo. et al.*, Case No. 11-cv-00682, *Order*, p. 1.

<sup>13</sup> EFIS Docket Entry No. 151, *BPS Telephone et al. v. Halo Wireless*, Case No. 11-cv-04220, *Order*.

#### 4. Halo's Texas Bankruptcy Proceedings

On August 8, 2011, Halo filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Texas ("Texas Bankruptcy Court").<sup>14</sup> In the Texas Bankruptcy case, Halo sought a ruling that the multiple state public utility commission complaint proceedings against Halo were stayed by the bankruptcy proceedings. Halo also sought to transfer the Missouri Commission complaint proceedings to the Texas Bankruptcy Court and have them heard in a central adversary proceeding.

#### 5. Texas Bankruptcy Court Order and Fifth Circuit Opinion

AT&T Missouri and the Missouri RLECs, along with many other similarly situated telephone companies, sought a ruling from the Texas Bankruptcy Court that proceedings before numerous state public utility regulatory commissions were not stayed by Halo's bankruptcy filing. The Texas Bankruptcy Court held an initial hearing on September 30, 2011, and it then made its findings of fact and conclusions of law on the record on October 7, 2011. The Texas bankruptcy court denied Halo's request and issued a ruling that the state public utility commission proceedings could continue under the regulatory power and proceedings exception to the bankruptcy code. Specifically, the bankruptcy court ruled that all state regulatory commission proceedings were excepted from the automatic stay under § 362(b)(4). The bankruptcy court then incorporated its findings of fact and conclusions of law in Stay Exception Orders entered on October 26, 2011, which Halo appealed on that same day.<sup>15</sup>

On June 18, 2012, the United States Court of Appeals for the Fifth Circuit affirmed the Texas Bankruptcy Court's ruling that the numerous actions involving Halo pending before state public utility regulatory commissions could move forward. The Fifth Circuit stated:

A fundamental policy behind the police or regulatory power exception . . . is to prevent the bankruptcy court from becoming a haven for wrongdoers. . . . If Halo is permitted to stay all of the PUC proceedings, it will have used its bankruptcy filing to avoid the potential consequences of a business model it freely chose and pursued.<sup>16</sup>

Thus, the Fifth Circuit concluded that the Texas Bankruptcy Court's finding that the state commission actions were continued by governmental units was consistent with the statutory language of § 362(b)(4), and was in keeping with the policy for the exception. The Fifth Circuit also observed that the PUC proceedings were being used to enforce the police and regulatory power of the states.

<sup>14</sup> On July 19, 2012, the Texas Bankruptcy Court issued its *Order Converting Halo's Chapter 11 Case to Case under Chapter 7 of the Bankruptcy Code*. See EFIS Docket Entry No. 237.

<sup>15</sup> EFIS Docket Entry No. 83, *In the Matter of Halo Wireless, Inc. v. Alenco Communications et al.*, United States Court of Appeals for the Fifth Circuit Case No. 12-40122, *Opinion*, pp. 5-6.

<sup>16</sup> EFIS Docket Entry No 83, *In the Matter of Halo Wireless, Inc. v. Alenco Communications et al.*, United States Court of Appeals for the Fifth Circuit Case No. 12-40122, *Opinion*, p. 26 (citations and quotations omitted).

## 6. FCC Connect America Fund Order

After receiving numerous written comments and several *ex parte* presentations from Halo and many LECs, the Federal Communications Commission's (FCC) November 18, 2011 *Connect America Fund Order*<sup>17</sup> rejected Halo's arguments and found that Halo's practices did not convert landline calls into something else. Specifically, the FCC held, "[T]he 're-origination' of a call over a wireless link in the middle of a call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position."<sup>18</sup> Rather, the FCC clarified that the originating caller remains the appropriate reference point for purposes of intercarrier compensation, and Halo's arrangement did not transform the nature of the calls. Thus, the FCC expressly rejected Halo's "wireless-in-the middle" argument.<sup>19</sup>

### B. Procedural History and Travel of the Instant Case

#### 1. Halo Complaint to Dispute RLEC and AT&T Blocking Requests

In February and March of 2012, the RLEC Respondents notified Halo that Halo's traffic would be blocked pursuant to the Commission's Enhanced Record Exchange (ERE) Rule due to Halo's failure to pay for compensable traffic being delivered over the LEC-to-LEC network, improper delivery of interLATA wireline traffic over the LEC-to-LEC network, and/or failure to include appropriate originating caller identification. The RLEC Respondents also notified the Commission's Telecommunications Department as required by the ERE Rule and sought assistance from AT&T Missouri in implementing the block.<sup>20</sup>

Subsequently, AT&T Missouri also notified Halo that AT&T Missouri would begin blocking Halo's traffic pursuant to the ERE Rule due to Halo's failure to pay AT&T Missouri the appropriate rate for its landline-originated traffic.<sup>21</sup> Both the RLEC Respondents and AT&T Missouri notified Halo of Halo's right to contest the blocks by filing a complaint with the Commission pursuant to the ERE Rule.

On April 2, 2012, Halo filed a complaint pursuant to the ERE Rules in response to the traffic blocking requests made by the RLEC Respondents and AT&T Missouri. Halo's complaint sought alternative forms of relief, the first of which was to stay the complaint proceeding until the Texas Bankruptcy Court ruled on the propriety of the blocking notices. Halo also contested, on numerous grounds, the propriety of the blocking notices as well as the Commission's authority to issue relief pursuant to the ERE Rules. Halo also requested expedited consideration of its complaint by the Commission.<sup>22</sup>

<sup>17</sup> *In the Matter of the Connect America Fund*, WC Docket No. 10-90 et al., *Report and Order*, released Nov. 18, 2011.

<sup>18</sup> *Id.* at 1006.

<sup>19</sup> Halo appealed the FCC's *Order* as part of a consolidated proceeding in the United States Court of Appeals for the Tenth Circuit, but the FCC's *Order* as it relates to Halo has not been stayed.

<sup>20</sup> See EFIS Docket Entry No. 226, *Craw-Kan et al. Exhibit 1, Wilbert Direct*, p. 7 and Ex. 6. EFIS Docket Entry No. 223, *Alma et al. Exhibit 2, Loges Direct Testimony, Alma Attachments A and B*; EFIS Docket Entry No. 222, *Alma et al. Exhibit 1, Molina Direct Testimony, Choctaw Attachments A and B, MoKan Attachments A and B*.

<sup>21</sup> EFIS Docket Entry No. 1, *Halo April 2, 2012 Complaint, Exhibits A through D*.

<sup>22</sup> EFIS Docket Entry No. 1.

On April 3, 2012, the Commission issued an order giving notice of a contested case and directing expedited responses to Halo's request for a stay.<sup>23</sup> Also on April 3, 2012, AT&T Missouri filed notice that it had ceased its blocking preparations pending the Commission's decision in this case.<sup>24</sup>

On April 11, 2012, the Commission issued an order denying Halo's request to stay the proceedings pending resolution of issues before the Texas Bankruptcy Court. The Commission concluded that proceedings before state public utility commissions had not been stayed by the bankruptcy proceedings. The Commission observed that while Halo's bankruptcy may prevent the RLEC Respondents from ever being compensated for Halo's pre-bankruptcy traffic, bankruptcy law does not allow Halo to continue: (a) receiving service and using RLEC Respondents' Missouri networks without payment, or (b) violating the Commission's ERE Rule.<sup>25</sup> The Commission also noted that the plain language of the bankruptcy code makes clear that the automatic stay does not apply to judicial proceedings initiated by the debtor.<sup>26</sup>

On May 1, 2012, the RLEC Respondents jointly filed a motion to consolidate this action with File Number TO-2012-0035, a complaint case filed by Alma, et al. seeking a determination that the ICA between AT&T and Halo was discriminatory and contrary to the public interest, which had been held in abeyance. On May 2, 2012, Craw-Kan, et al. filed a motion to dismiss, suggesting that Halo could not maintain its suit under Missouri law because Halo had failed to maintain its Certificate of Authority as a Foreign Corporation to operate in Missouri. On May 17, 2012, the Commission issued an order denying Craw-Kan et al.'s motion to dismiss Halo's complaint. The Commission's order granted the RLEC Respondents' motion to consolidate File Number TC-2012-0331 with File Number TO-2012-0035. Accordingly, the Commission reactivated File Number TO-2012-0035 and designated File Number TC-2012-0331 as the lead case.<sup>27</sup>

## **2. AT&T Counterclaim**

AT&T Missouri filed an answer and counterclaim to Halo's complaint which included a formal complaint and request for declaratory ruling seeking an order excusing AT&T Missouri from further performance under its wireless ICA with Halo, based on Halo's material breaches of the ICA. AT&T Missouri alleged that the ICA does not authorize Halo to send AT&T Missouri traffic that does not originate on a wireless network. AT&T Missouri further alleged that Halo breached and is breaching the ICA by sending large volumes of traffic that does not originate on a wireless network, in furtherance of an access charge avoidance scheme; and by failing to provide AT&T Missouri proper call information to allow AT&T to bill Halo for the termination of Halo's traffic. AT&T Missouri also sought an order finding that Halo owes AT&T Missouri the applicable access charges for the non-local landline traffic Halo has sent to AT&T Missouri (without determining any specific amount due).<sup>28</sup>

<sup>23</sup> EFIS Docket Entry No. 3.

<sup>24</sup> EFIS Docket Entry No. 2.

<sup>25</sup> EFIS Docket Entry No. 30, p. 6.

<sup>26</sup> EFIS Docket Entry No. 30, p. 6.

<sup>27</sup> EFIS Docket Entry No. 55.

<sup>28</sup> EFIS Docket Entry No. 45, *AT&T Missouri's Answer, Affirmative Defenses, Counterclaim and Motion for Expedited Treatment*, filed May 2, 2012.

Halo responded with a motion to dismiss AT&T Missouri's counterclaim.<sup>29</sup> On May 17, 2012, the Commission issued an order denying Halo's motion to dismiss AT&T Missouri's counterclaim.<sup>30</sup>

### 3. Evidence and Contested Hearing

Halo, the RLEC Respondents, AT&T Missouri, and the Commission Staff ("Staff") all filed written testimony, and all parties except Halo filed an agreed issues list, list of witnesses, and order of cross-examination on June 21, 2012.<sup>31</sup> Halo filed its separate list of issues on June 22, 2012,<sup>32</sup> and all of the parties filed position statements on that same date.<sup>33</sup> On June 25, 2012, Halo filed objections and moved to strike substantial portions of the testimony filed by the witnesses for AT&T Missouri, the Respondent RLECs, and Staff. The evidentiary hearing was conducted on June 26-27, 2012.<sup>34</sup> Ultimately, Halo's objections to the other parties' testimony were overruled and its motions to strike were denied by the Commission on July 9, 2012.<sup>35</sup>

The post-hearing procedural schedule required the parties to file proposed orders with proposed findings of fact and proposed conclusions of law no later than July 23, 2012. On July 23, 2012, local counsel for Halo, Daniel Young, on behalf of himself and his colleague Louis Huber, notified the Regulatory Law Judge ("RLJ"), that he was not authorized by his client to proceed with the required filing. None of Halo's other attorneys made a filing on Halo's behalf or contacted the RLJ. And none of Halo's attorneys sought an extension of time, nor have they sought leave to withdraw. Halo did not avail itself of the opportunity to present additional argument to the Commission. The RLJ issued a notice with regard to Halo's failure to comply with this deadline. That notice will be attached to this order as Attachment A.

The final post-hearing procedural deadline was the deadline of July 30, 2012 for the filing of reply briefs. Halo did not file a reply brief, and because Halo had not filed a proposed order on July 23, 2012, the Respondents had no reason to file a reply brief.

<sup>29</sup> EFIS Docket Entry No. 52.

<sup>30</sup> EFIS Docket Entry No. 55.

<sup>31</sup> EFIS Docket Entry No. 87.

<sup>32</sup> EFIS Docket Entry No. 90.

<sup>33</sup> EFIS Docket Entry Nos. 92-93 and 95-97.

<sup>34</sup> Transcript, Volumes 2 through 5. In total, the Commission admitted the testimony of 17 witnesses and received 29 exhibits into evidence. Proposed findings of fact were filed on July 23, 2012. Reply Briefs were filed on July 30, 2012, and the case was deemed submitted for Commission's decision on that date when the Commission closed the record. "The record of a case shall stand submitted for consideration 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).

<sup>35</sup> EFIS Docket Entry No. 210.

## **FINDINGS OF FACT**

An administrative agency, as fact-finder, receives deference when choosing between conflicting evidence.<sup>36</sup> 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.”<sup>37</sup>

Appellate courts must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.<sup>38</sup> And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.<sup>39</sup> 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.<sup>40</sup>

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

Witness credibility is solely a matter for the fact-finder, “which is free to believe none, part, or all of the testimony.”<sup>44</sup> 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. 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.

Bearing these evidentiary principles in mind, the Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

<sup>36</sup> *State ex rel. Missouri Office of Public Counsel v. Public Service Comm’n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009).

<sup>37</sup> *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).

<sup>38</sup> *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).

<sup>39</sup> *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).

<sup>40</sup> *Id.*

<sup>41</sup> *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).

<sup>42</sup> *Id.*

<sup>43</sup> *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).

<sup>44</sup> *State ex rel. Public Counsel v. Missouri Public Service Comm’n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

## A. The Parties

### 1. Halo

Complainant, Halo Wireless, Inc., is a Texas corporation with its principal place of business at 2351 West Northwest Highway, Suite 1204, Dallas Texas 75220.<sup>45</sup> Halo holds a Radio Station Authorization granted by the FCC on January 27, 2009 providing a nationwide, non-exclusive license qualifying Halo “to register individual fixed and base stations for wireless operations in the 3650-3700 MHz band.”<sup>46</sup>

Halo was originally granted a certificate of authority to transact business as a foreign corporation in the State of Missouri by the Missouri Secretary of State on January 29, 2010. Halo’s certificate of authority was administratively dissolved by the Secretary of State on August 25, 2010, for failure to file an annual report. Halo filed an Application for Reinstatement with the Secretary of State with the required Certificate of Tax Clearance from the Missouri Department of Revenue, Halo’s Annual Registration reports for 2010, 2011, and 2012, and the required rescission fee.<sup>47</sup> The Secretary of State issued a Certificate rescinding the administrative dissolution on June 1, 2012.<sup>48</sup>

### 2. Transcom

Transcom Enhanced Services, Inc. (“Transcom”) is a Texas corporation, with headquarters in Fort Worth, Texas. Transcom and Halo have “overlapping” ownership, with Scott Birdwell, the CEO, chairman and largest single individual owner of Transcom owning 50% of Halo. Russell Wiseman, the president of Halo, reports to a management committee of investor owners consisting of Scott Birdwell, Jeff Miller and Carolyn Malone. Mr. Miller and Ms. Malone serve as CFO and Secretary/Treasurer, respectively, of both Transcom and Halo.<sup>49</sup> Transcom is Halo’s only paying customer and the source of 100% of Halo’s revenues nationwide.<sup>50</sup>

### 3. AT&T Missouri

Respondent Southwestern Bell Telephone Company, d/b/a AT&T Missouri is an incumbent local exchange carrier (“ILEC”) as defined in 47 U.S.C. § 251(h) with offices at 909 Chestnut Street, St. Louis, Missouri, 63101. AT&T Missouri is a “local exchange telecommunications company” and a “public utility,” and is duly authorized to provide “telecommunications service” within the State of Missouri, as each of those phrases is defined in Section 386.020, RSMo 2000 in accordance with tariffs on file with and approved by the Commission.<sup>51</sup>

<sup>47</sup> EFIS Docket Entry No. 50, Halo Opposition to Craw-Kan Telephone et al.’s Motion to Dismiss the First Amended Complaint, filed May 11, 2012 at para. 2 and Ex. A.

<sup>48</sup> EFIS Docket Entry No. 82, Halo Notice of Filing of Certificate of Rescission, filed June 20, 2012.

<sup>49</sup> EFIS Docket Entry No. 72, Halo Exhibit A, Wiseman Direct, p. 8. EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, p. 10.

<sup>50</sup> EFIS Docket Entry No. 72, Halo Exhibit A, Wiseman Direct, p. 48. EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, p. 8.

<sup>51</sup> Following its June 26, 2007, Order in Case No. TO-2002-185 allowing Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, to alter its status from a Texas limited partnership to a Missouri corporation, the Commission approved tariff revisions to reflect the new corporate name, Southwestern Bell Telephone Company d/b/a AT&T Missouri. See, *Order Granting Expedited Treatment and Approving Tariffs*, Case No. TO-2002-185, issued June 29, 2007.

#### **4. RLEC Respondents**

Respondents Craw-Kan et al. and Alma et al. are all incumbent local exchange “telecommunications companies” providing “basic local telecommunications services” and “exchange access services,” as those terms are defined by §386.020 RSMo, to customers located in their service areas pursuant to a certificates of service authority issued by the Commission and tariffs on file with and approved by the Commission.

#### **5. The Office of the Public Counsel**

The Office of Public Counsel (“Public Counsel”) “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”<sup>52</sup> Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”<sup>53</sup>

#### **6. Commission Staff**

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.<sup>54</sup>

### **B. Halo and Transcom’s Activities**

#### **1. Transcom**

Transcom is a very high volume “least cost router” operating in the middle of long distance calls offering wholesale transport and termination using the cheapest available routing. Until recently, its company website represented its “core service offering” as “voice termination service,” (which is the intermediate routing of telephone calls between carriers for termination to the carrier serving the called party) and stated that Transcom terminates “nearly one billion minutes per month.” Transcom operates switches (or “data centers”) in Dallas, New York, Atlanta and Los Angeles, where it accepts traditional circuit-switched traffic in Time Division Multiplexing (“TDM”) format and in Internet Protocol (“IP”) format. Transcom provides service to the largest Cable Multiple System Operators (“Cable/MSOs”), competitive LECs (“CLECs”), broadband service providers, and wireless carriers.<sup>55</sup>

#### **2. Halo’s ICA with AT&T Missouri**

In June of 2010, Halo “opted-in”<sup>56</sup> to an existing ICA between AT&T Missouri and VoiceStream (now known as T-Mobile), which was filed with the Commission under VT-2010-0029. The Commission had previously approved the ICA in Case No. TO-2001-489.<sup>57</sup> Pursuant to 4 CSR 240-3.513(4), Halo’s adoption of the T-Mobile agreement was deemed approved upon its submission to the Commission.

<sup>52</sup> Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(15) and 2.040(2).

<sup>53</sup> Section 386.710(3), RSMo 2000.

<sup>54</sup> Commission Rules 4 CSR 240-2.010(10), (21) and 2.040(1).

<sup>55</sup> EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, pp. 8-11. A copy of Transcom’s webpage is filed under EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, Schedule JSM-3.

<sup>56</sup> Halo adopted the T-Mobile agreement as a most favored nation (“MFN”) ICA pursuant to Section 252(i) of the Telecommunications Act of 1996.

<sup>57</sup> EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, pp. 12-13. A copy of the AT&T/T-Mobile USA ICA and the Halo/AT&T MFN ICA are filed under EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, Schedule JSM-4.

There is also a provision in Halo's ICA with AT&T Missouri that allows Halo to transit traffic through AT&T Missouri for termination to Third Party Providers, such as RLEC Respondents. This "transit" provision provides in relevant part as follows:

Carrier and SWBT shall compensate each other for traffic that transits their respective systems to any Third Party Provider . . . The Parties agree to enter into their own agreements with Third Party Providers.<sup>58</sup>

In Missouri, Halo has not entered into any agreements with RLEC Respondents for the traffic it transits through AT&T Missouri for termination to the RLEC Respondents.<sup>59</sup>

### 3. Halo's ICA Amendment

At the time Halo and AT&T Missouri executed the ICA, they also executed an amendment to the ICA which expressly limited Halo to sending only wireless-originated traffic to AT&T Missouri.

Whereas, the Parties have agreed that this Agreement will apply *only* to (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) traffic that *originates through wireless transmitting and receiving facilities* before [Halo] delivers traffic to AT&T for termination by AT&T or for transit to another network.<sup>60</sup>

The Commission approved the Amendment on August 19, 2010 in Case No. IK-2010-0384.

### 4. Halo Agreements with AT&T ILEC Affiliates in Other States

Similar ICAs were adopted by Halo throughout most of the AT&T multi-state ILEC footprint. After the adoption of these agreements, it became evident to AT&T that Halo was sending landline traffic to AT&T Missouri as well as AT&T Missouri's affiliates in other states.<sup>61</sup> As a result, the AT&T affiliates in other states filed complaint cases against Halo with numerous state public utility commissions seeking to excuse those AT&T affiliates from further performance under the agreements with Halo due to Halo's material breaches.<sup>62</sup> Four of those state commissions have now rendered decisions, and all four (Georgia, South Carolina, Tennessee and Wisconsin) ruled in favor of the AT&T ILEC complainants, concluding that Halo breached its interconnection agreements with AT&T by delivering traffic to AT&T that is not wireless-originated and authorizing the AT&T affiliates to discontinue service to Halo. In addition, all four commissions ruled that Halo is liable for access charges on the non-local landline traffic Halo delivered to AT&T affiliates.<sup>63</sup>

<sup>58</sup> AT&T/Halo Interconnection Agreement, Section 3.1.3.

<sup>59</sup> See EFIS Docket Entry No. 226, *Craw-Kan et al. Exhibit 1, Wilbert Direct*, p. 3.

<sup>60</sup> A copy of the Amendment to the Halo/AT&T MFN ICA is filed under EFIS Docket Entry No. 66, AT&T Exhibit 1, *McPhee Direct*, Schedule JSM-5, para. 1. (Emphasis added)

<sup>61</sup> See EFIS Docket Entry No. 219, AT&T Exhibit 3, *Mark Neinast Direct*, pp. 10, 13-14 and Schedules MN-4 and 5.

<sup>62</sup> EFIS Docket Entry No. 66, AT&T Exhibit 1, *McPhee Direct*, pp. 2-3.

<sup>63</sup> See EFIS Docket Entry No. 153, *Tennessee Halo Order*, at 22; EFIS Docket Entry No. 236, *Georgia Halo Order* at 15 and *South Carolina Halo Order* at 27. The Public Service Commission of Wisconsin has not yet issued its written order.

### **C. Traffic Being Delivered by Halo and Transcom in Missouri**

Transcom and Halo are operating in concert. Transcom is a very high-volume “least-cost router” operating in the middle of long distance calls. It aggregates third-party long distance traffic by selling its “voice termination service” and then hands the traffic off to Halo, which claims the traffic is wireless-originated intraMTA traffic.<sup>64</sup>

Transcom and Halo both have equipment at tower sites in Junction City, Kansas and Wentzville, Missouri, from which traffic is delivered for termination to AT&T Missouri and the RLEC Respondents.<sup>65</sup> Every call that comes to Halo for termination in Missouri first passes from the carrier whose end-user originated the call to Transcom (typically, indirectly through intermediate carriers) at one of its four switching stations (or data centers) in Dallas, New York, Atlanta, and Los Angeles.<sup>66</sup> Transcom then sends the call to its equipment at the tower site where Transcom then transmits the call, wirelessly, for about 150 feet to Halo’s equipment.<sup>67</sup> Halo then sends the call on to AT&T Missouri’s tandem switch for termination to an AT&T Missouri end-user or to be passed on to third party carriers, such as RLEC Respondents, for termination.<sup>68</sup> There is no technical reason for the 150 foot length between Transcom and Halo to be wireless. The same connection could be made much less expensively by using a short “CAT-5” cable, and using a cable would increase service reliability.<sup>69</sup>

For traffic that Transcom passes to Halo, Transcom does not originate the call (the calling party does), Transcom does not decide who will be called (the calling party does), and Transcom does not provide voice content that the calling and called parties exchange on the call. Transcom’s equipment is not capable of originating a call; it simply converts IP data into a radio signal.<sup>70</sup>

#### **1. Transcom’s Involvement in the Calls**

Transcom does not alter or add to the content of any call. The calling and called parties say their own words and that is all that gets transmitted. Transcom only tries to make the voice communications more clear by suppressing background noise and adding comfort noise. These call-conditioning efforts are similar to what other carriers normally provide, and have provided for some time, as an incidental part of voice service.<sup>71</sup>

<sup>64</sup> EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, p. 11.

<sup>65</sup> EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, pp. 4-8.

<sup>66</sup> EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, p 6.

<sup>67</sup> EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, pp 5-8.

<sup>68</sup> EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, p 7.

<sup>69</sup> EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, pp 6-9.

<sup>70</sup> EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, pp 8.

<sup>71</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 22; EFIS Docket Entry No. 221, AT&T Exhibit 5, Drause Rebuttal, p. 11.

None of Transcom's written marketing materials make mention of the "enhancements" that Transcom provides. Until recently, Transcom's website stated that Transcom's "core service offering" is "voice termination service," and it made no mention of any purported service enhancements. Similarly, these "enhancements" are not mentioned in Transcom's contracts with its customers.<sup>72</sup>

The end-users that originate and make calls do not order a different service (in fact, they do not order any service from Transcom); they do not pay different rates for their calls because Transcom is involved; and they place and receive calls in exactly the same way they would if Transcom did not exist. Thus, from the customer's perspective (i.e., the calling party), any efforts Transcom undertakes to condition the call are merely incidental to the underlying voice service provided by the calling party's carrier and does not alter the fundamental character of the underlying service.<sup>73</sup>

## **2. Halo's Use of LEC-to-LEC Network**

Halo has direct interconnections with certain AT&T Missouri tandem switches. All of the trunks that Halo ordered to deliver traffic to AT&T Missouri were trunks reserved for wireless traffic only.<sup>74</sup> AT&T Missouri and the RLEC Respondents maintain a jointly owned network of common trunks between the AT&T tandems and RLEC Respondents' central offices. This network is sometimes referred to as the "LEC-to-LEC Network" or the "Feature Group C Network." Halo has used its direct interconnections with AT&T Missouri to send traffic to AT&T Missouri customers. Halo has also used its interconnections with AT&T Missouri to deliver traffic indirectly over the common trunk groups between AT&T Missouri and the RLECs for termination to RLEC customers.<sup>75</sup>

<sup>72</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 25-26,

<sup>73</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 23-24,

<sup>74</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 8,

<sup>75</sup> See EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, p. 8; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, pp. 8-9; EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Direct Testimony Wilbert, p. 3.

### 3. AT&T and RLEC Traffic Studies

The traffic studies by AT&T Missouri and several of the RLECs demonstrate that Halo is delivering substantial amounts of wireline traffic, including interLATA<sup>76</sup> traffic, to AT&T Missouri and the RLECs.<sup>77</sup> AT&T Missouri analyzed the calls Halo sent to it during one-week periods in March 2011 and September 2011, and during a four-week period in February-March, 2012.<sup>78</sup> AT&T Missouri began its analysis by identifying the Calling Party Number (CPN) on each call received from Halo, i.e., the telephone number of the person who initiated the call. AT&T then consulted the industry's Local Exchange Routing Guide (LERG) and the North American Numbering Plan's (NANP) Local Number Portability (LNP) database to determine what kind of carrier (landline or wireless) owned that telephone number and whether the carrier that owned the number had designated it in the LERG as landline or wireless.<sup>79</sup> Based upon this, AT&T Missouri was able to determine how many landline originated calls Halo was sending.<sup>80</sup> During the three periods reviewed, the call data showed that 22%, 56% and 66%, respectively, of the calls that Halo delivered to AT&T originated as landline calls.<sup>81</sup>

AT&T's traffic study data for the individual RLEC Respondents also showed that Halo was delivering significant amounts of interMTA wireless traffic. For example, the AT&T Missouri traffic study indicates that only 9-15% of the traffic Halo sends to McDonald County Telephone Company (McDonald County) was local or intraMTA wireless traffic.<sup>82</sup> The majority of Halo's traffic to McDonald County (between 85-91%) was either interMTA wireless traffic or landline interexchange traffic – both of which are subject to the McDonald County's approved access tariffs.

<sup>76</sup> Missouri law defines "Local Access and Transportation Area" or "LATA" as a "contiguous geographic area approved by the U.S. District Court for the District of Columbia in *United States v. Western Electric*, Civil Action No. 82-0192 that defines the permissible areas of operations for the Bell Operating companies." Section 386.020(30) RSMo. Supp. 2011. The ERE Rule adopts 386.020's statutory definition of LATA and defines IntraLATA and Inter LATA traffic as follows:

(A) IntraLATA telecommunications traffic is telecommunications traffic originating and terminating within the same LATA.

(B) InterLATA telecommunications traffic is telecommunications traffic originating and terminating in different LATAs.

ERE Rule, 4 CSR 240-29.020(17).

<sup>77</sup> See EFIS Docket Entry No. 219, AT&T Exhibit 3, Mark Neinast Direct, pp. 13-14 and Schedules MN-4 and 5; EFIS Docket Entry No. 231, Craw-Kan et al. Exhibit 6, McDonald County Telephone Company witness Benjamin Jack Rickett Direct, p. 6 and Proprietary Ex. 5.

<sup>78</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 11.

<sup>79</sup> *Id.* at 12.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 13.

<sup>82</sup> EFIS Docket Entry No. 231, Craw-Kan et al. Exhibit 6, Benjamin Jack Rickett Direct, p. 6 and Proprietary Ex. 5; see also EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, pp 8-9, Alma Attachments C-1 and C-2. 7; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, pp. 9-10, Choctaw Attachments C-1 and C-2, MoKan Attachments C-1 and C-2.

A study that McDonald County witness Jack Rickett conducted in late March of 2012 also revealed that landline long distance calls being originated and routed to the interexchange carrier (IXC) "Feature Group D" network by customers in one McDonald County exchange were being delivered as "Halo Wireless" intraMTA wireless calls to landline customers in another McDonald County exchange.<sup>83</sup> Mr. Rickett's findings are consistent with a study done by another small rural Missouri LEC, which found that landline interLATA calls from its regulatory attorneys' offices in Jefferson City, Missouri (in the central Missouri "Westphalia" LATA) to that company's landline network in Higginsville, Missouri (in the western Missouri "Kansas City" LATA) had been routed from CenturyLink to Transcom and then delivered by Halo over the LEC-to-LEC network as an "intraMTA wireless" call.<sup>84</sup> These calls were clearly in-state, inter-LATA landline calls originated by the FGD protocol trunking arrangements, yet Halo delivered these calls over the LEC-to-LEC network as intra-LATA "wireless" calls and refused to pay the appropriate tariff rates.<sup>85</sup>

Halo has offered no traffic studies of its own to contradict the studies showing that substantial amounts of Halo's traffic originates on landline facilities. Rather, Halo concedes that some of the traffic it is delivering to AT&T Missouri and the RLECs originates on landline facilities.<sup>86</sup> Likewise, Halo has offered no traffic studies to contradict AT&T's traffic studies showing that substantial amounts of Halo's traffic are interLATA landline traffic. Halo has offered no traffic studies or evidence to contradict the RLEC analysis that Halo traffic had been originated by FGD protocol trunking arrangements.

Halo argues that CPN may not always identify a call's origination point. While there are some situations where CPN may not always identify the origination point or originating carrier of a call, those situations are the exception, not the rule. The data and methods AT&T used in its traffic studies are the same data and methods that the entire industry uses today for determining types of calls (i.e., landline or wireless) and jurisdiction of calls.<sup>87</sup>

#### **4. Halo Traffic Included Landline-Originated and InterLATA Calls**

The Commission finds that the AT&T Missouri and RLEC traffic studies are competent and substantial evidence demonstrating that Halo is delivering interexchange landline traffic to AT&T Missouri and the RLEC Respondents, of which a significant amount is interLATA wireline traffic and all of which is subject to AT&T Missouri's and the RLEC Respondents' access tariffs. Halo has either failed to pay the lawful rates for this traffic (in the case of the RLEC Respondents) or paid significantly less than the lawful rate for substantial portions of its traffic (in the case of AT&T Missouri).

<sup>83</sup> Tr. 399, 401-2.

<sup>84</sup> EFIS Appeal Case No. AP11-00682, U.S. District Court for the Western District of Missouri, *Halo Wireless, Inc. v. Citizens Telephone Company of Higginsville, Missouri, et al.*, Docket Entry No. 1, Ex. 12.

<sup>85</sup> *Id.* (identifying landline calls from the central Missouri "Westphalia" LATA to the Kansas City LATA).

<sup>86</sup> EFIS Docket Entry No. 211, Halo Exhibit A, Wiseman Direct, p. 61.

<sup>87</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 17.

#### **D. Halo was Billed by the RLEC Respondents but Did Not Pay**

After reviewing the standard Category 11 billing records provided by AT&T Missouri as required by the Commission, each of the RLEC Respondents invoiced Halo for the Halo traffic being delivered for termination to RLEC Respondents' exchanges. In light of the fact that a substantial portion of the traffic appeared to be interexchange wireline calls, some RLEC Respondents billed Halo based on their Commission-approved intrastate access rates.<sup>88</sup> Another group of RLEC Respondents billed Halo invoices based upon their Commission-approved reciprocal compensation rates for "local" wireless traffic even though those companies did not agree that Halo's traffic was wireless.<sup>89</sup> In an effort to minimize its uncollectible write-offs, one RLEC Respondent billed Halo based on the FCC's interim transport and termination compensation rate of \$0.004.<sup>90</sup>

The uncontroverted record in this case shows that Halo has delivered compensable traffic (either access traffic or local reciprocal compensation traffic) and Halo has refused to pay for any of the post-bankruptcy traffic it delivered and continues to deliver to the RLECs, regardless of what rate is billed.<sup>91</sup> Accordingly, the Commission finds that Halo has paid nothing to date for the post-bankruptcy traffic it has delivered to the RLECs.

#### **E. Halo Has Not Paid AT&T the Appropriate Rate**

The Commission has found that Halo has sent landline-originated traffic to AT&T in breach of the ICA, despite AT&T Missouri's demands for Halo to cease sending such traffic.<sup>92</sup> A large portion of that landline traffic is non-local in nature, and AT&T terminated that traffic for Halo. AT&T's federal tariff, filed with the FCC, requires Halo to pay access charges on the interstate traffic AT&T has terminated for Halo;<sup>93</sup> and AT&T's state tariff,

<sup>88</sup> See EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, pp. 5-7; EFIS Docket Entry No. 222, Alma et al. Exhibit 3, Direct Testimony Molina, pp. 5-7.

<sup>89</sup> EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Direct Testimony Wilbert, p. 4 and Proprietary Ex. 2. In addition, Craw-Kan et al. provided Halo with a summary of their approved interconnection agreements with other wireless carriers as well as copies of traffic termination agreements with Cingular (now AT&T Mobility) and T-Mobile. Craw-Kan et al. offered to use the rates, terms, and conditions of these Commission-approved agreements as a starting place for negotiations. *Id.* at pp. 5-6. The Commission notes that it has approved agreements between the Respondent RLECs and all national wireless carriers.

<sup>90</sup> EFIS Docket Entry No. 227, Craw-Kan et al. Exhibit 2, Direct Testimony McCormack, p. 4 and Proprietary Ex. 2; Tr. 335-37; 47 CFR §51.715(3)(b)(3).

<sup>91</sup> See EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, pp. 5-7; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, pp. 5-7; EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Direct Testimony Wilbert, pp. 4-5; Ellington Telephone Company witness McCormack Cross- Examination, Tr. 331. Instead Halo insisted it owed the RLECs nothing, and would only pay the RLECs reciprocal compensation after the RLECs requested interconnection and interconnection agreements from Halo. *Id.*

<sup>92</sup> EFIS Docket Entry No. 217, McPhee Direct, Schedule 9.

<sup>93</sup> Southwestern Bell Telephone Company Interstate Access Service Tariff, F.C.C. No. 73, Section 6.9. 6.11. See also EFIS #217, McPhee Direct, p. 20 - 21.

filed with this Commission, requires Halo to pay access charges on the intrastate non-local traffic AT&T has terminated for Halo.<sup>94</sup> AT&T demanded that Halo pay appropriate switched access charges on all Halo post-bankruptcy petition landline-originated interexchange traffic terminated to AT&T Missouri.<sup>95</sup> But Halo has refused to do so, instead paying only the reciprocal compensation rate under the ICA.<sup>96</sup>

The Commission finds that Halo has sent AT&T interexchange traffic (both interstate and intrastate) that Halo has been misrepresenting as local, and thus subject only to reciprocal compensation charges instead of the higher access charges that apply to non-local traffic. Accordingly, the Commission finds that Halo has failed to pay AT&T Missouri the applicable access rates for terminating Halo's landline originated interexchange traffic.

#### **F. Originating Caller Information Violation**

The exchange of accurate call detail information between interconnected carriers is essential. This information includes, among other things, the phone number of the person that originated the call (the Calling Party Number or CPN) and, in some instances, a different number for the person or entity that bears financial responsibility for the call (the Charge Number or "CN").<sup>97</sup> For example, a Charge Number might be used when a business has 100 different lines for its employees but wants all calls on those lines to be billed to a single number. In that situation, calls from those 100 lines would include call detail that shows both the CPN, for the actual line that originated the call, and the Charge Number, for the billing number that will be charged from the call.<sup>98</sup> When the call information includes both a CPN and a CN, the CN overrides the CPN and controls how the call is categorized and billed.<sup>99</sup>

From approximately mid-February, 2011 until late December, 2011, Halo inserted Charge Numbers on every call it sent to AT&T Missouri.<sup>100</sup> In fact, Halo admitted that it inserted a CN assigned to Transcom into the call record on every call it sent to AT&T.<sup>101</sup> In every case, the CN was local (i.e., in the same MTA as the number the call was being terminated to), making the call appear to be local, and thus subject to reciprocal compensation. The industry practice is to determine the local or non-local nature of the traffic based on the CN (when both CPN and CN are present). Thus, by inserting an inaccurate CN in the call record, Halo made it more difficult for AT&T Missouri and the RLEC Respondents to evaluate Halo's traffic and therefore bill the appropriate intercompany compensation for such traffic.<sup>102</sup>

<sup>94</sup> Southwestern Bell Telephone Company Intrastate Access Services Tariff, P.S.C. Mo. No. 36, Sections 3.8,

<sup>95</sup> EFIS Docket Entry No.217, McPhee Direct, Schedule 9.

<sup>96</sup> EFIS Docket Entry No.217, McPhee Direct, pp. 16-17.

<sup>97</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 28.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 29.

<sup>100</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 28 - 29; Tr. 202.

<sup>101</sup> EFIS Docket Entry No. 211, Halo Exhibit A, Wiseman Direct, p. 66.

<sup>102</sup> EFIS Docket Entry No. 220, AT&T Exhibit 4, Neinast Rebuttal, p. 25.

There is no justification for Halo's insertion of a Transcom CN in the call record, because Transcom was not the financially responsible party on any of these calls.<sup>103</sup> The CN field is only used when a party other than the party that originated the call is financially responsible for the call. Transcom had no relationship with any of the individuals that actually originated these calls, and Transcom did not have an interconnection agreement with AT&T Missouri. Thus, there is no reason for Halo to insert a CN to make Transcom financially responsible for these calls.

### **G. AT&T and RLEC Blocking Requests Relied on Valid Violations**

AT&T Missouri and the RLEC Respondents have complied with the procedural requirements of the ERE Rule in order to initiate blocking of Halo's traffic. The RLEC Respondents notified Halo of their intention to block Halo's traffic pursuant to the ERE Rule on February 22, 2012,<sup>104</sup> March 9, 2012,<sup>105</sup> and March 23, 2012<sup>106</sup> by means of a letter sent email and U.S. Certified Mail to Halo and a separate letter sent to AT&T Missouri. In their letter to Halo, the RLEC Respondents set forth the reasons they proposed to block Halo's traffic, the date on which blocking would commence and the steps Halo could take to prevent the blocking. In their letter to AT&T Missouri, the RLEC Respondents specifically requested AT&T Missouri as the originating tandem carrier to implement the block. Copies of these letters were also sent, as required by the rule, to the Manager of the Commission's Telecommunications Department.<sup>107</sup> Upon receipt of the RLEC Respondents blocking request, AT&T Missouri notified Halo of them, and of AT&T Missouri's obligation under the Commission's ERE Rules to comply with the RLEC Respondents' request, and informed Halo of the steps it could take to prevent the blocking from occurring.

AT&T Missouri also notified Halo of its intention to block Halo's traffic pursuant to the ERE Rule on March 19, 2011, by means of a letter sent by email and U.S. Certified Mail. In its letter, AT&T Missouri set forth the reasons it intended to block Halo's traffic, the date it would do so and the steps Halo could take to prevent the blocking. A copy of AT&T's letter was also sent to the Manager of the Commission's Telecommunications Department.<sup>108</sup>

### **CONCLUSIONS OF LAW**

After consideration of the evidence and the findings set forth above, the Commission has determined that substantial and competent evidence in the record as a whole supports the following conclusions of law.

<sup>103</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 24-26.

<sup>104</sup> Alma, Choctaw, and MoKan Dial. EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, Alma Attachments A and B; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, Choctaw Attachments A and B, MoKan Attachments A and B.

<sup>105</sup> Craw-Kan et al. (except for Peace Valley Telephone); see e.g. EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Direct Testimony Wilbert, Ex. 6.

<sup>106</sup> Peace Valley Telephone, EFIS Docket Entry No. 233, Craw-Kan et al. Exhibit 8, Direct Testimony Bosserman, Ex. 6.

<sup>107</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 24-26.

<sup>108</sup> EFIS Docket Entry No. 1, Halo April 2, 2012 Complaint, Exhibits A through D.

### A. The Commission's Jurisdiction and Burden of Proof

The Respondent LECs are “telecommunications companies” and “public utilities” as those terms are defined by Section 386.020 RSMo. Supp. 2011. The Missouri LECs and their intrastate telecommunications networks are subject to the Commission’s jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 392 RSMo. Under Missouri law, the Commission has jurisdiction over intrastate telecommunications traffic and the LEC-to-LEC network – the network at issue in this case – as well as the manner in which the LECs’ lines and property are managed and operated. In particular, Section 386.320.1 obligates the Commission to assure that all calls placed on the LEC-to-LEC network, “including calls generated by nonregulated entities, are adequately recorded, billed, and paid for.”<sup>109</sup>

Federal law authorizes the Commission “to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”<sup>110</sup> The Federal Telecommunications Act “preserves a state’s interconnection regulations [and] holds that the FCC may not preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers.”<sup>111</sup>

The Commission has the authority under 47 U.S.C. §252 to approve interconnection agreements negotiated under the Telecommunications Act. This authority includes the power to interpret and enforce the agreements the Commission has approved.<sup>112</sup>

Because Halo brought the complaint, it bears the burden of proof. The burden of proof is the preponderance of the evidence standard.<sup>113</sup> In order to meet this standard, Halo must convince the Commission it is “more likely than not” that its allegations are true.<sup>114</sup> Similarly, AT&T Missouri bears the burden of proof for its counterclaim.

<sup>109</sup> EFIS Docket Entry No. 139, *ERE Order of Rulemaking*, Mo. Register, Vol. 30, No. 12, June 15, 2005, p. 1377. See also *BPS Telephone et al. v. Halo Wireless*, Case No. 11-cv-04220, *Order Regarding Jurisdiction*, WDMo. Dec. 21, 2011. In response to Halo’s attempted removal of the earlier RLEC complaint case to the U.S. Western District, Judge Laughrey concluded, “The Commission has the authority to regulate the subject matter of this dispute, and the Court does not have jurisdiction over Plaintiff’s claims until the Commission has rendered a decision for the Court to review.”

<sup>110</sup> 47 U.S.C. §253(b).

<sup>111</sup> EFIS Docket Entry No. 139, *ERE Order of Rulemaking*, p. 1377, citing 47 U.S.C §251(d)(3).

<sup>112</sup> EFIS Docket Entry No. 175, *Southwestern Bell v. Connect Communs Corp.* 225 F.3d 942 (8<sup>th</sup> Cir. 2000)(The Act’s “grant of power to state commissions necessarily includes the power to enforce the interconnection agreement.”); EFIS Docket Entry No. 176, *Budget Prepay, Inc. v. AT&T*, 605 F.3d 273 (5<sup>th</sup> Cir. 2012)(State commissions have “power both to approve ICAs and to interpret and enforce their clauses.”).

<sup>113</sup> *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).

<sup>114</sup> *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).

## B. AT&T Missouri's Counterclaim and ICA Complaint

### 1. Halo Has Delivered Traffic to AT&T Missouri That Was Not "Originated through Wireless Transmitting and Receiving Facilities" as Provided by the Parties' ICA

The Commission finds that Halo has delivered traffic to AT&T Missouri that was not originated through wireless transmitting and receiving facilities" as provided by the parties' ICA. The only traffic the ICA allows Halo to send to AT&T Missouri is traffic that originates on wireless equipment. The ICA states:

Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T*** for termination by AT&T or for transit to another network.<sup>115</sup>

The evidence has shown that Halo has been sending large amounts of landline-originated traffic to AT&T Missouri. For example, Halo's President, Mr. Wiseman, acknowledges, "Most of the calls probably did start on the other networks before they came to Transcom for processing. It would not surprise me if some of them started on the PSTN."<sup>116</sup> That alone proves a breach of the ICA.

AT&T Missouri presented evidence of extensive studies it performed in which it analyzed the calls Halo sent to it during one-week periods in March 2011 and September 2011, and during a four-week period in February-March 2012.<sup>117</sup> AT&T Missouri began its analysis by identifying the CPN on each call received from Halo, i.e., the telephone number of the person who started the call.

AT&T Missouri then consulted the industry's LERG and the NANP LNP database to determine what kind of carrier (landline or wireless) owned that number and whether the carrier that owned the number had designated it in the LERG as landline or wireless.<sup>118</sup> Based on this, AT&T Missouri was able to determine how many landline-originated calls Halo was sending.<sup>119</sup> During the three periods reviewed, the call data showed that 22%, 56% and 66%, respectively, of the calls that Halo delivered to AT&T Missouri originated as landline calls.<sup>120</sup>

<sup>115</sup> EFIS Docket Entry No. 217, AT&T Exhibit 1, J. Scott McPhee Direct Testimony, ("McPhee Direct"), p. 13, line 22 – 14, line 11; Schedule JSM-5. (Emphasis added.)

<sup>116</sup> EFIS Docket Entry No. 211, Halo Exhibit A, Russ Wiseman Direct Testimony ("Wiseman Direct"), p. 61, lines 10-11. See also EFIS Docket Entry No. 218, AT&T Exhibit 2, J. Scott McPhee Rebuttal Testimony ("McPhee Rebuttal"), p. 2, lines 1-7; EFIS Docket Entry No. 220, AT&T Exhibit 4, Mark Neinast Rebuttal Testimony ("Neinast Rebuttal"), p. 6, line 1 - 7, line 13.

<sup>117</sup> EFIS Docket Entry No. 219, AT&T Exhibit 3, Mark Neinast Direct Testimony ("Neinast Direct"), Direct, p.11, lines 1-6.

<sup>118</sup> *Id.* at 12, lines 8-16.

<sup>119</sup> *Id.* at 12, line 17 – 13, line 6.

<sup>120</sup> *Id.* at 13, line 22 – 14, line 4; Schedule MN-4.

Halo has challenged these call studies contending that some calls that originate from what appear to be landline numbers could, in some scenarios, actually originate from a wireless device. Based on this, Halo contends that CPNs are unreliable and cannot be used to identify the origination point or originating carrier on any of the calls Halo sends AT&T Missouri.<sup>121</sup> The Commission disagrees. The data and methods AT&T Missouri used are the same data and methods that the entire industry uses today for determining what AT&T Missouri sought to determine.<sup>122</sup> As the Tennessee Regulatory Authority explained in a nearly identical case:

The Authority acknowledges that a certain degree of imprecision can occur when analyzing the origin to individual telephone calls, due to factors such as the advent of number portability and the growth of wireless and IP telephony. However, because of these technical issues, the industry has developed conventions and practices to evaluate calls for the purpose of intercarrier compensation. The Authority finds that the methodology used to collect the data and the interpretation of the data in the AT&T study are based upon common industry practices to classify whether traffic is originated on wireline or wireless networks.<sup>123</sup>

Although Halo had access to all of the same data AT&T Missouri used for its analyses, Halo presented no call analysis to support its claims, nor did it present any evidence of how much of the traffic it delivers (if any) originates on wireless devices with CPNs that the LERG shows as landline. Based upon AT&T Missouri's call study data, the Commission concludes that Halo has been sending large amounts of landline-originated traffic to AT&T Missouri in violation of the parties' ICA.

Halo, however, contends that all the calls it sends to AT&T Missouri, regardless of how a call began or on what network, should be deemed to originate as wireless calls by Transcom, its affiliated high-volume (and only) customer in Missouri. Halo bases this contention on its claims that Transcom is an Enhanced Service Provider (because it claims to change the content of calls that pass through its system and claims to offer enhanced capabilities); and that since Transcom is not a carrier, it is an end-user. Halo thus argues it is a CMRS carrier selling wireless telephone exchange service to an Enhanced Service Provider (ESP) end-user. On this basis, Halo asserts that whenever a call passes through Transcom, that call is terminated and Transcom then originates a new, local, wireless call (because the connection between Transcom and Halo is wireless) before the call reaches Halo.

From a technical perspective, the evidence shows that Halo and Transcom have set up a network arrangement employing two tower sites at which both Transcom and Halo maintain equipment that serves Missouri: one in Wentzville, Missouri, to serve the eastern portion of Missouri; and the other in Junction City, Kansas to serve the western portion of the Missouri. Every call that comes to Halo for termination in the eastern portion of the state first passes from the carrier whose end user customer originated the call to Transcom

<sup>121</sup> EFIS Docket Entry No. 211, Wiseman Direct at 56, line 16, *et. seq.*

<sup>122</sup> *Id.*

<sup>123</sup> EFIS Docket Entry No.153, Order, *In re: BellSouth Telecommunications LLC d/b/a AT&T Tennessee v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Jan. 26, 2012) ("*Tennessee Halo Order*"), at 17. See also EFIS Docket Entry No.236, *In Re: Complaint of TDS TELECOM on Behalf of Its Subsidiaries Against Halo Wireless, Inc., Transcom Enhanced Services, Inc. and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and for Expedited Declaratory Relief and Authority to Cease Termination of Traffic*, Order on Complaints, Docket No. 34219, pp. 6-7 (Georgia Pub. Serv. Comm. July 17, 2012) ("*Georgia Halo Order*"); and EFIS Docket Entry No.236, Order Granting Relief against Halo Wireless, *Complaint and Petition for Relief of BellSouth Telecommunications LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless, Inc.*, Docket No. 2011-304-C, p. 9 (Pub. Serv. Comm. S. Car. July 17, 2012) ("*South Carolina Halo Order*").

(typically, indirectly through intermediate providers) at one of its four switching stations (or data centers) in Dallas, New York, Atlanta, and Los Angeles.<sup>124</sup> Transcom then sends the call to its equipment at the Wentzville tower site, where Transcom then transmits the call, wirelessly, for about 150 feet to Halo's equipment.<sup>125</sup> Halo then sends the call on to AT&T Missouri's tandem switch for termination to an AT&T Missouri end-user or to be passed on to a third-party carrier for termination.<sup>126</sup> The tower site Transcom and Halo have established in Junction City, Kansas to serve the western portion of Missouri functions similarly.

The Commission has examined Halo's theory based upon which it claims that no violation of the ICA has occurred, the authorities Halo has cited, and the evidence of the network arrangements employed by Transcom and Halo. Upon this review, the Commission rejects Halo's theory, primarily based on the FCC's recent *Connect America Order*,<sup>127</sup> which the Commission finds dispositive.

The FCC singled out Halo by name, described Halo's arrangement of having traffic pass through a purported ESP (*i.e.*, Transcom) before reaching Halo,<sup>128</sup> noted Halo's theory that calls in this arrangement are "re-originated" in the middle by Transcom, and flatly rejected that theory:

1003. In the *Local Competition First Report and Order*, the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges. As noted above, this rule, referred to as the "intraMTA rule," also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under section 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia*, on the proper interpretation of this rule.

1004. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.

<sup>124</sup> See Tr. June 26, 2012, at 266, lines 3-20.

<sup>125</sup> EFIS Docket Entry No. 221, AT&T Exhibit 5, Raymond W. Drause Rebuttal Testimony ("Drause Rebuttal") at 6, lines 1-14.

<sup>126</sup> *Id.* at 6, line 14 – 7, line 2; Schedule RD-3.

<sup>127</sup> *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011) ("*Connect America Order*").

<sup>128</sup> The FCC was well aware that Halo was arguing that Transcom is an ESP and therefore must be deemed to originate all calls that pass through it. Halo made this argument explicitly in its *ex parte* submissions to the FCC, which the FCC cited and relied on in the *Connect America Order* as describing Halo's position. See *Connect America Order*, nn. 2120-2122, 2128; (EFIS Docket Entry No. 217, McPhee Direct at 18 n.20; Schedules JSM-6, JSM-7).

1005. We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers “Common Carrier wireless exchange services to ESP and enterprise customers” in which the customer “connects wirelessly to Halo base stations in each MTA.” It further asserts that its “high volume” service is CMRS because “the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion.” Halo argues that, for purposes of applying the intraMTA rule, “[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly.” On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used “in the middle,” this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic. Responding to this dispute, CTIA asserts that “it is unclear whether the intraMTA rules would even apply in that case.”

1006. We clarify that ***a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider.*** Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that ***the “re-origination” of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo’s contrary position.***<sup>129</sup>

The FCC conclusively rejected Halo’s theory that calls that begin with an end-user dialing a call on a landline network are somehow “re-originated” and transformed into wireless calls simply by passing through Transcom. In fact, Halo concedes that the FCC rejected its theory; Halo witness Wiseman stated, “we acknowledge that the FCC ... apparently now believes ESPs ... do not originate calls.”<sup>130</sup> The FCC said that a call is originated wirelessly only if the “calling party” – the person dialing the phone number – initiated the call through a wireless carrier. The Commission concurs with this analysis.

<sup>129</sup> *Connect America Order*, (Emphasis added and footnotes omitted).

<sup>130</sup> EFIS Docket Entry No. 211, Wiseman Direct at 31, lines 3-4. Endowing a phrase in the first sentence of paragraph 1006 of the *Connect America Order* with a significance the FCC plainly did not intend, Halo has suggested that the FCC rejected its theory only “for purposes of the intraMTA rule,” and not for purposes of the parties’ ICA. But the very purpose of the provision in the ICA that permits Halo to deliver traffic to AT&T only if it originates on wireless equipment is to implement the intraMTA rule. Halo’s notion that the FCC’s ruling leaves open the possibility that the traffic at issue here originates with Transcom for purposes of the ICA, even though it does not originate with Transcom for purposes of the intraMTA rule, is desperately mistaken.

In addition, the Commission finds that there is no technical reason for the 150-foot link between Transcom and Halo to be wireless. The same connection could be made much less expensively by using a short “CAT-5” cable, and using a cable would increase service reliability.<sup>131</sup> The Commission finds that the only reason Halo created a roundabout wireless connection with Transcom, rather than a short and direct wired connection, was so Halo could attempt to claim that all calls it passes to AT&T are wireless and local.<sup>132</sup> For the reasons set out above, the Commission rejects Halo’s claim.

The Commission further concludes that there is no authority for Halo’s claim that ESPs terminate every call they touch and then originate a new call. Nothing in the law says that. The FCC has made clear that ESPs “are treated as end-users *for the purpose of applying access charges*”<sup>133</sup> only and “are treated as end users *for purposes of our access charge rules*.”<sup>134</sup> The “ESP exemption” is a legal fiction that allows ESPs to be treated like end users *for the purpose of not having to pay access charges*.<sup>135</sup> An ESP cannot use this limited “end-user” status to claim it “originates” calls that actually began when someone else picked up a phone and dialed a number. Transcom does not start the call (the calling party does), does not decide who will be called (the calling party does), and does not provide the voice content that the parties exchange on the call. The FCC has never held that an ESP “originates” calls that started elsewhere and end elsewhere and merely pass through the ESP somewhere in the middle.<sup>136</sup> To the contrary, the FCC rejected Halo’s theory that Transcom originates calls in the *Connect America Order*.<sup>137</sup> When a landline call is placed, for example from California to Missouri, that is one call, not two calls. No new, separate call exists merely because call passed through Transcom’s equipment.

<sup>131</sup> *Id.* at 7, lines 3-17.

<sup>132</sup> *Id.* At hearing, counsel for Halo suggested that the wireless connection between Transcom and Halo could not be eliminated by using a cable if the distance between the Transcom equipment and the Halo equipment were greater. See Tr. June 26, 2012, at 222, lines 4-7. That suggestion fell flat, for two reasons. First, a CAT-5 cable can carry IP voice packets more than 100 meters if a regenerator is used. *Id.* at 222, lines 8-15. Second, the wireless connection could be eliminated without even using a cable, by having the traffic transferred from Transcom to Halo within the Ethernet switch that Transcom and Halo share. *Id.* at 223, line 16 - 224, line 11.

<sup>133</sup> EFIS Docket Entry No. 238, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, 11 (2001) (“*ISP Remand Order*”) (emphasis added, subsequent history omitted).

<sup>134</sup> EFIS Docket Entry No. 126, *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, 21 (1987) (“*Northwestern Bell Order*”). Five years after it was issued, this decision was vacated as moot. 7 FCC Rcd. 5644 (1992). The decision still carries weight, however, as the FCC’s explanation of the ESP exemption.

<sup>135</sup> The Commission notes that the ESP exemption from access charges applies only to the ESP itself, not to any telecommunications carrier that serves the ESP, which means that any ESP exemption for Transcom would not apply to Halo anyway. EFIS Docket Entry No. 126, *Northwestern Bell Order*, 2 FCC Rcd. 5986, 21 (1987); EFIS Docket Entry No. 240, *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105, at 24, 42 (Ill. Comm. Comm’n Feb. 11, 2009) (the ESP exemption “exempts ESPs, and *only* ESPs, from certain access charges” and does not apply to carriers that transport calls for ESPs). Thus, regardless of Transcom’s purported status, there is no basis for Halo to claim it is exempt from access charges on the toll traffic it has been sending to AT&T.

<sup>136</sup> Halo claims that the FCC has found that ESPs – as end users – originate traffic even when they receive the call from some other end-point. But Halo does not cite a single decision by the FCC, or by any other authority, that actually holds this. Halo also tries to compare Transcom to an entity using a “Leaky PBX,” as if that legitimizes Halo’s conduct. That comparison to a Leaky PBX is telling, because the FCC long ago recognized that leaky PBXs – just like Halo’s and Transcom’s current scheme – constituted a form of “access charge avoidance” that needed correction. EFIS Docket Entry No. 193, *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶ 87 (1983). See also EFIS Docket Entry No. 220, *Neinast Rebuttal* at 22, line 15 - 23, line 13. Simply put, the only time the FCC has actually addressed what Halo does is in the *Connect America Order*, where it rejected the identical argument Halo is making here.

<sup>137</sup> *Connect America Fund Order*, 1005-06. The FCC also rejected a similar two-call theory several years earlier in the *AT&T Calling Card Order*. EFIS Docket Entry No. 173, *Order and Notice of Proposed Rulemaking, In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, 6 (2005) (“*AT&T Calling Card Order*”), *aff’d*, *AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

Halo's reliance on decisions by bankruptcy courts during Transcom's bankruptcy proceeding several years ago for the proposition that Transcom is an ESP under federal law is misplaced. Only one of these decisions both involved an AT&T entity and actually held that Transcom is an ESP.<sup>138</sup> That decision, however, was vacated on appeal and carries no precedential or preclusive effect here.<sup>139</sup> The Georgia,<sup>140</sup> Pennsylvania, South Carolina, Tennessee, and Wisconsin commissions have already evaluated this same issue and found that the bankruptcy rulings have no preclusive effect.<sup>141</sup> The Commission agrees.

The Commission further concludes that Transcom does not qualify as an ESP. To be an ESP, Transcom must provide an "enhanced service," which the FCC defines as: services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.<sup>142</sup>

In applying this definition, the FCC has consistently held that a service is not "enhanced" when it is merely "incidental" to the underlying telephone service or merely "facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that in deciding whether a service is "enhanced" one must use the end-user's perspective.<sup>143</sup> The FCC typically describes services that do not alter the fundamental character of the telephone service as "adjunct-to-basic," meaning they are not "enhanced services."<sup>144</sup>

<sup>138</sup> That decision is Exhibit 1 to the Johnson Direct, EFIS Docket Entry No.212.

<sup>139</sup> EFIS Docket Entry No. 212 at 1 (upper right-hand corner); EFIS Docket Entry No. 244, *Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008) (collecting cases). The other decision, the one confirming Transcom's plan of reorganization, did not resolve any dispute between parties regarding whether Transcom was an ESP— much less whether all calls that pass through Transcom must be deemed to be wireless-originated —because that point was neither contested in the proceedings leading to that order, nor was it necessary to the order. Accordingly, the order has no preclusive effect. *E.g.*, EFIS Docket Entry No. 245, RESTATEMENT (SECOND) OF JUDGMENTS, § 16 comment c.

<sup>140</sup> EFIS Docket Entry No. 236, *Georgia Halo Order*, pp. 3, 10. See also Georgia PSC May 9, 2012 Order Denying Partial Motion to Dismiss, pp. 3-4

<sup>141</sup> See EFIS Docket Entry No. 153, *Tennessee Halo Order* at 22 n.85; EFIS Docket Entry No. 236, *South Carolina Halo Order* at 19. The Public Service Commission of Wisconsin has not yet issued its written order.

<sup>142</sup> EFIS Docket Entry No. 246, 47 C.F.R. § 64.702(a).

<sup>143</sup> EFIS Docket Entry No. 247, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, 107 (1996).

<sup>144</sup> See EFIS Docket Entry No. 173, *AT&T Calling Card Order*, 16 & n.28. Halo has argued that Transcom's service technically cannot be "adjunct-to-basic" because Transcom does not provide basic telephone service. That both is incorrect and misses the point. Even if Transcom does not provide basic telephone service, that does not mean it therefore must be deemed to provide an enhanced service. The "adjunct-to-basic" terminology is used to distinguish *any* service that does not change the fundamental character of the telephone service the end-user is using, regardless of who provides that basic telephone service.

Transcom claims it provides enhanced service because it takes steps to minimize background noise on a voice call and inserts “comfort noise” during periods of silence so the parties do not think the call has been disconnected.<sup>145</sup> The Commission, however, finds that suppressing background noise and adding comfort noise are not “enhancements” to the underlying voice telecommunications service. They are merely the same type of call-conditioning that carriers normally provide, and have provided for some time, as an incidental part of voice service (e.g., by using repeaters to boost a voice signal over long distances).<sup>146</sup>

The Commission finds that Transcom’s involvement in the calls at issue here occurs “automatically, without the advance knowledge or consent of the customer [*i.e.*, the person making the call]” and Transcom does not provide any service to the calling party.<sup>147</sup> Nor does the calling party receive from Transcom (or from his or her own carrier) “anything other than [the capability to] make a telephone call.”<sup>148</sup> The end-users that make calls do not order a different service (indeed, they do not order any service from Transcom);<sup>149</sup> they do not pay different rates because Transcom is involved; and they place and receive calls in exactly the same way they would if Transcom did not exist. Thus, “[f]rom the customer’s perspective” – the perspective of the end-user making the call – anything Transcom does is merely “incidental” to or “adjunct to” the underlying voice service provided by the caller’s carrier, does not alter the “fundamental character” of that underlying service, and is therefore not an “enhanced service.”<sup>150</sup>

None of Transcom’s written marketing materials makes any mention of the purported “enhancements” that Transcom provides, so there is no “offering” of any enhancement.<sup>151</sup> Indeed, until recently Transcom’s website flatly stated that Transcom’s “core service offering” is “Voice Termination Service,” *not* any purported service enhancements.<sup>152</sup> And until recent changes made in response to AT&T’s testimony, Transcom’s website never mentioned any purported “enhancements” to service quality at all.<sup>153</sup> The claimed “enhancements” are not even mentioned in Transcom’s contracts with its customers.<sup>154</sup> At

<sup>145</sup> EFIS Docket Entry No. 212, Johnson Direct at 15, line 1 - 16, line 21.

<sup>146</sup> EFIS Docket Entry No. 219, Neinst Direct at 22, line 16 – 23, line 12; EFIS Docket Entry No. 221, Drause Rebuttal at 11, line 3 – 14, line 13.

<sup>147</sup> EFIS Docket Entry No. 212, Johnson Direct at 8, lines 7-11.

<sup>148</sup> EFIS Docket Entry No. 173, *AT&T Calling Card Order*, 16-17.

<sup>149</sup> Transcom does not serve any actual end users. Rather, it provides wholesale service to carriers and other providers. As Transcom’s representative testified, “Transcom does not deal with ultimate consumers [*i.e.*, end-users] and does not provide any service to them. Transcom has no relationship with their distant third parties [*i.e.*, end-users] at all.” EFIS Docket Entry No. 212, Johnson Direct at 8, lines 7-9.

<sup>150</sup> EFIS Docket Entry No. 173, *AT&T Calling Card Order*, 16. Further evidence that Transcom does not alter the “fundamental character” of the calls that pass through it on the way to Halo and AT&T is that the calls still fit easily with the definition of “telecommunications” in 47 U.S.C. § 153(50). The definition states that “telecommunications” means “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content thereof.” The calls at issue here, e.g., a call from a girl in California to a relative in St. Louis, involve transmission “between or among points specified by the user” (the girl specifies her landline phone in California and her grandmother’s phone in St. Louis), of “information of the user’s choosing” (the voice communication with her relative), “without change in the form or content of the information as sent or received,” since the words the girl speaks in California are the same words that reach her grandmother in St. Louis.

<sup>151</sup> EFIS Docket Entry No. 218, McPhee Rebuttal at 4, lines 7-19.

<sup>152</sup> *Id.* at 4, lines 1-6.

<sup>153</sup> EFIS Docket Entry No. 217, McPhee Direct at 9, lines 6-18.

<sup>154</sup> EFIS Docket Entry No.218, McPhee Rebuttal at 4, lines 16-19.

best, whatever Transcom does is merely “incidental” to the underlying telecommunications service provided by the calling party’s carrier, and therefore does not qualify as an enhanced service.<sup>155</sup>

Consistent with FCC precedent, four state commissions have now expressly ruled that Transcom’s service is not an enhanced service. For example, the Tennessee Regulatory Authority found:

Transcom only reduces background noise and inserts “comfort noise” in periods of silence so that those periods of silence are not mistaken for the end of a call. . . . The alleged “enhancements” that Transcom claims it makes to calls that transit its network are simply processes to improve the quality of the call. Telecommunications networks have been routinely making those types of improvements for years and, in some cases, decades. Carriers have routinely incorporated equipment into networks that have, for example, expanded the dynamic range of a voice call to improve clarity. The conversion from analog to digital and back to analog has significantly improved call quality, yet none of those processes are deemed “enhancements” in the sense of an ESP.<sup>156</sup>

The Commission agrees and concludes that Transcom is not an ESP.

## **2. Halo Has Not Paid the Appropriate Compensation to AT&T Missouri as Prescribed by the Parties’ ICA. Access Compensation Applies to Halo’s Traffic**

The Commission has found that Halo has sent AT&T and the LECs subtending its tandem switches large amounts of interexchange landline-originated traffic (both interstate and intrastate). Halo has contended that this traffic is local, and thus subject only to reciprocal compensation charges instead of the higher access charges that apply to non-local traffic. Halo has argued that it cannot be required to pay tariffed access charges because, it claims, it technically did not receive access service precisely as it is defined in AT&T’s tariffs. For example, Halo contends that it did not receive service from AT&T via a “Feature Group D” arrangement. The Commission disagrees.

AT&T’s federal tariff, filed with the FCC, requires Halo to pay access charges on the interstate traffic AT&T has terminated for Halo, and AT&T’s state tariff, filed with this Commission, requires Halo to pay access charges on the intrastate non-local traffic AT&T has terminated for Halo.<sup>157</sup> A tariff is a document which lists a public utility’s services and the rates for those services. Once approved by the Commission, a tariff “becomes Missouri law and has the same force and effect as a statute enacted by the legislature.”<sup>158</sup> The lack of terms in the ICA defining the proper intercarrier compensation that Halo must pay for terminating interexchange landline-originated traffic (because the landline-originated traffic was not permitted by the ICA) does not excuse Halo from compliance with lawful tariffs. When AT&T terminates interexchange and interstate calls for other carriers, that is access service, and those carriers must pay the access rates in AT&T’s access tariffs. The Commission holds that Halo should be treated no differently.

<sup>155</sup> EFIS Docket Entry No. 173, *AT&T Calling Card Order*, ¶ 16 & n.28

<sup>156</sup> EFIS Docket Entry No. 153, *Tennessee Halo Order*, at 21-22. See also EFIS Docket Entry No. 236, *Georgia Halo Order*, pp. 9-10; and EFIS Docket Entry No. 236, *South Carolina Halo Order*, p. 6.

<sup>157</sup> EFIS Docket Entry No. 217, McPhee Direct at 20, line 16 - 21, line 2.

<sup>158</sup> EFIS Docket Entry No. 167, *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997).

Halo's claim that it has not ordered access service is unavailing. A carrier "constructively orders" service under a tariff, and therefore must pay the tariffed rate, if it (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of services; and (3) does in fact receive such services.<sup>159</sup> The doctrine applies here for three reasons.

*First*, Halo "is interconnected [to AT&T] in such a manner that it can expect to receive access services." Halo interconnects to AT&T under the ICA and agreed to pay access charges on at least some of the traffic it sent to AT&T (assuming the traffic was all wireless).<sup>160</sup> Halo also knew it was sending traffic to AT&T that started outside the MTA or local calling area where Halo was located and that interMTA and non-local traffic are subject to access charges. *Second*, Halo "fail[ed] to take reasonable steps to prevent the receipt of [access] services." Indeed, Halo took *no* steps to prevent the receipt of access services. Halo never tried to stop Transcom from sending it landline-originated traffic that Halo knew (or should have known) began in other local calling areas or other states and continues to knowingly accept that long-distance landline traffic and pass it to AT&T for termination today.<sup>161</sup> *Third*, Halo "did in fact" receive terminating access service from AT&T. The evidence shows Halo sent huge amounts of landline-originated non-local traffic to AT&T and AT&T terminated such traffic to its end-users. The termination of long-distance traffic is the essence of terminating switched access service, and the long-established rates for such service are in AT&T's access tariffs.<sup>162</sup>

Halo also contends that the FCC held in the *Connect America Order* that Halo's service is merely transit service and it cannot owe terminating access charges to AT&T or other carriers. Halo is incorrect. The *Connect America Order* never held that Halo's service is transit service, much less that Halo is exempt from paying terminating access charges when it hands long-distance traffic to AT&T for termination. The issue in the *Connect America Order* was whether Transcom could be deemed to originate every call it touches and whether the calls Halo was handing to LECs should be treated as local or non-local.<sup>163</sup> The FCC used the term "transit" merely to point out that entities that simply pass

<sup>159</sup> EFIS Docket Entry No. 255, *Advantel LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000) (citing *United Artists Payphone Corp. v. New York Tel. Co.*, 8 FCC Rcd 5563 at ¶ 13 (1993) and *In re Access Charge Reform*, 14 FCC Rcd 14221 (1999) at ¶ 188).

<sup>160</sup> EFIS Docket Entry No. 217, McPhee Direct, Schedule JSM-4, ICA § 4.2.

<sup>161</sup> See EFIS Docket Entry No. 254, *AT&T Corp. v. Community Health Group*, 931 F. Supp. 719, 723 (S.D. Cal. 1995) (defendants constructively ordered service because they "have come forth with no showing that they acted in any way to control the unauthorized charging of AT&T ... calls to their system" by a hacker).

<sup>162</sup> 47 C.F.R. § 69.2(b) (FCC defines "Access service" to include "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."). See also *Southwestern Bell Telephone Company Access Service Tariff* F.C.C. NO. 73, Section 6.9; P.S.C. Mo.-No. 36 Access Services Tariff Sections 3.8, 6.11. Those tariffed rates are the rates Halo must pay. EFIS Docket Entry No. 217, McPhee Direct, p. 21.

<sup>163</sup> *Connect America Order*, 1004-06. The Commission also notes Halo's *ex partes* to the FCC, which framed the issue there, never once argued that Halo was providing transit service to other carrier. Quite the opposite, Halo argued that it was merely sending locally originated, wireless traffic to ILECs and therefore only had to pay reciprocal compensation, rather than access charges. EFIS Docket Entry No. 217, McPhee Direct, Schedules JSM-6 and JSM-7.

calls on in the middle of the call path are not viewed as originating those calls – and that because Transcom did not originate the calls Halo was passing to other carriers for termination, those calls were not local (*i.e.*, not intraMTA) and therefore were not merely subject to reciprocal compensation charges.<sup>164</sup> The Commission concludes that as non-local calls, those calls are subject to terminating access charges.

Halo further contends that Transcom performs enhancements on the calls it receives from other carriers and then originates the purported enhanced traffic for delivery to Halo. As discussed above, the Commission has concluded that Transcom neither performs enhancements nor originates traffic. But even if it did, the Commission finds that the purportedly enhanced traffic necessarily would originate from the same locations that Transcom performed the “enhancements,” namely, at the Transcom data centers in Atlanta, New York City, Los Angeles and Dallas, *not* at a tower site in Missouri.<sup>165</sup> Traffic, whether wireline or wireless, that originates in Atlanta, New York, Los Angeles or Dallas and terminates in Missouri is non-local traffic to which access charges apply.

Given that Halo has received terminating access service from AT&T, and under the law has “constructively ordered” that service for all landline traffic it sent to AT&T, the Commission holds that Halo is liable to AT&T for access charges on the long-distance landline traffic Halo has sent to AT&T. The Commission notes that it is not making any determination how much Halo owes AT&T, or how many minutes of access traffic Halo has sent AT&T. The court in Halo’s bankruptcy case has made clear that this relief is permissible, explaining that the only limitation on the relief state commissions can grant for Halo’s wrongdoing is that they should not issue relief involving “*liquidation of the amount of any claim against the Debtor.*”<sup>166</sup> The actual amount Halo must pay will be determined in bankruptcy court.

### **3. Halo Has Committed a Material Breach of Its ICA with AT&T Missouri, so AT&T Missouri Is Entitled to Discontinue Performance under the ICA**

The Commission has concluded that only traffic the ICA allows Halo to send to AT&T is traffic that originates on wireless equipment. The ICA states:

Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on AT&T’s network or is transited through AT&T’s network and is routed to Carrier’s wireless network for wireless termination by Carrier; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T for termination by AT&T or for transit to another network.*** [Emphasis added].<sup>167</sup>

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 235, line 20 - 236, line 6 (“ . . . So while I am not saying that there is an origination – or a further origination, I believe is the terminology that your witnesses are commonly using, they’re claiming there’s a further origination of the call that takes place. And if that further origination were to take place, then the point at which that was taking place would be back at the data center. It wouldn’t be at the tower site”); and at 266, lines 206, line 3 – 267, line 14 (stating that Transcom’s data centers are in Atlanta, New York City, Los Angeles and Dallas; that there is no wireless equipment at Transcom’s data centers; and that a further origination at the data centers therefore would not be wireless). See also *id.* at 241, lines 10-18 (Q: Now, I believe what you are saying is that, well, if you want to get to where it might originate from Transcom, where it really originates is back at the data center, which is not there in the MTA, it’s one of the four locations that are involved here? A: That’s right. The call -- or the further communication would originate back at the data center.”).

<sup>166</sup> EFIS Docket Entry No. 25, Exhibit B, Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay, *In re Halo Wireless, Inc.*, Case No. 11- 42464-btr-11 (Bankr. E.D. Tex., Oct. 26, 2011) (emphasis added).

<sup>167</sup> EFIS Docket Entry No. 217, McPhee Direct at 13, line 22 – 14, line 11; Schedule JSM-5.

The Commission holds that this “wireless traffic only” provision is a material term of the ICA. It is important because wireless traffic and landline traffic are regulated differently. The geographic areas used to determine whether traffic is local (and therefore subject to reciprocal compensation charges) or non-local (and therefore subject to access charges, which are higher) differ greatly for wireless and landline traffic.<sup>168</sup> Wireless traffic is classified as local or non-local based on Major Trading Areas (“MTAs”), which are quite large. For landline traffic, calls are classified as local or non-local based on “local calling areas,” which are much smaller.<sup>169</sup> For example, there are only four MTAs in all of Missouri, but more than 720 landline local calling areas.<sup>170</sup>

Having found the “wireless traffic only” provision material, the Commission holds that Halo’s breach of it entitles AT&T to discontinue performance under the ICA and stop accepting traffic from Halo. When a party materially breaches a contract, or breaches the contract in a way so basic as to defeat the purpose of the contract, the other party is excused from further performance.<sup>171</sup> Halo’s breach here – continuously sending huge amounts of landline-originated traffic that the ICA does not allow – plainly defeats the core purpose of the ICA, which was to establish rates, terms, and conditions for *wireless-originated traffic only*.

The Commission’s granting this relief will not run afoul of Halo’s ongoing bankruptcy proceeding. AT&T asked for and received the identical relief from the Tennessee Regulatory Authority,<sup>172</sup> and then discontinued service to Halo in light of the TRA’s Order. Halo complained of this to the bankruptcy court, and the bankruptcy court rejected Halo’s complaint.<sup>173</sup> The bankruptcy court found that the TRA “had jurisdiction to interpret and enforce the provisions of the interconnection agreement,” that “[t]he TRA’s ruling and Order regarding AT&T Tennessee’s right to stop accepting traffic is within the TRA’s police and regulatory powers and falls with[in] the exception to the automatic stay as found in this court’s Courts 362(b)(4) Order,” and that “[t]he TRA’s determination that AT&T Tennessee may terminate the ICA is also within the TRA’s authority and jurisdiction; however, prior to any termination, AT&T Tennessee must also comply with section 365 of the Bankruptcy Code.”<sup>174</sup> The Commission grants AT&T similar relief here and notes that AT&T must similarly comply with Section 365.

<sup>168</sup> EFIS Docket Entry No. 217, McPhee Direct at 15, line 1 – 16, line 13.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 16, lines 11-13.

<sup>171</sup> *E.g.*, EFIS Docket Entry No. 190, *Barnett v. Davis*, 335 S.W.3d 110, 112 (Mo. App. W.D. 2011) (noting “Missouri’s first to breach rule, stated in *R.J.S. Security v. Command Security Services, Inc.*, 101 S.W.3d 1, 18 (Mo. App. W.D. 2003), [EFIS Docket Entry No. 191] which provides that ‘a party to a contract cannot claim its benefit where he is the first to violate it.’ A breach by one party will excuse the other party’s performance, however, only if the breach is material. *Id.*”).

<sup>172</sup> See EFIS Docket Entry No. 153, *Tennessee Halo Order* at 22.

<sup>173</sup> EFIS Docket Entry No. 6, Exhibit 5, Order Denying Plaintiff’s Request for Emergency Injunctive Relief, *In re Halo Wireless, Inc. and Halo Wireless, Inc. v. BellSouth Telecommunications, LLC*, Case No. 11-42464-btr- 11/Adv. Proc. No. 12-04019 (Bankr. E.D. Tex., Feb 6, 2012)

<sup>174</sup> *Id.*, ¶¶ 2-4.

## C. Blocking Under the Missouri ERE Rule

### 1. The Missouri ERE Rule Applies to Halo's Traffic

#### a. History and Necessity of the ERE Rule

Staff witness William Voight was a primary drafter of the ERE Rule.<sup>175</sup> Mr. Voight testified that the rule was a necessary response to protect the LEC-to-LEC network from documented problems:

The ERE rule . . . was established to avert incidences of unidentifiable, or phantom, traffic. The ERE rule was put into place to ensure all companies on the call-path were adequately compensated for use of their networks. Central to the goal of full and fair compensation was a requirement for tandem switch providers, such as AT&T Missouri and CenturyTel, to create billing records and for all companies to ensure calling party telephone number (CPN) information is provided and transmitted for all types of traffic. The ERE rule establishes a framework to help ensure: (1) CPN is transmitted on each call; (2) a record of the call is created and made available to terminating carriers; and, (3) carriers are paid for the use of their networks. If companies are not paid for use of their networks or if companies fail to transmit CPN or otherwise disguise the jurisdiction of the call, the aggrieved company may request blockage of the offender's traffic.<sup>176</sup>

Staff's testimony is consistent with the ERE *Order of Rulemaking*, which recognized "extensive documentation of problems" experienced by RLECs.<sup>177</sup>

On June 15, 2005, after a rulemaking proceeding in Case No. TX-2003-0301, the Commission published and adopted the ERE Rule, which became effective July 30, 2005.<sup>178</sup> The intent of the ERE Rule was to adopt minimally invasive local interconnection rules necessary to address the complex processes and interests of those companies involved with traffic traversing the LEC-to-LEC network. In its *Order of Rulemaking*, the Commission rejected wireless carriers' contentions they were entitled to use the LEC-to-LEC network without regard to service quality, billing standards, or compensation. The Commission determined that the ERE Rule did not seek to regulate the business practices and customer-related activities of wireless carriers.

<sup>175</sup> Tr. 90, 446.

<sup>176</sup> EFIS Docket Entry No. 224, PSC Staff Ex. 1, William Voight Direct Testimony, p. 3.

<sup>177</sup> EFIS Docket Entry No. 139, *ERE Order of Rulemaking*, Mo. Register, Vol. 30, No. 12, p. 1376

<sup>178</sup> EFIS Docket Entry No. 139, *ERE Order of Rulemaking*, Mo. Register, Vol. 30, No. 12, pp. 1373-1401. The separate sections of the ERE Rule are codified at 4 CSR 240-29.010-29.160.

### **b. Commission Authority for Promulgating the ERE Rule**

The Commission's *Order of Rulemaking* found no FCC rules addressing the disputes arising from traffic placed on the LEC-to-LEC network. On the contrary, the Commission observed that adoption of the ERE Rule was necessary and of particular importance to reduce compensation disputes and provide a forum for resolving such disputes when they occurred. The Commission concluded §386.320.1, RSMo, obligated the Commission to assure all calls, including calls generated by nonregulated entities such as wireless carriers, are adequately recorded, billed, and paid for. Federal law also authorizes the Commission to enforce "any regulation, order, or policy . . . that establishes access and interconnection obligations of local exchange carriers."<sup>179</sup>

Thus, the Commission has subject matter jurisdiction to resolve this complaint pursuant to §386.390.1 and 386.400 RSMo. even if Halo were considered a bona fide CMRS provider because there is an issue as to whether Halo is an access customer of AT&T Missouri and the RLEC Respondents.<sup>180</sup> Halo, by delivering such traffic to AT&T Missouri at AT&T Missouri's originating access tandems in the Kansas City, St. Louis, and Springfield LATA tandems has placed traffic on the LEC-to-LEC network as an originating and aggregating carrier. Halo has made itself financially responsible for its traffic that traversed the LEC-to-LEC network by the terms of its ICA with AT&T Missouri, and Halo has thereby brought itself within the jurisdiction of the state of Missouri under the ERE Rule.

### **c. The ERE Rule**

The ERE Rule defines "the LEC-to-LEC network" as "that part of the telecommunications network designed and used by telecommunications companies for the purposes of originating, terminating, and transiting local, intrastate/intraLATA, interstate/intraLATA, and wireless telecommunications services that originate via the use of feature group C protocol . . ."<sup>181</sup> The origination, transit, and termination of traffic utilizing the LEC-to-LEC network is only allowed upon compliance with the ERE Rule.<sup>182</sup> The ERE Rule expressly prohibits certain actions and types of traffic from being placed on the LEC-to-LEC network:

- (1) It prohibits the transmission of interLATA wireline traffic over the LEC-to-LEC network. 4 CSR 240-29.010 and 29.030(2);
- (2) It prohibits the termination of traffic originated by or with the use of feature group A, B or D protocol trunking arrangements from being terminated on the LEC-to-LEC network. 4 CSR 240-29.030(3);

<sup>179</sup> EFIS Docket Entry No. 139, ERE *Order of Rulemaking*, 30 MO Reg, No. 12, p. 1377, citing 47 USC 251(d)(3).

<sup>180</sup> See EFIS Docket Entry No. 140, *Order Regarding Subject Matter Jurisdiction*, Case No. TC-2002-57, Feb. 14, 2002.

<sup>181</sup> 4 CSR 240-29.010.

<sup>182</sup> 4 CSR 240-29.030(1).

- (3) It prohibits any traffic aggregator from placing traffic on the LEC-to-LEC network except as permitted by Chapter 29. 4 CSR 240-29.030(4);
- (4) It prohibits any originating carrier or traffic aggregator from altering or failing to deliver originating caller information for landline-originated traffic placed on the LEC-to-LEC network. 4 CSR 240-29.040(1) and (5);
- (5) It prohibits the alteration of record creation, exchange or billing processes currently in place for traffic carried by interexchange carriers using feature groups A, B, or D protocols. 4 CSR 240-29.030(5);

The ERE Rule also contains certain requirements for the creation and exchange of records:

- (1) It contains provisions for the use of record creation that terminating carriers could utilize in preparing invoices to bill originating carriers of traffic placed on the LEC-to-LEC network. 4 CSR 240-29.080;
- (2) It contains provisions for the exchange of records, invoices, objections to payment of invoices, and dispute resolution procedures for traffic placed on the LEC-to-LEC network. 4 CSR 240-29.090 and 29.100;

The ERE Rule includes blocking provisions as enforcement mechanisms:

- (1) It allows AT&T Missouri as a transiting carrier to block traffic of originating carriers or traffic aggregators who failed to comply with the ERE Rule. 4 CSR 240-29.120;
- (2) It allows the RLECs here, as terminating carriers, to request AT&T Missouri, as an originating tandem carrier, to block traffic of originating carriers or traffic aggregators. 4 CSR 240-29.130;
- (3) It allows an originating carrier or traffic aggregator wishing to dispute a blocking request by either the transiting carrier or the terminating carrier to file a Complaint with the Commission to do so. 4 CSR 240-29.120 and 29.130.

#### **d. The ERE Rule Governs the Missouri LEC-to-LEC Network**

The ERE Rule was adopted to govern Missouri's LEC-to-LEC network and ensure the carriers that build and maintain the network receive adequate records and compensation for the traffic that traverses it. The rule was designed to require appropriate records and compensation for such traffic and prevent the sort of abuse Halo has employed. Halo argues that the ERE Rule unlawfully regulates CMRS or "enhanced service" providers. The Commission has already considered and rejected such arguments when it adopted the rule:

[T]he Enhanced Record Exchange Rules do not regulate wireless carriers, as the Joint Wireless Carriers and Sprint suppose. Rather, what the rules would regulate is use of the LEC-to-LEC network—not the wireless carriers. We find that section 386.320.1, in particular, places an obligation upon the commission to assure that all calls, including calls generated by nonregulated entities, are adequately recorded, billed, and paid for. We reject Joint Wireless Carriers' apparent contention that nonregulated carriers may use the Missouri LEC-to-LEC network without regard to service quality, billing standards, and, in some instances, with an apparent disregard for adequate compensation.... We are not convinced that one carrier's most technological and efficient interconnection should extend to another carrier's financial loss without an agreement. Moreover, we would note [that] Section (d)(3)

preserves a state's interconnection regulations. Specifically, this section holds that the FCC may not preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers. We find that the obligation we are imposing on incumbent local exchange carriers is a necessary interconnection obligation on incumbent carriers.

\* \* \*

[W]e do not believe our rules conflict with federal law, because they have nothing to do with the relationship between a wireless carrier and its customers. Rather, our proposed rules have only to do with the terms and conditions that may be required by those who provide services *to a wireless carrier*, and in particular, transiting service. Our rules are not targeted to the practices of wireless carriers; rather, our rules are targeted to the practices of regulated local exchange carriers and the network employed by them—a matter that *is* under the jurisdiction of this commission. In particular, our proposed rules address use of the LEC-to-LEC network, especially that traffic which is transited to terminating carriers who are not a party to agreements made between originating carriers (including but not limited to wireless carriers) and transiting carriers.<sup>183</sup>

Thus, the ERE Rule does not “regulate” wireless carriers or ESPs. Rather, the ERE Rule governs the type of traffic allowed on the Missouri LEC-to-LEC network and the way in which it is handled.

**e. Halo Is Placing Telecommunications Traffic on the LEC-to-LEC Network via Its Interconnection with AT&T Missouri for Termination on AT&T Missouri's and RLEC Respondents' Networks**

Halo's direct “wireless” interconnection with AT&T Missouri's tandem switches allows Halo to place traffic over the LEC-to-LEC network. Under its interconnection agreement with AT&T Missouri, Halo delivers traffic to AT&T Missouri over the LEC-to-LEC network for termination to AT&T Missouri end-user customers and also to the RLEC Respondents' end user customers (via the “transit” provisions in the ICA).

**f. Halo is An “Originating Carrier” and “Traffic Aggregator” for Purposes of ERE Rule**

Halo has delivered large volumes of traffic to AT&T Missouri for transmission on the LEC-to-LEC network. Significant amounts of Halo's traffic is landline interexchange traffic for which the LECs' access rates apply. Significant amounts of this landline traffic is interLATA traffic which is prohibited by the ERE Rule. Some of the other traffic is interMTA wireless traffic for which the LECs' access rates apply.

<sup>183</sup> EFIS Docket Entry No. 139, ERE *Order of Rulemaking*, 30 MO Reg, No. 12, p. 1377.

By delivering traffic to the AT&T Missouri tandems, Halo is acting as an originating carrier (a carrier that “is responsible” for originating telecommunications traffic that traverses the LEC-to-LEC network). Halo argues that it is neither an originator nor aggregator of traffic under the ERE Rule.<sup>184</sup> The Commission disagrees and concludes that Halo has acted as both an originator and aggregator of traffic by placing telecommunications traffic on the LEC-to-LEC network. Halo has employed its direct connection with AT&T Missouri to place traffic on the LEC-to-LEC network, making Halo directly “responsible for originating telecommunications traffic that traverses the LEC-to-LEC network” as defined by 29.020(29). Moreover, Halo also concedes that it is placing telecommunications traffic on the LEC-to-LEC network “on behalf of another carrier” (Transcom) and thus meets the definition of an aggregator under 29.020(3).

Halo suggests that it is a “transiting” carrier somehow exempt from the Missouri law. Under the ERE Rule, however, only originating tandem carriers perform a transit function when they transport traffic properly comporting with the ERE Rule over the LEC-to-LEC network to the end office of another LEC. Halo’s claim it is “transiting” Transcom’s traffic to AT&T Missouri is neither contemplated nor permitted by the ERE Rule. Under the ERE Rule, by delivering the traffic in dispute to AT&T Missouri’s originating tandem, Halo is acting as both an originator and aggregator of the traffic for purposes of the ERE Rule.

#### **g. Halo’s “CMRS license” Has No Consequence**

Transcom is routing large volumes of wireline interexchange and interMTA wireless voice calls to its affiliate, Halo. Halo then delivers those wireline and interMTA wireless calls to AT&T Missouri for completion (i.e. “termination”) to AT&T Missouri’s customers and the RLEC Respondents’ customers. Although these voice calls employ the facilities and services of RLEC Respondents, Halo has refused to compensate the RLEC Respondents for these calls even where Halo has been billed at the RLEC Respondents’ lowest reciprocal compensation rates.

Halo argues that it has a CMRS license which grants it federal authority and prohibits the Commission from regulating its activities.<sup>185</sup> The evidence indicates Halo has been issued a Radio Station Authorization.<sup>186</sup> There is no evidence that any of the traffic in question was originated by *mobile* wireless customers of Halo. The insertion of a “wireless link” in the call paths did not involve wireless equipment that was capable of moving and ordinarily did move. Under the evidence, it is not clear that any traffic which is the subject of this case was Halo CMRS traffic. Rather, the evidence establishes that the majority of Halo’s traffic is wireline-originated interexchange traffic. Regardless of the nature of Halo’s license, and regardless of whether Halo may operate as a CMRS provider, Halo has improperly placed interexchange landline traffic and interMTA wireless traffic on the LEC-to-LEC network.

<sup>184</sup> EFIS Docket Entry No. 211, Wiseman Direct, p. 33.

<sup>185</sup> EFIS Docket Entry No. 72, Halo Exhibit A, Wiseman Direct, pp. 26-28.

<sup>186</sup> Halo Exhibits 2 and 2A.

The FCC's *Connect America Fund Order*<sup>187</sup> rejected Halo's arguments and found that Halo's practices did not convert landline calls into something else. Specifically, the FCC held, "[T]he 're-origination' of a call over a wireless link in the middle of a call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position."<sup>188</sup>

Therefore, the Commission's determination that Halo has violated the ERE Rule is based upon Halo's actual operations and improper use of the LEC-to-LEC network in Missouri rather than Halo's claimed status as a CMRS provider. The ERE Rule was established to address and prevent such improper activity.

## **2. Halo Has Placed InterLATA Wireline Telecommunications Traffic on the LEC-to-LEC Network**

The record demonstrates and the Commission concludes that Halo has delivered large volumes of telecommunications traffic via the LEC-to-LEC network to AT&T Missouri for termination to AT&T Missouri customers and for termination to the customers of Craw-Kan et al. and Alma et al. As previously discussed, AT&T Missouri's traffic studies demonstrate that significant proportions of the Halo traffic were originated as landline calls. This traffic terminated to landline customers of AT&T Missouri, Craw-Kan et al., or Alma et al., and thus were landline to landline interexchange calls.

The Commission further concludes that AT&T Missouri's traffic studies demonstrate that significant proportions of these landline to landline calls were interLATA in jurisdiction, as the calls originated in LATAs that were different than the LATAs in which the calls terminated. Halo's delivery of interLATA landline to landline calls to AT&T Missouri on the LEC-to-LEC network violated 4 CSR 240-29.010 and 4 CSR 240-29.030(2) of the Commission's ERE Rule. In addition, interLATA landline to landline calls were originated by or with the use of Feature Group D protocol trunking arrangements, and Halo's delivery of such calls to AT&T Missouri on the LEC-to-LEC network violated 4 CSR 240-29.030(3).<sup>189</sup>

## **3. Halo Has Failed To Compensate the RLEC Respondents for Traffic it is Delivering to Them for Termination Pursuant to Halo's Interconnection Agreement with AT&T Missouri**

As the Commission has previously concluded, significant portions of the Halo traffic were landline to landline interexchange calls. To the extent these landline interexchange calls were originated in one state and terminated to another state, they are subject to the interstate access tariffs and charges of the Respondents. To the extent these landline interexchange calls originated in Missouri and terminated in Missouri, they are subject to the Missouri intrastate access tariffs and charges of the Respondents.<sup>190</sup>

<sup>187</sup> *In the Matter of the Connect America Fund*, WC Docket No. 10-90 et al., *Report and Order*, released Nov. 18, 2011.

<sup>188</sup> *Id.* at ¶1006.

<sup>189</sup> Tr. 399, Re-Cross of Craw-Kan et al. witness for McDonald County Telephone, Jack Rickett.

<sup>190</sup> See e.g. EFIS Docket Entry No. 143, *BPS Telephone Company et al. v. Voicestream Wireless Corp.*, Case No. TC-2002-1077, *Report and Order*, issued Jan 27, 2005, pp. 14-15.

The Commission also concludes that AT&T Missouri's traffic studies demonstrate that significant proportions of the Halo traffic were originated as wireless calls by customers of Commercial Mobile Radio Service providers other than Halo. This traffic terminated to landline customers of AT&T Missouri, Craw-Kan et al., and Alma et al., and thus were wireless to landline calls. Whether wireline or wireless, and whether local or interexchange, all of the traffic Halo delivered to AT&T Missouri and the RLEC Respondents is "compensable traffic" pursuant to 4 CSR 240-29.020(8) ("telecommunications traffic that is transited or terminated over the LEC-to-LEC network, for which the transiting and/or terminating carrier is entitled to financial compensation.")

AT&T Missouri's traffic studies further demonstrate that significant proportions of these wireless to landline calls were interMTA in jurisdiction, as the calls originated in MTAs that were different than the MTAs in which the calls terminated. To the extent the wireless to landline interMTA Halo calls originated in one state and terminated in another state, they are subject to the interstate access tariffs of the Respondents. To the extent the wireless to landline interMTA calls originated in Missouri and terminated in Missouri, they are subject to the intrastate access tariffs of the Respondents.<sup>191</sup>

By sending landline interexchange traffic, and by sending wireless interMTA traffic, Halo has used its direct interconnection with AT&T Missouri, and its indirect interconnections with Craw-Kan et al. and Alma et al. in a manner such that Halo knew it would receive terminating exchange access services from AT&T Missouri, Craw-Kan et al., and Alma et al. Halo intended to receive terminating exchange access services from AT&T Missouri, Craw-Kan et al., and Alma et al. Halo did in fact receive terminating exchange access services from AT&T Missouri, Craw-Kan et al., and Alma et al. Thus, as the Commission has previously concluded, Halo constructively ordered terminating exchange access services from AT&T Missouri, Craw-Kan et al., and Alma et al.

Halo has refused to pay AT&T Missouri its terminating exchange access tariff rates for this non-local Halo traffic terminating to AT&T Missouri. Halo has only paid AT&T Missouri its reciprocal compensation rate set forth in the Halo-AT&T interconnection agreement. Halo has also refused to pay Craw-Kan et al. or Alma et al. anything for this non-local Halo traffic terminating to Craw-Kan et al. and Alma et al. By failing to pay AT&T Missouri, Craw-Kan et al., and Alma et al., terminating exchange access tariff rates for this non-local Halo traffic, Halo violated the provisions of 4 CSR 240-29.090 and 29.100.

#### **4. Halo Did Not Deliver Appropriate Originating Caller Identification**

The Commission's ERE Rule defines originating caller identification as the "10 (10-digit) telephone number of the caller who originates the telecommunications that is placed on the LEC-to-LEC network. This feature is also known as Caller ID, Calling Number Delivery (CND), Calling Party Number (CPN), and Automatic Number Identification (ANI)."<sup>192</sup> In other words, originating caller identification is the calling party number or CPN of the end user who places the call. As the Commission has previously concluded, the traffic Halo is placing on the LEC-to-LEC network does not originate with its customer Transcom but with the end user who actually initiated the call. Therefore, the Commission concludes that the appropriate originating caller identification to be included in the calls Halo is putting on the LEC-to-LEC network for delivery to Respondents is the CPN of the calling party who initiated the call.

<sup>191</sup> *Id.* at pp. 16-17.

<sup>192</sup> 4 CSR 240-29.020(28).

The Commission's ERE Rule also prohibits carriers that use the LEC-to-LEC network from substituting any number other than the telephone number of the end user responsible for originating the call:

The originating telephone number shall be the telephone number of the end user responsible for originating the telephone call. Under no circumstances in Sections (1), (2), (3), (4) and (5) above shall any carrier substitute an originating telephone number other than the telephone number of the end user responsible for originating the telephone call.<sup>193</sup>

In this case, it is clear, and Halo admits, that for a period of time beginning in approximately mid-February, 2011 through late December, 2011, it was placing a Charge Number that it assigned to Transcom in the record for each call delivered to AT&T Missouri for termination on the LEC-to-LEC network. As the Commission previously found when the call record information includes both a CPN and a CN, the CN overrides the CPN and controls how the call is categorized and billed. By inserting the inaccurate CN, Halo masked the true nature of the calls it was sending to AT&T Missouri and RLEC Respondents. It was only after AT&T Missouri and several RLECs conducted special, time-consuming, and expensive analyses that the true nature of the calls was discovered.

The Commission concludes the only apparent reason for Halo's insertion of the inaccurate CN in the call record was to make the long distance landline calls that Halo sent to AT&T Missouri appear to be local wireless calls, and therefore avoid access charges for what was actually non-local traffic. Therefore, by inserting an inaccurate CN in the call record, Halo has violated the Commission's ERE Rule prohibiting a carrier from substituting an originating telephone number other than the telephone number of the end user responsible for originating the telephone call. 4 CSR 240-29.040(6).

### **5. Blocking of Halo's Traffic in Accordance with the ERE Rules**

Blocking or disconnection from the network is the appropriate remedy under the ERE Rule (as well as longstanding legal precedent) for customers, including other carriers, that do not pay their bills. The right to block calls or disconnect service for failure to comply with Commission-approved tariffs has been consistently upheld by the Missouri Court of Appeals.<sup>194</sup> Similarly, the FCC has explained, "the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties."<sup>195</sup> The Georgia Public Service Commission, South Carolina Public Service Commission, Tennessee Regulatory Authority, and Public Service Commission of Wisconsin have all granted similar relief -- authority to stop accepting traffic from Halo.<sup>196</sup>

<sup>193</sup> 4 CSR 240-29.040(6).

<sup>194</sup> See e.g. EFIS Docket Entry No. 169, *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Service Comm'n*, 806 S.W.3d 432, 435 (Mo. App. 1991) ("To hold otherwise would mean that a telephone company would be required to serve every customer so long as service was requested whether the customer paid the bill or not."); EFIS Docket Entry No. 165, *Sprint Spectrum v. Missouri PSC*, 112 S.W.3d 20, 26 (Mo. App. 2003) ("We disagree that the Act prohibits blocking the traffic of a carrier in default of applicable tariff provisions, such as failing to pay approved rates. . . . It is well established that telephone companies may discontinue service to a customer in default of a tariff, as long as proper notice is given.").

<sup>195</sup> EFIS Docket Entry No. 169, *In the Matter of Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone Company of Missouri*, File No. E-87-59, *Memorandum Opinion and Order*, 4 FCC Rcd 8338, rel. Nov. 29, 1989, ¶19. This FCC decision was affirmed by the U.S. Court of Appeals for the D.C. Circuit in *Tel-Central of Jefferson City, Missouri, Inc. v. FCC*, 920 F.2d 1039 (D.C. Cir. 1990) (concluding that United Telephone Company "was authorized to disconnect Tel-Central's lines for nonpayment of charges.") [EFIS Docket Entry No.170].

<sup>196</sup> EFIS Docket Entry No. 153, *Tennessee Halo Order*, 22; EFIS Docket Entry No. 236, *Georgia Halo Order* at 15 and *South Carolina Halo Order* at 34. The Public Service Commission of Wisconsin has not yet issued its written order.

The Commission observes that blocking of Halo's traffic over the LEC-to-LEC network is a limited remedy that does not prevent Halo from using alternative methods to deliver traffic to Missouri carriers. Rather, blocking under the ERE Rule only prevents Halo's traffic from being transited through the AT&T tandem over Feature Group C (FGC) trunks on the LEC-to-LEC network. The ERE Rule specifically allows Halo to use other methods to deliver traffic:

In all instances of traffic blocking, originating carriers and traffic aggregators may utilize alternative methods of delivering the blocked traffic to terminating carriers. Such methods may include interconnection agreement negotiations with terminating carriers for transiting traffic, direct interconnection with terminating carriers, or contracting with interexchange carriers for traffic delivery.<sup>197</sup>

Thus, the ERE's blocking provisions are reasonable limitations which generally prohibit carriers from sending interexchange traffic on FGC trunks unless otherwise approved by the Commission.

As the Commission has previously concluded, Halo has violated the provisions of the ERE Rule that prohibit altering originating caller information, that prohibit interLATA landline to landline traffic from being placed on the LEC-to-LEC network, that prohibit the placement of traffic originated by or with the use of Feature Group D protocol trunking arrangements on the LEC-to-LEC network, and that prohibit Halo from failing to pay the appropriate compensation for the traffic it placed on the LEC-to-LEC network.

As a result of these violations, the Commission concludes that blocking of Halo traffic terminating to AT&T Missouri is appropriate pursuant to 4 CSR 240-29.120. Further, as a result of these violations, the Commission concludes that blocking of Halo traffic terminating to Craw-Kan et al. and Alma et al. is appropriate pursuant to 4 CSR 240-29.130.

## **6. No Claim or Finding of Fraud**

At the conclusion of the evidentiary hearing, Commissioner Kenney invited the parties to address his questioning of Staff witness Voight as to whether Transcom was created for the purpose of avoiding having to pay access charges and, if so, whether that is illegal or merely a permissible clever strategy.<sup>198</sup>

In this case, no party has asserted a fraud claim against Halo or Transcom. Nor has any party sought a decision or ruling as to the state of mind of the creators and incorporators of Halo and Transcom. Therefore, the Commission makes no determination in this case as to whether Halo and Transcom were created for an illegal purpose.

Regardless of why the two companies were created, Halo and Transcom's access compensation avoidance strategy did not permit Halo to lawfully avoid the payment of exchange access compensation due on the traffic in question. It does not matter who created Transcom or Halo, or whether they were created as part of a clever strategy whose goal was the avoidance of payment of access charges. Under the law applicable to the facts of this case, it is the nature of the traffic, and the originating and terminating locations of the calls, that determine whether exchange access is owed.

<sup>197</sup> ERE Rule, 4 CSR 240-29.130(1).

As the Commission has found above, the landline traffic at issue was interexchange traffic subject to exchange access compensation. The Halo/Transcom strategy to convert landline calls into two separate calls by insertion of a “wireless in the middle” link did not convert the landline calls into intraMTA wireless calls. These calls remained interexchange landline calls subject to exchange access compensation.

Similarly, the interMTA wireless traffic at issue was also subject to exchange access compensation. The Halo/Transcom strategy to convert wireless calls into two separate calls by insertion of the “wireless in the middle” link did not convert interMTA calls into intraMTA calls. These calls remained interMTA wireless calls subject to exchange access compensation.

#### **D. Alma et al.’s ICA Complaint**

Alma et al. also filed an Application seeking rejection of the transit provisions of Halo’s interconnection agreement with AT&T Missouri, as implemented, pursuant to 47 USC 252 (e) (2). As grounds therefore, Alma et al. alleged that the implementation of the transit provisions in Halo’s interconnection agreement with AT&T Missouri were contrary to the public interest because they allowed Halo to use rural network facilities without an approved agreement and compensation arrangements in place, and that as a result unlawful discriminations were caused. Craw-Kan et al. intervened in the case, designated as TO-2012-0035. Case number TO-2012-0035 was consolidated with the instant case TC-2012-0331.<sup>199</sup>

The Commission has decided that Halo’s actions constituted a material breach of its interconnection agreement with AT&T Missouri. The Commission has also decided that Halo’s actions violated the provisions of the ERE Rule. The Commission has authorized and directed AT&T to discontinue the termination of Halo traffic to AT&T Missouri, and to Craw-Kan et al., and to Alma et al. because of such breach and violations. Halo’s traffic will no longer terminate to AT&T Missouri, to Craw-Kan et al., or to Alma et al. As the Commission’s decision in this order obviates the need to consider the relief requested in TO-2012-0035, no decision is necessary to be rendered by the Commission in TO-2012-0035.

### **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 independently and impartially reached the following final decision. Halo has failed to meet its burden to prove its allegations by the preponderance of the evidence. AT&T Missouri, on the other hand, has met its burden to prove the allegations within its counterclaim by the preponderance of the evidence. The substantial and competent evidence in the record as a whole supports the conclusion that Halo has violated the Missouri Enhanced Records Exchange Rule and materially breached its interconnection agreement with AT&T Missouri.

<sup>198</sup> Transcript Volume 4, pp. 492-495 and 509-510.

<sup>199</sup> EFIS Docket Entry No. 55, *Order Regarding Motion to Consolidate, Motion to Dismiss, and Motion to Dismiss AT&T Missouri’s Counterclaim*, issued May 17, 2012, p. 4 (recognizing that a single hearing could be utilized to decide both cases and that the relief ordered in this case may eliminate the need for additional relief to be ordered in TO-2012-0035).

Additionally, Staff, in its brief, states: "Although this was not contained in the issues lists in this case, the Staff wishes to make clear that Halo and Transcom were legally required to be certificated in Missouri prior to the transport of landline telephone calls." Consequently, the Commission will direct its Staff to complete an investigation into any unlawful actions by Halo and Transcom and to file a complaint seeking penalties if the results of Staff's investigation support such action.

**THE COMMISSION ORDERS THAT:**

1. The Commission's "Notice Regarding Communication and Post-Hearing Procedural Schedule," issued on July 24, 2012, shall be attached to this order and designated Attachment A.
2. Halo Wireless, Inc.'s ("Halo") complaint is denied.
3. Southwestern Bell Telephone Company, d/b/a AT&T Missouri's ("AT&T Missouri") counterclaim is granted.
4. Halo has materially breached its interconnection agreement with AT&T Missouri by sending landline-originated traffic to AT&T Missouri. As a result of this breach, AT&T Missouri is excused from further performance under the parties' interconnection agreement and may stop accepting traffic from Halo.
5. Halo violated the Missouri ERE Rule by failing to pay AT&T Missouri and the RLEC Respondents the applicable access rates for terminating Halo's landline originated interexchange traffic and interMTA wireless originated traffic; failing to deliver appropriate originating caller identification as required by the Rule; and transmitting interLATA wireline traffic over the LEC-to-LEC network. AT&T Missouri is therefore authorized to block Halo's traffic terminating to AT&T Missouri and to the RLECs pursuant to the ERE Rule.
6. Halo is liable, without quantifying any specific amount due, to AT&T Missouri and the RLEC Respondents for access charges on the interstate and intrastate access traffic Halo has sent to AT&T Missouri and the RLEC Respondents. The precise amount due will be an issue for Halo's bankruptcy proceeding.
7. To the extent the record citations and legal arguments in "AT&T Missouri's Brief in Support of Its Proposed Findings of Fact and Conclusions of Law," which was filed on July 23, 2012, supplement the findings of fact and conclusions of law in this order, it is incorporated by reference as if fully set forth. This filing shall be attached to this order as Attachment B.
8. To the extent the record citations and legal arguments in "Staff's Initial Brief," which was filed on July 23, 2012, supplement the findings of fact and conclusions of law in this order, it is incorporated by reference as if fully set forth. This filing shall be attached to this order as Attachment C.
9. The Staff of the Missouri Public Service Commission shall complete an investigation into any unlawful actions by Halo Wireless, Inc. and Transcom Enhanced Services, Inc. and file a complaint seeking penalties if the results of Staff's investigation support such action.

10. This Report and Order shall become effective on August 13, 2012.<sup>200</sup>
11. This file shall be closed on August 14, 2012.

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

Stearley, Deputy Chief Regulatory Law Judge

<sup>200</sup> Because of the nature of Halo's ongoing violations, the Commission finds good cause to exercise its discretion and set the date for this order to take effect in less than 30 days. The Commission has the authority to make an order effective in less time than the 30-day statutory period described in Section 386.490.3, RSMo 2000. *Harter v. Missouri Public Service Comm'n*, 361 S.W.3d 52, 57 (Mo. App. 2011).

**In the Matter of the Third Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of KCP&L Greater Missouri Operations Company****File No. EO-2011-0390**

**Accounting. §42. Accounting Authority Orders.** The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that KCP&L Greater Missouri Operations Company engaged in improper accounting practices in violation of the Accounting Authority Order from File Number ER-2005-0436.

**Accounting. §8. Duty to keep proper accounts generally.** The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that KCP&L Greater Missouri Operations Company (GMO) violated the Uniform System of Accounts. The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that GMO violated its Fuel Adjustment Clause Tariff.

**Evidence, Practice and Procedure. §26. Burden of proof.** Staff's allegations and the relief sought were denied because Staff failed to: provide substantial controverting evidence to rebut the presumption of the prudence of KCP&L Greater Missouri Operations Company's (GMO) hedging practices; meet its burden of proving that GMO engaged in improper accounting practices in violation of the accounting authority order; meet its burden of proving that GMO violated the Uniform System of Accounts; or meet its burden of proving that GMO violated its Fuel Adjustment Clause tariff.

**Electric. §43. Accounting Authority Orders.** The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that KCP&L Greater Missouri Operations Company (GMO) engaged in improper accounting practices in violation of the Accounting Authority Order from File Number ER-2005-0436.

**Electric. §27. Accounting.** The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that KCP&L Greater Missouri Operations Company (GMO) violated the Uniform System of Accounts. The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that GMO violated its Fuel Adjustment Clause Tariff.

**REPORT AND ORDER**

**Issue Date:** September 4, 2012

**Effective Date:** September 14, 2012

**APPEARANCES****APPEARING FOR KCP&L GREATER MISSOURI OPERATIONS COMPANY:**

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

**Roger W. Steiner**, Kansas City Power & Light Company, P.O. Box 418679. Kansas City, Missouri 64141.

**APPEARING FOR DOGWOOD ENERGY, L.L.C.:**

**CARL J. LUMLEY**, CURTIS, OETTING, HEINZ, GARRETT & O'KEEFE, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105.<sup>1</sup>

<sup>1</sup> Counsel for Dogwood sent the RLJ an e-mail request to be excused from the evidentiary hearing on May 29, 2012, which was granted by the RLJ. This was announced at the hearing. Transcript, p. 25.

**APPEARING FOR THE SEDALIA INDUSTRIAL ENERGY USERS ASSOCIATION:**

**Stuart W. Conrad**, Finnegan, Conrad & Peterson, L.C., 3100 Broadway, Suite 1209, Kansas City, Missouri 64111.<sup>2</sup>

**APPEARING FOR AG PROCESSING, INC.:**

**Stuart W. Conrad**, Finnegan, Conrad & Peterson, L.C., 3100 Broadway, Suite 1209, Kansas City, Missouri 64111.<sup>3</sup>

**APPEARING FOR THE OFFICE OF THE PUBLIC COUNSEL AND THE PUBLIC:**

**Lewis Mills**, Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102.<sup>4</sup>

**APPEARING FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

**Kevin Thompson**, Chief Staff Counsel, **Meghan McClowry**, Legal Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

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

### **I. Procedural History**

On June 9, 2011, the Staff of the Missouri Public Service Commission filed a notice that it had started its third prudence audit of KCP&L Greater Missouri Operations Company's ("GMO") fuel adjustment clause ("FAC"). The Commission issued notice, set a deadline for intervention requests and acknowledged the timeline for completion of the audit and for requests for a hearing pursuant to Commission Rule 4 CSR 240-20.090. On November 29, 2011, after having received an extension of time, Staff filed its report. In its report, Staff alleged that GMO had acted imprudently in association with its hedging future purchases of spot market power by buying options to purchase natural gas. Staff requests the Commission to order GMO to refund monies that it believes GMO has over-collected in its FAC in relation to the alleged imprudent actions.

On December 5, 2011, GMO requested a hearing. A procedural schedule was set that culminated with convening an evidentiary hearing on June 5-6, 2012,<sup>5</sup> wherein the Commission admitted the testimony of 9 witnesses and received 38 exhibits into evidence. The parties filed post-hearing briefs, proposed findings of fact and conclusions of law and reply briefs. The case was deemed submitted for the Commission's decision on July 27, 2012 when the Commission closed the record.<sup>6</sup>

<sup>2</sup> Counsel for SIEUA appeared at the evidentiary hearing, but did not file a post-hearing brief, a reply brief, or proposed findings of fact and proposed conclusions of law.

<sup>3</sup> Counsel for AG Processing, Inc. appeared at the evidentiary hearing, but did not file a post-hearing brief, a reply brief, or proposed findings of fact and proposed conclusions of law.

<sup>4</sup> Public Counsel entered an appearance at the evidentiary hearing, where upon he asked to be excused. The request was granted. Transcript, pp. 25-26. Public Counsel did not file a post-hearing brief, a reply brief, or proposed findings of fact and proposed conclusions of law.

<sup>5</sup> EFIS Docket Entry No. 23, *Order Setting Procedural Schedule*, effective December 21, 2011. EFIS is the Commission's Electronic Information and Filing System.

<sup>6</sup> Reply briefs were filed on this date, and this was the last scheduled filing for this matter. "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).

## **II. Findings of Fact and Conclusions of Law**

### **A. The Parties**

#### **Findings of Fact:**

1. **KCP&L Greater Missouri Operations Company (“GMO”)** is a Delaware corporation authorized to do business in Missouri with its principal office and place of business located at 1200 Main Street, Kansas City, Missouri 64105. GMO is in the business of owning, controlling and operating electric plant, as defined at § 386.020(14), RSMo, used for generating, transmitting and distributing electricity for sale to the public for light, heat and power. According to Great Plains Energy, Inc.’s (“GPE”)<sup>7</sup> Form 10-K filed with the United States Securities and Exchange Commission in February, 2010, GMO is “an integrated, regulated electric utility that primarily provides electricity to customers in the state of Missouri [and] also provides regulated steam service to certain customers in the St. Joseph, Missouri area.” GMO has approximately 312,000 customers, including 273,500 residential customers, 38,000 commercial customers, and some 500 industrial, municipal, and other utility customers. To serve these customers, GMO owns 2,182 Megawatt (“MW”) of generating capacity, of which 1,025 MW is coal capacity, 1,094 MW is natural gas-fired combustion turbine capacity, and 63 MW is oil-fired combustion turbine capacity.<sup>8</sup>

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 650 MW combined cycle generating facility located in Pleasant Hill, Missouri, which is within the service territory of GMO.<sup>9</sup>

3. **AG Processing, Inc. (“AGP”)** is an agricultural cooperative and a large manufacturer and processor of soybean meal, soy-related food products, and other grain products throughout the central and upper Midwest, including the State of Missouri. AGP is the largest cooperative soybean processing company in the world, the third-largest supplier of refined vegetable oil in the United States and the third-largest commercial feed manufacturer in North America. AGP operates a major processing facility in St. Joseph, Missouri.<sup>10</sup>

4. **Sedalia Industrial Energy Users Association (“SIEUA”)** is an unincorporated voluntary association consisting of large commercial and industrial users of natural gas and electricity in Sedalia, Missouri and in the surrounding area.<sup>11</sup>

<sup>7</sup> GPE is GMO’s parent company. See File No. EM-2007-0374, Report and Order, effective July 11, 2008.

<sup>8</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012. In Case No. EN-2009-0164 the Commission recognized the name change of Aquila, Inc. d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company. At different points in time the company now named KCP&L Greater Missouri Operation Company was known as, or did business in Missouri as, Aquila, Inc., Aquila Networks-MPS, Aquila Networks-L&P and KCP&L Greater Missouri Operations Company.

<sup>9</sup> EFIS Docket Entry No. 4, *Application to Intervene*, filed June 29, 2011.

<sup>10</sup> In re Aquila, Inc., *Report and Order*, effective May 27, 2007, File No. ER-2007-0004, 2007 WL 1663103, 6, 257 P.U.R.4th 424 (Mo. P.S.C. 2007). GMO’s FAC was established in File Number ER-2007-0004. Commission Rule 4 CSR 240-3.161(10) provides that parties to the rate case in which the Commission established GMO’s fuel adjustment clause are automatically parties to this prudence audit, without the necessity of having to apply for intervention. AGP was made an automatic party pursuant to this rule.

<sup>11</sup> *Id.* As with AGP, SIEUA was made an automatic party pursuant to Commission Rule 4 CSR 240-3.161(10). Members of SIEUA are as follows: Pittsburgh Corning Corporation, a manufacturer of cellular glass insulation at its manufacturing facility in Sedalia, Missouri; Waterloo Industries, a manufacturer of tool storage equipment in Sedalia, Missouri; Hayes-Lemmerz International, a manufacturer of automobile wheels in Sedalia, Missouri; EnerSys Inc. a manufacturer of industrial batteries in Warrensburg, Missouri; Alcan Cable Co. a manufacturer of aluminum electrical conductors in Sedalia, Missouri; Gardner Denver Corporation a manufacturer of industrial compressors and blowers in Sedalia, Missouri; American Compressed Steel Corporation, a scrap metal recycling facility near Sedalia, Missouri; and ThyssenKrupp Stahl Company, a manufacturer of specialty and precision aluminum castings in Warrensburg and Kingsville, Missouri. Counsel for SIEUA confirmed that its members remain essentially the same, except for the change of one of the member’s names. Transcript, pp. 153-154.

**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.”<sup>12</sup> Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”<sup>13</sup>

**6. The Staff of the Missouri Public Service Commission** (“Staff”) is a party in all Commission investigations, contested cases and other proceedings.<sup>14</sup> Staff is represented by Staff Counsel.<sup>15</sup>

**7. Automatic Parties:** Pursuant to Commission Rule 4 CSR 240-3.161(10), parties to the rate case in which the Commission established GMO’s Fuel Adjustment Clause are automatically made parties to this action without the necessity of applying for intervention.<sup>16</sup> The majority of those parties, from File Number ER-2007-0004, withdrew from this action.<sup>17</sup> Two of the automatic parties did not withdraw - the County of Jackson, Missouri and the Federal Executive Agencies. These two parties did not participate in any manner throughout this proceeding and are subject to dismissal.<sup>18</sup>

### **Conclusions of Law - Jurisdiction, Burden of Proof and Prudence Standard: Jurisdiction**

GMO is an electric corporation pursuant to section 386.020(15), RSMo Supp. 2010, and subsequently is a public utility within the meaning of 386.020(43), RSMo Supp. 2010.<sup>19</sup> As a public utility, GMO is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.<sup>20</sup> The Commission’s subject matter jurisdiction over a FAC request is established under Section 386.266, RSMo Supp. 2010.

<sup>12</sup> Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(15) and 2.040(2).

<sup>13</sup> Section 386.710(3).

<sup>14</sup> Section 386.250(7) grants the Commission all necessary powers, express or implied, in the Public Service Commission Law to carry out its statutory mandates. Implied powers include employing an independent Staff. Commission employees (Staff) are also expressly mentioned in Sections 386.135, .150, .200, .240, .320, .480 and Section 393.140, RSMo 2000.

<sup>15</sup> Commission Rules 4 CSR 240-2.010(21) and 2.040(1).

<sup>16</sup> EFIS Docket Entry Number 3, *Order Acknowledging Automatic Parties*, issued and effective on June 23, 2011.

<sup>17</sup> EFIS Docket Entry Number 22, *Order Granting Leave to Withdraw*, issued and effective on December 21, 2012; EFIS Docket Entry Number 27, *Order Granting Leave to Withdraw*, issued and effective on January 9, 2012. The automatic parties that withdrew were: the Missouri Department of Natural Resources, the City of St. Joseph, the Consumers Council of Missouri, AARP, the City of Kansas City, and Union Electric Company d/b/a Ameren Missouri.

<sup>18</sup> Commission Rules 4 CSR 240-2.090 and .116.

<sup>19</sup> The parties have stipulated to this. EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012.

<sup>20</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012.

### **Burden of Proof and Presumption of Prudence**

When Section 386.266.4(4), RSMo Supp. 2010, creates a “prudence review” it does not define who has the burden of proof. However, it is well settled law that in rate cases, where a utility has the burden of proof to justify its proposed rate increase, there is initially a presumption that its expenditures, comprising one component of its revenue requirement, are prudent.<sup>21</sup> This presumption can be rebutted upon a showing of serious doubt as to the prudence of the expenditure, at which point the utility must dispel this doubt and prove the questioned expenditure is prudent.<sup>22</sup> This presumption regarding expenses; however, does not change the fact that the utility company, in that rate case, retains the burden of proof to establish that its proposed rates are just and reasonable. But this is not a rate case wherein GMO came to the Commission bearing the burden of proof to set just and reasonable rates.

To properly examine the interaction of the burden of proof and the presumption of prudence for Staff’s prudence review of GMO’s hedging costs, the Commission must bear in mind that the burden of proof has two parts: the burden of production and the burden of persuasion.<sup>23</sup> “The burden of production requires the party to introduce enough evidence on an issue to have that issue decided by a fact-finder.”<sup>24</sup> “The burden of persuasion requires the party to convince the fact-finder to favor that party.”<sup>25</sup> “A presumption alters who has these various burdens, shifting them from one party to another.”<sup>26</sup>

The general rule in Missouri is that “when a party against whom a presumption operates introduces evidence controverting a presumed fact, that fact must then be determined from the evidence in the case as if there never was a presumption.”<sup>27</sup> This rule only shifts the burden of production, not the burden of persuasion.<sup>28</sup> GMO’s burden, if Staff can demonstrate a serious doubt as to the prudence of its hedging costs, becomes one of production and not persuasion. Consequently, Staff maintains the burden of persuasion and the overall burden of proof throughout this proceeding.<sup>29</sup>

<sup>21</sup> *State ex rel. Public Counsel v. Public Service Comm’n*, 274 S.W.3d 569, 586 (Mo. App. 2009).

<sup>22</sup> *Id.*; *State ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*, 954 S.W.2d 520, 528 (Mo.App.1997); *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)).

<sup>23</sup> *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 745 (Mo. App. 2005).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 746.

<sup>28</sup> *Id.*

<sup>29</sup> *Raisher v. Director of Revenue*, 276 S.W.3d 362, 364 (Mo. App. 2009); *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 746 (Mo. App. 2005); *Middlemas v. Director of Revenue, State of Missouri*, 159 S.W.3d 515, 517 (Mo. App. 2005) (overruled on other grounds in *Hurt v. Director of Revenue*, 291 S.W.3d 251 (Mo. App. 2009); *R.T. French Co. v. Springfield Mayor’s Comm’n on Human Rights and Community Relations*, 650 S.W.2d 717, 722 (Mo. App. 1983).

The Commission's Staff has levied allegations of imprudence against GMO, and it is Staff that is requesting relief in this matter. As the charging party, Staff must first demonstrate serious doubt as to the prudence of GMO hedging costs in order to overcome the presumption of prudence and in order for the claim of imprudence to survive a summary determination.<sup>30</sup> In order to demonstrate serious doubt, Staff must introduce "substantial controverting evidence" to rebut the presumption of prudence.<sup>31</sup> "Substantial evidence is that evidence which, if true, has probative force upon the issues and from which the trier of fact can reasonably decide the case on the fact issues."<sup>32</sup>

Should Staff succeed with overcoming the presumption of prudence, then, although GMO has a burden of production to dispel any serious doubt, Staff still bears the burden of proof to conclusively establish imprudence on GMO's part.<sup>33</sup> In order to carry its burden of proof, Staff must meet the preponderance of the evidence standard.<sup>34</sup> This is the minimum burden in a civil case, and in order to meet this standard, Staff must convince the Commission it is "more likely than not" that GMO engaged in imprudent conduct related to its allegation that GMO imprudently used natural gas futures contracts as a means of mitigating risk associated with the costs of natural gas fuel for generation and spot market purchased power.<sup>35</sup> It is important to recognize the proper standard for the burden of proof, because there is no burden of proof less than the preponderance of the evidence standard called "serious doubt" that would comply with the Constitutional requirements of due process.<sup>36</sup>

<sup>30</sup> If the presumption is not rebutted, then the issue is never reached. *Jones v. Jones*, 10 S.W.3d 528, 535-536 (Mo. App. 1999). If the presumption is not rebutted, GMO would not have to produce any evidence.

<sup>31</sup> The Missouri Supreme Court "set forth the general rule that when a presumption is operating against a party, that party need only introduce substantial controverting evidence to rebut that presumption." *Hoit v. Rankin*, 320 S.W.3d 761, 773 (Mo. App. 2010). See also *Wills v. Townes Cadillac-Oldsmobile, Inc.*, 490 S.W.2d 257, 260 (Mo. banc 1973) and *Michler v. Krey Packing Co.*, 363 Mo. 707, 253 S.W.2d 136, 140 (1952).

<sup>32</sup> *Hermel, Inc. v. State Tax Commission*, 564 S.W.2d 888, 895 (Mo. banc 1978).

<sup>33</sup> Even if a presumption is overcome "the burden of proof on the facts and inferences would still rest on petitioner, for it is the moving party seeking affirmative relief." *Cupples Hesse Corp. v. State Tax Commission*, 329 S.W.2d 696, 702 (Mo. 1959).

<sup>34</sup> *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, 109-110 (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).

The validity of the standard of proof a state imposes upon a given judicial proceeding depends upon whether the quantum satisfies the constitutional minimum of fundamental fairness. The least degree of proof due process tolerates depends upon the gravity of the private as counterpoised against the public interests affected and reflects the communal judgment as to how the risk of error shall be distributed between the litigants. The function of the standard of proof as embodied in due process, therefore, is to instruct the factfinder as to "the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Thus, the standard of proof not only allocates the risk of error between the litigants, but also speaks the relative importance of the ultimate decision. In a criminal proceeding, the transcendent interest of an accused to personal liberty incurs the demand of due process that to minimize the risk of error of the conviction of an innocent person, the other party prove guilt of the accused beyond a reasonable doubt. In the usual civil litigation only private interests are involved, the societal concern in the outcome is minimal, the litigants share the risk of error almost equally—and the factfinder comes to decision on a preponderance of the evidence. (Internal citations omitted). *In re Monnig*, 638 S.W.2d 782, 785 (Mo. App. 1982).

<sup>35</sup> *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 746 (Mo. App. 2005); *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).

<sup>36</sup> Missouri courts have rejected other attempts at lowering this standard to only a showing of "probable cause" or "credible evidence." *Jamison v. Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 411-412 (Mo. banc 2007).

Staff's second set of allegations do not refer to alleged imprudence with incurring hedging costs, the cause of action constituting the "prudence review." These allegations assert violations of: (1) GMO's accounting practices in relation to an Accounting Authority Order ("AAO") granted by the Commission;<sup>37</sup> (2) the Commission rules pertaining to the Uniform System of Accounts ("USOA");<sup>38</sup> and, (3) GMO's FAC tariff.<sup>39</sup> Staff's allegations of these violations constitute a complaint, not a "prudence review."

In a complaint case the burden of proof lies solely with the complainant and neither the burden of production, nor the burden of persuasion, shifts.<sup>40</sup> The complaint portion of Staff's allegations carry with it the burden that Staff prove, at the preponderance of the evidence standard, that it is more likely than not that GMO violated the AAO, violated the rules on the USOA and violated the FAC tariff.

Finally, Article V, Section 18, of the Missouri Constitution requires the Commission to support its findings of fact and conclusions of law with substantial and competent evidence on the record as a whole. Consequently, for Staff to meet its burden of proof at the preponderance of the evidence standard, for its allegation of imprudence and its complaint allegations, it must do so with substantial and competent evidence.

### **Prudence Standard**

The "prudence standard" further qualifies how Staff must meet its burden of proof in relation to its allegations. To determine if GMO's conduct was imprudent, the Commission looks at whether the utility's conduct was reasonable at the time, under all of the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight.<sup>41</sup> More specifically, Staff must prove, by the preponderance of the evidence, that GMO's conduct was unreasonable at the time, under all of the circumstances, from a prospective viewpoint, not in hindsight. Additionally, "[i]f the company has exercised prudence in reaching a decision, the fact that external factors outside the company's control later produce an adverse result do not make the decision extravagant or imprudent."<sup>42</sup>

<sup>37</sup> Staff Witness Hyeman has alleged that GMO seeking inclusion of the resulting hedging gains or losses in its FAC in its fifth, sixth and seventh accumulation period Cost Adjustment Factors ("CAFs"), and the manner in which the hedging gains or losses have been accounted for (i.e. account 547 versus 555), violated the terms of the Stipulation and Agreement in ER-2005-0436 (which included an AAO) and thus violated the order approving it. (Hyeman Rebuttal pp 22-24).

<sup>38</sup> Staff Witness Eaves has alleged that GMO's booking of its hedging gains and losses associated with on- peak purchased power in Account 547 is a violation of Commission Rule 4 CSR 240-20.030 (Uniform System of Accounts) because all costs incurred for purchased power - those gains and losses, according to Mr. Eaves, should be recorded in Account 555. (Eaves Direct pp 10-11).

<sup>39</sup> Staff Exh. 2, Mantle Rebuttal, pp. 10-11; Staff Exh. 1, Eaves, Direct/Rebuttal, pp. 5-11.

<sup>40</sup> *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n of State of Mo.*, 116 S.W.3d 680, 695 (Mo. App. 2003).

<sup>41</sup> *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n*, 116 S.W.3d 680, 694 (Mo. App. 2003); *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 954 S.W.2d 520, 528 -529 (Mo. App. 1997).

<sup>42</sup> *State ex rel. Missouri Power and Light Co. v. Public Service Comm'n*, 669 S.W.2d 941, 947 -948 (Mo. App. 1984).

In order for the Commission to direct a refund for any alleged imprudently incurred costs, it must apply a two-part test. The Commission must find both that: (1) the utility acted imprudently when incurring those costs and, (2) such imprudence resulted in harm to the utility's ratepayers.<sup>43</sup> Harm to ratepayers in relation to imprudently incurred costs requires proof of causation, i.e., that the increased costs recovered from the ratepayers were causally related to the alleged imprudent action, and evidence as to the amount those expenditures would have been if the utility acted prudently.<sup>44</sup>

## B. Witnesses

### Findings of Fact:

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.

### 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."<sup>45</sup> An administrative agency, as fact-finder, also receives deference when choosing between conflicting evidence.<sup>46</sup> 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."<sup>47</sup>

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.<sup>48</sup> And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.<sup>49</sup> 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.<sup>50</sup>

<sup>43</sup> *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 954 S.W.2d 520, 529-530 (Mo. App.1997). "Ultimately, the PSC's standards for the recoverability of ANG's costs arise from the statutory mandate that all charges made by a gas company be just and reasonable. Section 393.130.1. It would be beyond this statutory authority for the PSC to make a decision on the recoverability of costs, based upon a prudency analysis of gas purchasing practices, without reference to any detrimental impact of those practices on ANG's charges to its customers, such as evidence that the costs which ANG is seeking to pass on to its customers are unjustifiably higher than if different purchasing practices had been employed. Therefore the PSC's decision denying recovery of half the premium of the SEECO contract must be deemed unlawful." *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

<sup>46</sup> *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009).

<sup>47</sup> *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).

<sup>48</sup> *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).

<sup>49</sup> *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).

<sup>50</sup> *Id.*

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

### C. GMO's FAC and Its Accumulation Periods

#### Findings of Fact:

**10.** The Commission approved the acquisition of Aquila, Inc. ("Aquila") by Great Plains Energy, Inc. ("GPE") and, subsequently, Aquila was renamed KCP&L Greater Missouri Operations Company ("GMO" or "Company"). This acquisition became effective July 14, 2008. The Commission first authorized a Fuel Adjustment Clause ("FAC") for Aquila in Case No. ER-2007-0004 on May 27, 2007. Following GPE's acquisition of Aquila and the renaming of Aquila to GMO, the Commission has approved continuation of the FAC with modifications in its orders in GMO's general rate cases, File Numbers ER-2009-0090 and ER-2010-0356.<sup>54</sup>

**11.** A FAC is defined by statute as "an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation."<sup>55</sup> It is also described as a "mechanism that allows an electrical utility to make periodic rate adjustments outside of a general rate proceeding that accords with changes in its prudently incurred fuel and purchased-power costs."<sup>56</sup>

**12.** The Commission-authorized FAC for GMO included two annual price adjustments and a 95% pass-through cap to encourage efficient management. Each 6-month adjustment period is referred to as an "accumulation period." These features continue to characterize GMO's FAC.<sup>57</sup>

**13.** GMO's FAC allows GMO to recover from its ratepayers 95% of its prudently incurred variable fuel and purchased power costs above a base amount that is set in a general rate case. Likewise, 95% of any reduction of GMO's fuel and purchased power costs below the base amount is returned to ratepayers through the FAC.<sup>58</sup>

<sup>51</sup> *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).

<sup>52</sup> *Id.*

<sup>53</sup> *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).

<sup>54</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012. Staff Exh. 16, [Third] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company, pp. 1-2. Before it was acquired by GPE, GMO was named Aquila, Inc., and before that, Utilicorp United, Inc. *Id.*

<sup>55</sup> Section 386.266.1, RSMo Supp. 2010.

<sup>56</sup> *Praxair, Inc. v. Public Service Comm'n*, 346 S.W.3d 377, 378 (Mo. App. 2011).

<sup>57</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012.

<sup>58</sup> *Id.*

**14.** GMO's fuel and purchased power costs are accumulated during six-month accumulation periods; each of which is followed by a 12-month recovery period during which the under-recovery or over-recovery is flowed through to ratepayers by an increase or decrease in the Cost Adjustment Factor ("CAF").<sup>59</sup>

**15.** Adjustments to the CAF are designed to offset the under-recovery or over-recovery by the end of the 12-month recovery period. GMO's FAC is also designed to true-up any over-recoveries or under-recoveries during recovery periods. Any disallowance made by the Commission due to a prudence review is accounted for as an adjustment to the next CAF filing.<sup>60</sup>

**16.** As required by statute and Commission rule, GMO's FAC is subject to prudence reviews at intervals not longer than 18 months.<sup>61</sup>

**17.** Staff filed its first Prudence Review Report in File No. EO-2009-0115. That report covered the first two six-month accumulation periods of GMO's FAC - the period June 1, 2007 through May 31, 2008.<sup>62</sup>

**18.** Staff did not recommend any disallowance in the first prudence review. In its report, Staff noted regarding hedging that "the Company attempts to hedge against the fluctuations of natural gas, coal and diesel prices." The *Report* went on to state with respect to natural gas hedging costs:

The Company had a net loss through its natural gas hedging program of approximately \$7 million for the June 1, 2007 to May 31, 2008 time period of this audit. The program had losses through the months of June 2007 through March 2008 – the first 10 months of the audit year. In the last two months of the audit year, the company's hedging program produced a gain of approximately \$1.5 million.<sup>63</sup>

**19.** The first prudence report did not expressly refer to the cross-hedging of purchased power spot market price risk with financial instruments based on natural gas futures.<sup>64</sup>

**20.** Staff filed its second Prudence Review Report in File No. EO-2010-0167. That report covered the third and fourth six-month accumulation periods of GMO'S FAC - the period June 1, 2008 through May 31, 2009.<sup>65</sup>

**21.** Staff did not recommend any disallowance in the second prudence review. Staff's report included a section headed, "Financial Hedges of Natural Gas." The *Report* went on to state with respect to natural gas hedging costs:

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* See Section 386.266.4(4), RSMo Supp. 2010, and Commission Rule 4 CSR 240-20.090(7).

<sup>62</sup> *Id.* Staff Exh. 14, [First] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company, June 1, 2007 through May 31, 2008. See also Staff Exh. 16, [Third] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company, pp. 1-2.

<sup>63</sup> *Id.* Staff did not assert that fuel costs, or purchased power costs or hedging costs were imprudent, nor did Staff have any reason to believe that these costs were unreasonable or excessive. Transcript, pp. 333-334.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; Staff Exh. 15, [Second] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company; Staff Exh. 16, [Third] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company, pp. 1-2.

The Company had a net gain, i.e., it was able to purchase natural gas at a price lower than the market price, through its natural gas hedging program of approximately **\*\* ---HC---** for the June 1, 2008 to May 31, 2009 time period of this audit. The program had a gain or increase of approximately **\*\* ---HC---** through the months of June 1, 2008 through December 31, 2008 – the first seven months of the prudence review period. In the last five months of the prudence review period, the company's hedging program produced a loss or decrease of approximately **\*\* ---HC---**. Because the company's financial hedging program is used to avoid market fluctuations in natural gas prices, there will be times that GMO benefits and times that they do not. If it was found that GMO had been imprudent in its financial hedges and natural gas fuel purchases, ratepayer harm could result from an increase in fuel costs recovered through the FAC. The Company had a net loss through its natural gas hedging program of approximately \$7 million for the June 1, 2007 to May 31, 2008 time period of this audit. The program had losses through the months of June 2007 through March 2008 – the first 10 months of the audit year. In the last two months of the audit year, the company's hedging program produced a gain of approximately \$1.5 million.<sup>66</sup>

**22.** The second prudence report did not expressly refer to the cross-hedging of purchased power spot market price risk with financial instruments based on natural gas futures.<sup>67</sup>

**23.** The prudence review at issue in this matter, GMO's third, involves the fifth, sixth and seventh six-month accumulation periods of GMO's FAC ("prudence review period"). The fifth accumulation period started June 1, 2009 and ended November 30, 2009, the sixth accumulation period started December 1, 2009 and ended May 31, 2010, and the seventh accumulation period started June 1, 2010 and ended November 30, 2010. Thus, the 18-month prudence review period at issue in this matter is from June 1, 2009 through November 30, 2010.<sup>68</sup>

**24.** In Staff's third prudence report, it recommended the disallowance of \$18,755,865 reflecting GMO's use of natural gas hedges to mitigate risk associated with its future purchases in the spot power market. Staff characterized that practice as imprudent. Staff recommended that GMO be required to refund that amount, plus interest at the short term rate, to ratepayers through the FAC.<sup>69</sup>

**25.** The third prudence review is the first FAC prudence review in which Staff has specifically alleged that Aquila or GMO's cross-hedging activities related to the use of natural gas futures contracts to hedge spot purchased power costs were imprudent.<sup>70</sup>

**26.** In its *Position Statement* filed on May 25, 2012, Staff revised the amount of its proposed disallowance and refund recommendation. Staff stated: "GMO must refund \$14.9 million, with interest at its short-term borrowing rate, to ratepayers through its FAC mechanism."<sup>71</sup>

<sup>66</sup> *Id.* The highly confidential amounts need not be disclosed as they are not necessary for the disposition of the issues in this matter. Staff did not assert that fuel costs, or purchased power costs or hedging costs were imprudent, nor did Staff have any reason to believe that these costs were unreasonable or excessive. Transcript, pp. 333-334.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; Staff Exh. 16, [Third] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company, pp. 1-2; Staff Exh. 1, Eaves Direct, Schedule 1, p. 12.

<sup>69</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

### Conclusions of Law – FAC’s Generally

Section 386.266 authorizes any electrical corporation to apply for rate schedules authorizing an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently-incurred fuel and purchased-power costs, including transportation.<sup>72</sup> The Commission has the power to approve, modify, or reject such adjustment mechanisms, and if approved, the FAC must include 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.<sup>73</sup> Additionally, Section 386.266.4(4), RSMo Supp. 2010, and Commission Rule 4 CSR 240-20.090(7) require the Commission to undertake a prudence review of GMO’s FAC no less frequently than at eighteen-month intervals. Any imprudently-incurred costs must be refunded, plus the interest at the utility’s short-term borrowing rate.<sup>74</sup> Once such an adjustment mechanism is approved it remains in effect until such time as the Commission authorizes the modification, extension, or discontinuance of the mechanism in a general rate case or complaint proceeding.<sup>75</sup>

### D. General Hedging Principles

**27.** Hedging is defined as a method of reducing the risk of loss caused by price fluctuation. It consists of the purchase or sale of equal quantities of the same or similar commodities, approximately simultaneously, in two different markets with the expectation that a future change in price in one market will be offset by an opposite change in the other market.<sup>76</sup>

**28.** Hedging is also defined as taking a position in a futures market opposite to a position held in the cash market to minimize the risk of financial loss from an adverse price change; a purchase or sale of futures as a temporary substitute for a cash transaction that will occur later.<sup>77</sup>

**29.** Hedging is a process of protecting oneself against risk.<sup>78</sup>

**30.** Hedging employs various techniques but, basically, involves taking equal and opposite positions in two different markets as offsets to one another.<sup>79</sup>

<sup>72</sup> Section 386.266.1, RSMo Supp. 2010.

<sup>73</sup> Section 386.266.4 and .4(2), RSMo Supp. 2010.

<sup>74</sup> Section 386.266.4(4), RSMo Supp. 2010. See also *State ex rel. Noranda Aluminum, Inc. v. Public Service Comm’n*, 356 S.W.3d 293, 313 (Mo. App. 2011).

<sup>75</sup> Section 386.266.5, RSMo Supp. 2010.

<sup>76</sup> Staff Exh. 1, Eaves Direct, Schedule 1, p. 12; Staff Exh. 10, Staff’s Third Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company – June 1, 2009 through November 30, 2010, p. 12; GMO Exh. 1, Blunk Direct, pp.12-13.

<sup>77</sup> GMO Exh. 1, Blunk Direct, pp.12-13. According to the CME Group, only 9,018 of the 76,864,334 natural gas contracts traded on the NYMEX in 2011 were ultimately delivered as physical natural gas at Henry Hub, representing only about 0.01% of the contracts. *Id.* Hubs create a common point for commercial trading contracts to settle with or without going to physical delivery.

<sup>78</sup> GMO Exh. 1, Blunk Direct, p.13.

<sup>79</sup> *Id.*

**31.** A hedge is constructed by linking a futures or derivative transaction with a similar cash or physical transaction.<sup>80</sup>

**32.** It is the simultaneous offsetting of physical and futures positions that neutralizes market volatility.<sup>81</sup>

**33.** When constructing a hedge, two transactions must be performed: (1) buy what you sell, and (2) sell what you buy.<sup>82</sup>

**34.** Every hedge has two sides to the transaction, a gain and a loss. For example, when the price of natural gas decreases in a financially-hedged transaction for purchased power, then the natural gas hedge decreases in value and the underlying hedge for purchased power has an offsetting non-cash increase in value (i.e., the market prices of purchased power are decreasing).<sup>83</sup>

**35.** For financial instruments, the cash settlement is easy to identify because it is cash settled. The other side of the hedge is non-cash, but it impacts the company.<sup>84</sup>

**36.** By comparing the value of the transaction when the hedge was placed with the value of the transaction when the hedge was closed, you can determine the physical market change for each hedge.<sup>85</sup>

**37.** Not all hedges result in a hedge settlement.<sup>86</sup>

**38.** You cannot determine the success or failure of a hedging program by looking only at the futures market transactions.<sup>87</sup>

**39.** Cross hedging is a risk management strategy that involves offsetting a position in one commodity with an equal position in a different commodity with similar price movements.<sup>88</sup>

**40.** Cross hedging entails using a futures contract for one commodity whose spot price moves very closely with the spot price of another commodity to be hedged.<sup>89</sup>

**41.** Cross hedging is often used in markets where there is no active futures trading for the commodity of concern.<sup>90</sup>

**42.** The National Rural Electric Cooperative Association, American Public Power Association and Large Public Power Council have concurred that "Cross-commodity hedging is commonplace."<sup>91</sup>

<sup>80</sup> GMO Exh. 2, Blunk Surrebuttal, p. 8.

<sup>81</sup> GMO Exh. 1, Blunk Direct, p. 15; GMO Exh. 2, Blunk Surrebuttal, p. 8; Transcript, pp. 135-136.

<sup>82</sup> GMO Exh. 2, Blunk Surrebuttal, p. 8; Transcript, pp 117-119. See also Schedule WEB-9.

<sup>83</sup> GMO Exh. 3, Bresette Surrebuttal, p. 10. GMO Exh. 2, Blunk Surrebuttal, p. 8. See also Schedule WEB-9.

<sup>84</sup> GMO Exh. 3, Bresette Surrebuttal, p. 10.

<sup>85</sup> GMO Exh. 2, Blunk Surrebuttal, p. 10.

<sup>86</sup> GMO Exh. No. 3, Bresette Surrebuttal, p. 11.

<sup>87</sup> GMO Exh. 2, Blunk Surrebuttal, p. 11.

<sup>88</sup> GMO Exh. 1, Blunk Direct, p.15; Transcript, p. 268-269.

<sup>89</sup> GMO Exh. 8, Woo Direct, p. 11.

<sup>90</sup> GMO Exh. 1, Blunk Direct, p.15; GMO Exh. 8, Woo Direct, p. 11.

<sup>91</sup> GMO Ex No. 1, Blunk Direct, p.15-18; GMO Ex No. 2, Blunk Surrebuttal, p. 35; GMO Ex No. 17; Tr. 307. Cross hedging has been taught by the Electric Power Research Institute ("EPRI") since the mid-1990s (GMO Ex No. 2, Blunk Surrebuttal, p. 35; GMO Ex. No. 17.), and numerous Staff personnel, including Dana Eaves and Charles Hyneman, have attended webinars presented by PGS Energy Training where this cross hedging technique was explained and taught. (Transcript, pp. 256-257; GMO Ex No. 2, Blunk Surrebuttal, pp. 33-36, Schedule WEB-15, pp. 1-8; GMO Ex No. 7, Rush Surrebuttal, p. 23.)

**43.** Any two goods or commodities may be cross-hedged as long as they are correlated enough to create a hedge position and as long as the prices for those goods or commodities move in the same direction.<sup>92</sup>

**44.** Cross hedging is not the same as speculating in the stock market hoping to generate cash to pay a future variable expense. If the price of the underlying commodity and the price to be hedged are perfectly correlated, you can construct a perfect hedge resulting in price certainty for the hedged commodity.<sup>93</sup>

**45.** Hedge effectiveness in the context of futures contracts is most commonly demonstrated using correlation methodology.<sup>94</sup>

**46.** To be a “highly effective” hedge, or a prudent hedge, the financial instrument used to hedge a transaction must be “highly correlated” to the risk being hedged.<sup>95</sup>

**47.** There are two main criteria accepted by the accounting industry to determine if a hedge is highly effective; (1) the R-squared or  $R^2$  method and (2) the Dollar Offset Method, also referred to as the “slope” of the relationship.<sup>96</sup>

**48.** R-squared is a statistic that measures the strength of the relationship between two data sets. Specifically, it gives the proportion, or if multiplied by 100, the percent, of the variability in one data set explained by the variability in another data set. The R-squared is the squared correlation coefficient (R-value). For example, an R-squared of 0.80 means changes in natural gas prices explain 80% of the changes in electricity prices.<sup>97</sup>

**49.** Application of a correlation analysis with the R-squared method can be used *ex ante* to determine the effectiveness of a cross hedge.<sup>98</sup>

**50.** It is improper to use an *ex post* price correlation to determine the prudence of a cross hedging decision made *ex ante*. The relevant price correlation is based on the price data available when making an *ex ante* hedging decision.<sup>99</sup>

**51.** Under the Dollar Offset test, a post-validation test, the change in value of the derivative is compared to the change in value of the hedged item. Hedges that yield a ratio within the range of 80-120 percent<sup>100</sup> are deemed highly effective. A more technical way to state this test is that the slope of the relationship between the variables must be between negative 0.8 and negative 1.25.<sup>101</sup>

<sup>92</sup> Transcript, pp. 268-269, 327; GMO Exh. 8, Woo Direct, pp. 11-12; GMO Exh. 19, CME Group, Derivatives and Hedge Accounting.

<sup>93</sup> GMO Exh. 8, Woo Direct, p. 12.

<sup>94</sup> Transcript, pp. 324, 327, GMO Exh. 3, Bresette Surrebuttal, p. 9-10; GMO Exh. 8, Woo Direct; GMO Exh. 9 Woo Surrebuttal.

<sup>95</sup> GMO Exh. 3, Bresette Surrebuttal, pp. 9-10. This has been referred to as regression analysis or the calculation of regressive coefficients, i.e. “R-values” and “R-squared” values. GMO Exh. 8, Woo Direct, pp. 10, 17-18, 26; GMO Exh. 9, Woo Surrebuttal, pp. 5, 7,; GMO Exh. 22, Proctor Surrebuttal from File Number ER-2009-0090, p.5.

<sup>96</sup> GMO Exh. 3, Bresette Surrebuttal, p. 9; GMO Exh. 2, Blunk Surrebuttal, pp. 12.

<sup>97</sup> GMO Exh. 3, Bresette Surrebuttal, p. 9-10; GMO Exh. 2, Blunk Surrebuttal, pp. 22.

<sup>98</sup> Transcript, pp. 324, 327, GMO Exh. 2, Blunk Surrebuttal, pp. 22-24; GMO Exh. 3, Bresette Surrebuttal, pp. 9-10; GMO Exh. 8, Woo Direct; GMO Exh. 9 Woo Surrebuttal. See also GMO Exh. 19, CME Group, Derivatives and Hedge Accounting, p. 3.

<sup>99</sup> GMO Exh. 9, Woo Surrebuttal, p. 3.

<sup>100</sup> The test has been referred to interchangeably as both the 80-120 rule and the 80-125 rule.

<sup>101</sup> GMO Exh. 3, Bresette Surrebuttal, p. 9; GMO Exh. 2, Blunk Surrebuttal, p. 12; See also GMO Exh. 19, CME Group, Derivatives and Hedge Accounting, p. 3.

**52.** While there is no single, definitive test prescribed by Financial Accounting Standard 133, that generally addresses accounting and reporting standards for financial derivative instruments, *ex post* validation of the effectiveness of a hedge can be performed using the Dollar Offset Method per the “80/125” rule. Thus, the actual gains and losses of the derivative(s) should fall within the 80% to 125% of the gains/losses for the hedged item.<sup>102</sup>

**53.** A second post-validation study involves examining the total effective rate by examining the total variable costs of the hedged commodities over time to see if the hedge neutralized the risk. Examining the total allows consideration of both sides of the hedge. If the total effective rate demonstrates that the risk has been mitigated, then the hedge is effective.<sup>103</sup>

**54.** A third post validation study involves determining the cost of the hedge. If the cost of the hedging insurance to cover the risk is less than 30%, the hedging insurance was worth the cost.<sup>104</sup>

**55.** Post-validation studies cannot be used to determine prudence because they are performed in hindsight. However, they can be used to provide confirmation of a hedge’s effectiveness.

**56.** A perfect or completely effective hedge has a mathematical correlation of 1.<sup>105</sup>

**57.** While futures contracts derive their value from certain underlying physical markets, they likely will not be perfectly correlated with the daily physical markets for the same commodity at the same location.<sup>106</sup> Similarly, futures contracts will likely not be perfectly correlated with daily physical markets for different commodities.

**58.** The Securities and Exchange Commission has informally prescribed that a highly-effective hedge requires that the derivatives and hedged items exhibit a correlation coefficient of at least 0.90 or an R-squared value greater than or equal to 0.80.<sup>107</sup>

**59.** As a “rule of thumb,” a strong correlation or relationship exists for hedging when there is an R-value falling in the range of 0.85 to 1.0 or -0.85 to -1.0.<sup>108</sup> This translates to an R-squared value ranging between 0.7225 to 1.0.

**60.** An R-squared less than 0.80 or a slope that is not in between negative 0.8 and 1.25 does not mean you cannot cross-hedge, it just means that the hedge must be accounted for differently.<sup>109</sup>

**61.** Hedging costs represents the net of purchasing a derivative and selling that derivative.<sup>110</sup>

<sup>102</sup> GMO Exh. 19, CME Group, Derivatives and Hedge Accounting, p. 3.

<sup>103</sup> GMO Exh. 1, Blunk Direct, p. 31-33.

<sup>104</sup> Transcript, pp. 117-120.

<sup>105</sup> GMO Exh. 8, Woo Direct, p. 16.

<sup>106</sup> GMO Exh. 2, Blunk Surrebuttal, p. 46.

<sup>107</sup> GMO Exh. 2, Blunk Surrebuttal, pp. 22-24, and Schedule WEB-13; GMO Exh. 3, Bresette Surrebuttal, pp. 9-10; GMO Exh. 19, CME Group, Derivatives and Hedge Accounting, p. 3. It should be noted that in May of 2010, the Financial Accounting Standards Board proposed changes to hedge accounting practices in “Topic 815” that are expected to be implemented in 2013. FASB has determined that current hedge accounting qualifications should be less rigorous and more qualitative as opposed to current quantitative measures to assess the *ex ante* effectiveness of the hedge. FASB has proposed that the *ex ante* expectation of hedge effectiveness be reduced from “highly” to “reasonably” effective. GMO Exh. 19, CME Group, Derivatives and Hedge Accounting, p. 4; GMO Exh. 21, ASC – Topic 815.

<sup>108</sup> Transcript pp. 315-325; GMO Exh. 18, Data Request No. 0118, directed to and answered by Staff Witness Dana Eaves.

<sup>109</sup> GMO Exh. 2, Blunk Surrebuttal, p. 23; GMO Exh. 3, Bresette Surrebuttal, p. 9; Staff Exh. 12, Statement of Financial Accounting Standards No. 133, Accounting for Derivatives Instruments and Hedging Activities, Financial Accounting Standards Board, June 1998.

<sup>110</sup> GMO Exh. 3, Bresette Surrebuttal, p. 17.

**62.** When hedging with futures or forward contracts, unrealized gains and losses are incurred from the date of entering the futures or forward contracts until the date the contracts are cash settled. At that time, unrealized gains or losses are converted to realized gains or losses.<sup>111</sup>

**63.** Hedging is an activity similar to purchasing insurance. Losses in a hedging program are not unanticipated and do not suggest that the hedging program is unreasonable or imprudent. Hedging losses are recognized as a possible result of prudent efforts to dampen upward volatility.<sup>112</sup>

**64.** Hedging losses cannot be known until “after the fact,” or in hindsight.<sup>113</sup>

## **E. GMO’s Cross-Hedging with Natural Gas Futures**

### **Findings of Fact:**

**65.** In addition to, or in place of, energy generated by its native capacity described above in Finding of Fact Number 1, GMO also purchases power on the spot market when prices are such that purchased power is the least cost alternative for serving its native load.<sup>114</sup>

**66.** Daily on-peak, spot market electricity price is defined as the daily average of hourly electricity prices during the 16 hour on-peak period of 0600 through 2200 (6:00 a.m. through 10:00 p.m.) Monday through Friday excluding holidays.<sup>115</sup>

**67.** The Commission authorized a FAC for GMO on May 27, 2007, in Case No. ER-2007-0004, finding that fuel and purchased power costs constituted approximately 46% of GMO's test year operations and maintenance expenses; that GMO's fuel and purchased power costs increased on average between 13% and 20% annually; that GMO had “heavy reliance” on both purchased power and gas-fired generation; that the purchased power and natural gas markets were characterized by “high volatility”; and that these factors were outside of GMO’s control.<sup>116</sup>

**68.** GMO has sufficient generation to supply its native load, but some of its generation is at a higher cost and usually cannot beat market price.<sup>117</sup>

**69.** Spot market purchased power currently represents about 35.8% of the energy sold at retail by GMO.<sup>118</sup>

**70.** As long as spot market prices for electricity are lower than GMO’s cost to generate energy with its own generation, GMO should be buying electricity on the spot market.<sup>119</sup>

<sup>111</sup> GMO Exh. 3, Bresette Surrebuttal, p. 5.

<sup>112</sup> GMO Exh. 1, Blunk Direct, p. 30. Transcript, pp. 164, 226-235. See also Commission Rule 4 CSR 240-40.018, Natural Gas Price Volatility Mitigation.

<sup>113</sup> Transcript, p. 231.

<sup>114</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012; GMO Exh. 5, Heidtbrink Direct, pp. 4-5.

<sup>115</sup> GMO Exh. 1, Blunk Direct, p. 28; GMO Exh. 9, Woo Surrebuttal, pp. 2.

<sup>116</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012.

<sup>117</sup> Transcript, p. 347. GMO Exh. 5, Heidtbrink Direct, pp. 4-5.

<sup>118</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012.

<sup>119</sup> Transcript, pp. 205, 207-208; Staff Witness Mantle testified that she didn’t believe that Staff had ever said that GMO over-relied on spot market electricity. *Id.* at 205. Staff Exh. 2, Mantle Rebuttal, p.6. Staff Witness Mantle testified that if GMO did not utilize the least cost electricity that Staff would allege the GMO was imprudent for failing to do so. *Id.*

**71.** Additional generation capacity would not eliminate GMO's electricity and natural gas spot market price risks.<sup>120</sup> Building additional generation is not a viable short-term alternative to purchasing power on the spot market.<sup>121</sup>

**72.** During the FAC prudence audit period, purchasing power on the spot market was prudent for GMO to meet their customers' needs. It was the least cost alternative because GMO's generation was much more expensive.<sup>122</sup>

**73.** Natural gas prices and power prices are affected by natural gas price volatility.<sup>123</sup>

**74.** The New York Mercantile Exchange ("NYMEX") prices for natural gas directly affect the electric contract prices.<sup>124</sup>

**75.** Natural gas prices are very closely associated with the average systems prices in the Southwest Power Pool ("SPP") region.<sup>125</sup>

**76.** Natural gas prices and electric power prices are correlated. For most on-peak hours, natural gas is on the margin meaning wholesale power prices are set by the cost of the last gas-fired unit to be dispatched.<sup>126</sup>

**77.** As demonstrated by the SPP's "State of the Market Reports," SPP has long believed there is a strong link between natural gas and electricity markets.<sup>127</sup>

**78.** Dr. Michael Proctor, formerly of the Commission Staff, also reviewed the correlations between the electric and natural gas markets in the 2009 GMO rate case, File Number ER-2009-0090. Dr. Proctor was asked if higher natural gas prices result in higher spot-market electricity prices in the SPP electricity markets, and he concluded that 87.23% (regression coefficient) of the total variation in SPP's electricity prices for the years 2003 through 2008 was explained by variation in natural gas prices. He further stated that there was little doubt that natural gas prices drove electricity prices for most of the hours of the year in the SPP region.<sup>128</sup>

<sup>120</sup> GMO Exh. 2, Blunk Surrebuttal, pp. 6-8. Transcript, pp. 132-133. "The utility can use the turbine to produce electricity or procure the same amount from the electricity spot market. The per MWh cost resulting from the utility's least-cost decision is the lesser of (a) the electricity spot price, or (b) the turbine's per MWh fuel cost, which is turbine's heat rate times the natural gas spot price. Since this per MWh cost varies with both spot prices, generation ownership does not eliminate spot price risks." GMO Exh. 8, Woo Direct, pp. 6-7.

<sup>121</sup> *Id.* There is no evidence in the record providing a cost benefit analysis as to whether construction or purchase of new generation could be a viable short-term or long-term alternative to support these options as viable alternatives. It is clear, however, that acquiring additional capacity cannot even be accomplished in the short-term as a least-cost alternative to purchased power. It is also clear that additional generation would not eliminate market risks for natural gas or electricity prices. See also Tr. 122-124, 132, 205, 211-212, 361-362.

<sup>122</sup> Transcript, p. 206. Staff Witness Mantle testified that GMO "should have put steel in the ground back in 2000 when the Aries plant was built," and had GMO "acquired a combined cycle plant in 2000, its fleet would be more efficient and it now would be buying less spot market electricity." Staff Exh. 2, Mantle Rebuttal, pp. 5-6; Transcript, pp. 206-207. However, the current management of GMO did not take over the day-to-day operations of the company until after the merger was completed on July 14, 2008, and GMO cannot be faulted for past management decisions of the former Aquila, Inc. in relation to this prudence review. Ms. Mantle also testified that this argument, the need for additional capacity, was not the basis for the disallowance it had proposed in this case. Transcript, p. 207.

<sup>123</sup> GMO Exh. 3, Bresette Surrebuttal, p. 4.

<sup>124</sup> GMO Exh. 4, Clemens Surrebuttal, p. 3.

<sup>125</sup> GMO Exh. 8, Woo Direct, p. 20.

<sup>126</sup> GMO Exh. 5, Heidbrink Direct, pp. 4-5.

<sup>127</sup> GMO Exh. 1, Blunk Direct, p. 10.

<sup>128</sup> GMO Exh. 22, *Filing Memorandum with Exhibits*, Surrebuttal Testimony of Michael Proctor, filed April 9, 2009, EFIS Docket Entry No. 173 in Case ER-2009-0090, p. 5; GMO Ex. No. 2, Blunk Surrebuttal, p. 31; GMO Exh. 7, Rush Surrebuttal, pp. 11-12. In Dr. Proctor's analysis, SPP annual average electricity prices were compared to the annual average natural gas prices at the Henry Hub. The Henry Hub is the largest centralized point for natural gas spot and futures trading in the United States. The Henry Hub is the pricing point for natural gas futures contracts traded on the New York Mercantile Exchange (NYMEX). It is a point on the natural gas pipeline system in Erath, Louisiana. It interconnects with nine interstate and four intrastate pipelines.

**79.** It is well accepted in the electric industry by marketers, energy buyers and strategic planners that the best indication of what electric prices will be in the future is reflected in future natural gas prices.<sup>129</sup>

**80.** Natural gas market price uncertainty affects GMO in two primary ways: (1) a direct impact on the price it pays for the natural gas it consumes, and (2) the effect natural gas pricing has on the market price for electricity.<sup>130</sup>

**81.** There is no formalized market that allows GMO to buy electric futures contracts in the Southwest Power Pool region that could serve as a hedge,<sup>131</sup> so GMO uses natural gas derivatives to mitigate price exposure to natural gas and purchased power price volatility.<sup>132</sup>

**82.** While the spot electricity market is hourly, NYMEX natural gas futures, that settle monthly, can be used to cross hedge the daily on-peak price when a reasonable time period is considered.<sup>133</sup> This cross-hedging technique is widely accepted within the electric industry.<sup>134</sup>

**83.** GMO's hedging program is designed to mitigate adverse upward price volatility in natural gas and power.<sup>135</sup> Stated in terms of risk, GMO uses natural gas derivatives to hedge natural gas price risk and "on peak" purchased power price risk.<sup>136</sup>

**84.** In order to offset the risk of price spikes in electricity, GMO enters into natural gas futures contracts for the BTU-equivalent of the purchased power it expects to buy. Together, these two actions create the hedge – the physical purchase of the spot purchased power, and the entering into the natural gas futures contracts for a BTU equivalent amount of natural gas that can be sold in the future.<sup>137</sup>

**85.** Buying the purchased power is referred to as the "physical side" of the hedge. Buying the natural gas futures contracts is sometimes referred to as the "derivative side" of the hedge transaction. At the same time that GMO buys its purchased power, it also has natural gas futures contracts that it can sell to offset the increased price for electricity.<sup>138</sup>

<sup>129</sup> GMO Exh. 1, Blunk Direct, p. 15-18; GMO Exh 2, Blunk Surrebuttal, p. 35; GMO Exh. 7, Rush Surrebuttal, p. 25; GMO Exh. 17, Blunk Response to Staff Data Request No. 0089; Transcript, pp. 307, 329.

<sup>130</sup> GMO Exh. 1, Blunk Direct, p. 24.

<sup>131</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012; Transcript, p. 210-211; Staff Exh. 16, Prudence Review of Cost Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company, June 1, 2009 through November 30, 2012, File No. EO-2011-0390, p. 9.

<sup>132</sup> GMO Exh. 2, Blunk Surrebuttal, p. 7; GMO Exh. 3, Bresette Surrebuttal, p. 4. The price movement of natural gas futures contracts is not affected by whether GMO uses cross hedges or direct hedges. GMO's customer load or MWh requirement is also not affected by whether GMO uses cross hedges or direct hedges. GMO Exh. 2, Blunk Surrebuttal, p. 7

<sup>133</sup> GMO Ex No. 2, Blunk Surrebuttal, p. 17-18; GMO Exh. 9, Woo Surrebuttal, p. 3 (and in its entirety).

<sup>134</sup> See Finding of Fact Number 79 and the associated Footnote.

<sup>135</sup> GMO Exh. 1, Blunk Direct, p. 24.

<sup>136</sup> GMO Exh. 1, Blunk Direct, p.28.

<sup>137</sup> *Id.*; GMO Exh. 2, Blunk Surrebuttal, pp. 8-10.

<sup>138</sup> GMO Exh. 1, Blunk Direct, pp. 14-15; GMO Ex. 2, Blunk Surrebuttal, pp. 8-11; Transcript pp. 112-136.

**86.** The three most significant benefits of using NYMEX natural gas futures contracts and options to hedge electricity price risk are liquidity,<sup>139</sup> minimal counterparty credit risk<sup>140</sup> and contract size.<sup>141</sup>

**87.** Besides the benefits of using the NYMEX, there is another benefit of combining GMO's projected natural gas usage with natural gas equivalent volumes for its projected purchased power requirements. It manages the risk that while the total load served might equal the projection, the supply mix between GMO's natural gas-fired generation and purchased power might be different than projected.<sup>142</sup>

**88.** Entering into purchased power contracts, as opposed to hedging in the futures market, loses the benefits of using NYMEX natural gas futures contracts. Power agreements are not good secondary markets due to the lack of flexibility and the additional costs, or penalties, associated with those bilateral contracts.<sup>143</sup>

**89.** When constructing a hedge for spot purchased power, the Company performs two transactions that are directly and inseparably linked. The gain or loss in the physical position is offset by the gain or loss in the futures market.<sup>144</sup>

**90.** This method provides a hedge or insurance against skyrocketing electric prices,<sup>145</sup> and as demonstrated by GMO's informal survey, other electric companies across the country use this cross-hedging technique when necessary to mitigate the price risk of spot purchased power.<sup>146</sup>

**91.** GMO designates its natural gas derivatives as economic hedges.<sup>147</sup>

**92.** Under an economic hedge, the change in fair value is recorded to a derivative asset or liability with the offset to the income statement in the period the change in fair value occurs.<sup>148</sup>

<sup>139</sup> GMO Exh. 1, Blunk Direct, pp. 18-19. NYMEX natural gas contracts can easily be bought or sold quickly because there are large numbers of buyers and sellers ready and willing to trade at any time during market hours. Because of high trading volumes there tend to be low spreads between asking and selling prices which results in little to no premium when entering or exiting a position. *Id.* See also GMO Exhibit 5, Heidtbrink Direct, p. 5; Transcript pp. 122-124.

<sup>140</sup> *Id.* The NYMEX uses a central counterparty clearing model. All trades are cleared through the Exchange clearinghouse which becomes the ultimate counterparty, acting as the "buyer to every seller" and the "seller to every buyer." Counterparty credit risk is shared among clearing members, who represent some of the largest names in financial services. Consequently, the NYMEX has received and maintains an AA+ long-term counterparty credit rating from Standard & Poor's. *Id.*

<sup>141</sup> *Id.* One NYMEX natural gas contract represents 10,000 MMBTUs of natural gas. That is roughly equivalent to one (1) megawatt hour (MWh) of electricity. Given the liquidity of the NYMEX there is essentially no premium for entering or exiting a position as small as one MWh. That liquidity gives GMO the ability to fine tune its hedge position as expectations change. *Id.*

<sup>142</sup> GMO Exh. 1, Blunk Direct, p. 19.

<sup>143</sup> Staff Ex. No. 2, Mantle Rebuttal, pp. 1-6; Tr. 122-124, 132, 211-212, 361-362. No party provided a cost-benefit analysis support power agreements being a least-cost alternative. Staff only made conclusory statements in this regard. *Id.*

<sup>144</sup> GMO Exh. 2, Blunk Surrebuttal, pp. 8-10 and Schedule WEB-9; Transcript, pp. 135-137.

<sup>145</sup> GMO Exh 1, Blunk Direct, pp. 14-15; GMO Ex. 2, Blunk Surrebuttal, pp. 8-11; Transcript pp. 112-136.

<sup>146</sup> GMO Exh. No. 17; GMO Ex. No. 2, Blunk Surrebuttal, p. 37, and Schedule WEB-17. GMO's informal survey revealed that about one-half of the electric companies responding to the survey have used this crosshedging technique to mitigate the price risk associated with the spot purchase power market. The list of those using this technique included Arizona Public Service, Florida Power & Light, Madison Gas & Electric, Mississippi Power—Southern Company, Portland General, and Ameren Missouri. For example, GMO's email survey includes a response from Ameren's Wil Cooper that indicates that Ameren "used natural gas derivatives (futures, options, forwards etc.) to cross hedge electricity price risk." *Id.*

<sup>147</sup> GMO Exh. No. 3, Bresette Surrebuttal, p. 4.

<sup>148</sup> *Id.*

**93.** GMO's hedging program first divides the hedge volume into two parts. One-third of the volume is not hedged but is left to primarily absorb the risk of requirements being less than projected and secondarily float with the market. The remaining two-thirds are hedged under two hedging programs, Kase and Company, Inc.'s HedgeModel and ezHedge.<sup>149</sup>

**94.** The approach of the HedgeModel program is to identify statistically favorable points at which to hedge. The strategy can be thought of as a three-zone strategy comprised of high price, normal price and low price zones. The high price zone identifies prices that are threatening to move upward. In this price zone actions are taken to protect against unfavorable high price levels, mostly through the use of options-related tactics. The normal price zone identifies prices that are in a "normal" range, neither high enough to warrant protecting price, nor low enough to be considered "opportunities." No action is taken whenever prices are deemed to be in the normal price range. The low price zone identifies prices that are statistically low. In this zone, actions are taken to capture favorable forward prices as the market moves into a range where the probability of prices remaining at or below these levels is decreasing. While the main focus in the high price zone is defensive, to set a maximum or ceiling on prices, in the low price zone the focus is on capturing attractive prices.<sup>150</sup>

**95.** Kase's ezHedge generates hedging signals based on market cycles and uses a volume averaging approach, similar to dollar cost averaging. The model divides a price range into five zones based on an evaluation of percentile levels over a range of look-back periods. It selects the look-back length based on market behavior relative to the highest and lowest zones. This approach results in hedges being placed under all but the most favorable conditions, in which volumes are left unhedged. The volume averaging aspect results in more frequent hedges when prices are in the lower priced zones and fewer hedges are in the higher price zones.<sup>151</sup>

**96.** ezHedge usually results, over time, in all of the volumes placed in that program being hedged. On the other hand, if prices do not fall low enough, or if prices stay too high, there is a possibility that certain contract months could go unhedged when using HedgeModel. Combining ezHedge with HedgeModel helps ensure that at least a modest portion of the exposure has a high probability of being hedged.<sup>152</sup>

**97.** The primary purpose for leaving one-third of the forecast volume requirements unhedged is to provide a cushion for the possibility that actual requirements may turn out to be less than projected. GMO updates its projected requirements monthly. If the projected requirements are determined to be significantly different than prior projections, hedge volumes may be adjusted. If the volumes increase, the increases are added to the volume available to hedge. If the volumes decrease but the decrease is not material and GMO already has the two-thirds hedged, those hedges that exceed the two-thirds are liquidated. If the decrease were material, GMO would develop a remediation strategy.<sup>153</sup>

<sup>149</sup> GMO Ex No. 1, Blunk Direct, p. 26-29; Transcript, pp. 103-106, 125-137.

<sup>150</sup> Id.

<sup>151</sup> Id.

<sup>152</sup> Id.

<sup>153</sup> Id. at 29.

**98.** GMO may hedge up to 67 percent of the sum of projected natural gas usage and projected on peak natural gas equivalent for purchased power.<sup>154</sup>

**99.** The primary purpose for leaving one-third of the forecast volume requirements unhedged is to provide a cushion for the possibility that actual requirements may turn out to be less than projected.<sup>155</sup>

**100.** GMO's natural gas hedging program is oriented toward finding a balance between the need to protect against high prices and the opportunity to purchase gas at low prices.<sup>156</sup>

**101.** GMO's hedging plan is not designed to benefit the company, but to benefit the customers by protecting the customers from large swings in both purchased power and natural gas costs. It is not designed to make money for the shareholders, but to act as an insurance policy and protect against the volatility in the purchased power and natural gas markets.<sup>157</sup> GMO's shareholders don't make money by hedging since the gains or losses in the physical market are largely offset by the opposite gains or losses in the derivative market and the gains or losses in the derivative market are passed along to consumers through the FAC just as are the gains or losses in the physical market.<sup>158</sup>

**102.** GMO's hedging program has been specifically designed to take into account changing market conditions.<sup>159</sup>

**103.** There is no evidence that demonstrates that GMO's hedging program during this FAC review period was rigid or market-insensitive.<sup>160</sup>

**104.** The Commission intended for GMO to continue to hedge price risk to protect its customers,<sup>161</sup> and examining GMO's hedging program as a whole, the program has been successful because it has decreased total costs and reduced volatility.<sup>162</sup>

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> GMO Ex No. 1, Blunk Direct, p. 261

<sup>157</sup> Transcript, pp. 124-125, GMO Ex No. 1, Blunk Direct, pp. 31-32; GMO Exh 7, Rush Surrebuttal, p. 27; Schedules TMR-7, TMR-8

<sup>158</sup> *Id.*, GMO Exh. No. 2, Blunk Surrebuttal, Schedule WEN-9. See also Transcript pp. 243-244- similarities between the use of a FAC and a PGA.

<sup>159</sup> GMO Exh. 1, Blunk Direct, pp. 24-35; Transcript, pp. 125-129.

<sup>160</sup> Staff argued that "GMO's hedging program actually increased the risk to the ratepayers because it was –and is –insensitive to the market." Staff Brief at 20. This criticism first appeared in the case in Staff's Position Statement. Staff Position Statement at 1. However, this allegation is not based upon any evidence presented by Staff witnesses, and it is not correct. Ms. Lena Mantle indicated during cross-examination that this criticism, to the best of her knowledge, was not included anywhere in her testimony or other Staff witness's testimony. Transcript, pp. 209-10. The Commission has reviewed Staff's testimony for references to "insensitivity" or "rigid" in the testimony of Staff witnesses Mantle, Eaves and Hyneman. The Commission did not find any allegations that the current GMO hedging program is "insensitive to the market" or "rigid", as alleged by Staff counsel. The only reference that is remotely close is Mr. Hyneman's discussion of Staff's position in the 2005 Aquila rate case where Staff suggested that the One-Third Program was "too systematic and too rigid." Staff Ex No. 3, Hyneman Rebuttal, p. 15, lines 7-9. GMO specifically stopped utilizing its One-Third Program in favor of the Kase Program in order to employ a less rigid and more market sensitive approach to its hedging decisions. GMO Ex. No. 5, Heidbrink Direct, pp. 5-7.

<sup>161</sup> GMO Exh. 1, Blunk Direct, p. 22; GMO Exh. 2, Blunk Surrebuttal, pp. 39-40; GMO Exh. 5, Heidbrink Direct, p. 9-10; GMO Exh. 7, Rush Surrebuttal, pp. 4-5; GMO Exh. 22.

<sup>162</sup> GMO Exh. 1, Blunk Direct, pp. 31, 35; GMO Exh. 5, Heidbrink Direct, p. 3; GMO Exh. 20, Graph – Total Variable Fuel and Purchased Power Cost; Transcript, pp. 335-337.

**105.** Aquila, now GMO, began hedging in 2004. Beginning in 2005, Staff and interveners have investigated GMO's hedging practices.<sup>163</sup> Four rate cases and two FAC prudence reviews have been conducted since the beginning of the company's hedging practices, and no party to these actions has previously asserted that GMO's hedging practices were imprudent.<sup>164</sup>

**106.** GMO has tried to keep the Commission's Staff apprised of each step in the process of developing its hedging strategy by inviting Staff's participation in the overview of the program.<sup>165</sup>

## **F. The Prudence of GMO's Use of Natural Gas Hedges**

### **Findings of Fact:**

**107.** The Prudence Review Period is June 1, 2009 to November 30, 2010. Consequently, pursuant to the prudence standard, to evaluate GMO's prudence the Commission must examine what GMO knew at the time it placed the hedges, i.e., the time period prior to the review period.

**108.** The relevant time period to evaluate prudence for this FAC review period is the time frame encompassing the 18-month interval prior to June 1, 2009.<sup>166</sup>

**109.** The 12 months preceding (*ex ante*) the review period, June 2008 through May 2009, best represents the time period from which to evaluate what GMO knew at the time when making the decision to use natural gas derivatives as a cross hedge for electricity price risk.<sup>167</sup> GMO, on average places its hedges about 11 to 12 months in advance.<sup>168</sup>

<sup>163</sup> GMO Ex. 1, Blunk Direct, p. 4; GMO Ex. 4, Clemens direct, pp. 4-10; GMO Ex. 5, Heidtbrink Direct, p. 5; GMO Ex. 7, Rush Surrebuttal, p. 11, 16-19; Staff Ex. 15, [Second] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company; Staff Ex. 16, [Third] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company. See also File Numbers ER-2005-0436, ER-2007-0004, ER-2009-0090, EO-2009-0115, EO-2010-0167 and ER-2010-0356.

<sup>164</sup> *Id.* See also GMO Ex. No. 4, Clemens Surrebuttal, pp. 4-10; GMO Ex. No. 5, Heidtbrink Direct, pp. 3-10; GMO Ex. No. 6, Rush Direct, pp. 8-10; Staff Ex No. 3, Hyneman Rebuttal, p. 10; GMO Ex Nos. 13, 14 and 15; Transcript, pp. 221-226.

<sup>165</sup> GMO Ex No. 7, Rush Surrebuttal, pp. 24-25. Transcript, pp. 215, 218. There is substantial testimony in the record delineating the full history of Aquila/GMO's hedging program – See GMO Ex. No. 4, Clemens Surrebuttal, pp. 4-10; GMO Ex. 5, Heidtbrink Direct, pp.3-10. See also Footnote No. 163. While this evidence is not relevant to the prudence determination of GMO's current hedging program, it is relevant to establish that GMO has redesigned its hedging program to address the concerns expressed by Staff in File Number ER-2005-0436. It is also relevant to establish that Staff has been fully aware of GMO's hedging practices. In support of Finding of Fact Number 106 the Commission incorporates that testimony as findings of fact by reference, as if fully set out herein.

<sup>166</sup> GMO Ex. 9, Woo Surrebuttal, p. 9.

<sup>167</sup> GMO Ex. 2, Blunk Surrebuttal, pp. 23-24.

<sup>168</sup> Transcript, p. 131-132.

**110.** The Commission's Staff did not conduct any completely prospective, or forward-looking, analyses when it calculated the correlation coefficient between SPP electric prices and the NYMEX natural gas settlement prices. Staff's calculations were either totally in hindsight, or a mixed hindsight and forward-looking analysis. Consequently, Staff's analyses are irrelevant for purposes of determining the prudence of GMO's hedging activities for the relevant prudence review period.<sup>169</sup>

**111.** The correlation coefficient, or R-value, between SPP's electric prices and the NYMEX natural gas settlement price for the 12 months preceding the FAC audit review period is 0.9411. This is within the timeframe in which the decision makers at GMO would have been making the decision to cross-hedge their electric prices using natural gas futures. That equates to an R-squared of 0.89 (0.9411 x 0.9411), which means that 89% of the change in the electricity prices was explained by the changes in the natural gas prices for this period.<sup>170</sup> This R-squared value exceeds the SEC R-squared threshold of 0.80 for determining a hedge is "highly effective."<sup>171</sup> This R-squared value also exceeds the rule of thumb threshold for high correlation of an R-value of 0.85 and R-squared of 0.7225.

**112.** Because GMO can generate electricity with its turbines or procure the same amount of electricity from the spot market, to determine the least cost alternative, GMO must determine the per MWh procurement cost, which is the turbines' heat rate times the natural gas spot price.<sup>172</sup>

**113.** The heat rate, or the efficiency at which a power plant converts fuel into electricity, must be considered when determining the volume of fuel to hedge.<sup>173</sup>

**114.** GMO uses the market implied heat rate from its market model to convert its expected energy purchases from Megawatt hours ("MWh") of electricity to Million British Thermal Units ("MMBTUs") of natural gas.<sup>174</sup>

**115.** The weighted average heat rate that was used to determine the potential volume of GMO's cross hedges was 8,517 BTU/kWh or 8,517,000 BTU/MWh or 8.517 MMBTU/MWh.<sup>175</sup>

<sup>169</sup> Staff performed three studies to determine if GMO's cross-hedging was prudent. Two of those studies were totally in hindsight. The first examined the twelve month period of November 2010 through October 2011, which produced a correlation coefficient of 0.617. (Staff Exh. 1, Eaves Direct/Rebuttal, pp. 15-16.) The second looked at one-day's data (16 hours) - August 9, 2009 - and compared what GMO paid for peak spot market electricity and the actual NYMEX natural gas monthly settlement price. (Id. at pp.16-18). This showed that a flat monthly market price compared to hourly fluctuations on the spot market for one day and demonstrated no correlation. This study, however, is also in hindsight, improperly compares one monthly settlement price to hourly spot-market fluctuations and this study cannot be replicated. If this study was used, it would invalidate all hedging programs because all hedging programs use futures that settle less frequently than the physical market. (GMO Ex No. 2, Blunk Surrebuttal, pp. 13-17). In Staff's third study, Staff compares SPP Electricity Prices with the NYMEX natural gas settlement prices from February 2007 through August 2011. Staff's Witness Dana Eaves, while disagreeing that these two markets are "highly correlated," concedes there is a "strong positive association" or "correlation" between natural gas futures and the spot market for the period February 2007 through August 2011.<sup>169</sup> (Staff Exh. 1, Eaves Direct/Rebuttal, p. 15). Staff's third study is a mixed forward-looking review and hindsight review. Staff's analysis yielded a correlation coefficient of 0.8941 or an R-Squared value of 0.799. (Staff Exh. 1, Eaves Direct/Rebuttal, p. 15.)<sup>169</sup> Staff's third analysis, although improper in time frame, still demonstrates that GMO's hedge falls within industry standards for highly effective hedges. It does not escape the Commission that Staff performed its hindsight analysis in hindsight, i.e., Staff alleged GMO was imprudent before conducting any actual analysis. (Transcript, p. 311-312.)

<sup>170</sup> See GMO Exh. 2, Blunk Surrebuttal, p. 22, 24.

<sup>171</sup> GMO Exh. 2, Blunk Surrebuttal, p. 24. GMO used data contained in Staff's workpapers to make this calculation. *Id.*

<sup>172</sup> GMO Exh. 8, Woo Direct, pp. 7-8.

<sup>173</sup> GMO Exh. 2 Blunk Surrebuttal, p. 6. See also Staff Exh. 2, Mantle Rebuttal, pp. 7-8.

<sup>174</sup> GMO Exh. 1, Blunk Direct, p. 28; GMO Exh. 2 Blunk Surrebuttal, pp. 40-41.

<sup>175</sup> GMO Exh. Blunk Surrebuttal, pp. 6-7. The evidence in the record concerning GMO's generation fleet, while lacking specificity, establishes that GMO has several simple-cycle combustion turbines that enable it to meet its peak loads. GMO Exh. 5, Heidtbrink Direct, p. 4. However, the weighted average heat rate of GMO's generation fleet provides an accurate assessment of the efficiency of GMO's generation for purposes of determining procurement costs of spot market electricity. GMO knows its generation capabilities and its likely spot purchased power requirements. Transcript, pp. 133-134. See also Schedule WEB-9 for an example of the mechanics of how futures contracts are used to cross hedge GMO's on-peak purchased power using the heat rate.

**116.** GMO's witness, Dr. Woo, determined the correlation between the daily on-peak per MWh procurement cost of a utility that owns natural-gas-fired generation and the daily natural gas price at Henry Hub.<sup>176</sup> Dr. Woo chose the AMRN and AECI nodes for his correlation analysis.<sup>177</sup> Because the utility's per MWh procurement cost depends on the heat rates of the generation fleet, Dr. Woo's assessment assumes three heat rates: (1) 7 MMBTU/MWh for a relatively new combined cycle gas turbine; (2) 9 MMBTU/MWh for a relatively new combustion turbine; and (3) 11 MMBTU/MWh for a relatively old combustion turbine.<sup>178</sup> The results of his study are presented in the following table:<sup>179</sup>

Period	AMRN			AECI		
	7 MMBTU/MWh	9 MMBTU/MWh	11 MMBTU/MWh	7 MMBTU/MWh	9 MMBTU/MWh	11 MMBTU/MWh
18 Month: Dec. 2007 - May 2009	0.921	0.886	0.860	0.937	0.906	0.879
12 Month: June 2008 - May 2009	0.926	0.909	0.895	0.937	0.922	0.908
28 Month: Feb. 2007 - May 2009	0.903	0.847	0.795	0.921	0.871	0.820

Rearranging Dr. Woo's table chronologically, latest to earliest time period, is as follows:

Period	AMRN			AECI		
	7 MMBTU/MWh	9 MMBTU/MWh	11 MMBTU/MWh	7 MMBTU/MWh	9 MMBTU/MWh	11 MMBTU/MWh
28 Month: Feb. 2007 - May 2009	0.903	0.847	0.795	0.921	0.871	0.820
18 Month: Dec. 2007 - May 2009	0.921	0.886	0.860	0.937	0.906	0.879
12 Month: June 2008 - May 2009	0.926	0.909	0.895	0.937	0.922	0.908

**117.** Dr. Woo's analyses establishes that the daily per MWh procurement cost and the daily Henry Hub natural gas price are highly correlated for the relevant prudence review period supporting the use of cross hedging to effectively manage the per MWh procurement cost risk.<sup>180</sup>

**118.** Comparing the trend between the 28, 18, and 12-month periods just prior to the review period demonstrates that the correlation coefficients between the daily per MWh procurement cost and the daily Henry Hub natural gas price were strengthening as the time period for placing the hedges was approaching.

<sup>176</sup> Henry Hub is the primary natural gas market driving the delivered natural gas price for GMO. GMO Exh. 22, Surrebuttal Testimony of Dr. Michael Proctor in File Number ER-2009-0090, pp. 6-7.

<sup>177</sup> GMO Exh. 9, Woo Surrebuttal, pp. 14-15. SNL Financial has identified 7 nodes as representative of the SPP market. Of those 7 nodes, GMO primarily transacts at AMRN and AECI. These are the proper pricing nodes for the correlation analysis. *Id.* at 11. No party offered any evidence to controvert this fact. "AMRN" is the Ameren node. AECI is the Associated Electric Cooperative, Inc. For a description of AECI, see File No. EO-93-259, Report and Order, issued September 17, 1993, 1993 WL 719871.

<sup>178</sup> GMO Exh. 9, Woo Surrebuttal, pp. 14-15.

<sup>179</sup> *Id.*

<sup>180</sup> GMO Exh. 9, Woo Surrebuttal, pp. 13-15.

**119.** As the table of Dr. Woo's calculations demonstrates, even the most inefficient turbines, those having the highest per MWh procurement cost, satisfy the rule of thumb threshold for there being high correlation between spot market electricity prices and natural gas prices. And, by the time the 12-month pre-prudence review period is reached all but one (the most inefficient turbine) of the correlation coefficients satisfy the higher SEC test for having a highly correlated hedge.

**120.** Dr. Woo's calculations further demonstrate that the correlation coefficients for the 12-month period prior to the review period, using the 9 MMBTU/MWh heat rate (the heat rate closest in comparison to GMO's weighted average heat rate of 8.517 MMBTU/MWh), exceeds the SEC R-squared threshold of 0.80 and the rule of thumb threshold R-value of 0.85 and R-squared of 0.7225 for determining a hedge is highly correlated and highly effective.<sup>181</sup>

**121.** GMO's Witness Dr. Woo testified that a "highly effective" hedge between natural gas prices and daily on-peak electricity prices would demonstrate a correlation coefficient of approximately 0.8.<sup>182</sup> Dr. Woo states this is because daily spot market electric prices can be highly volatile, with potentially large daily fluctuations.<sup>183</sup> Dr. Woo supports his conclusions with extensive mathematical analysis.<sup>184</sup> The correlation coefficients for the 18-month and 12-month period prior to the prudence review period satisfy Dr. Woo's test to be a highly effective hedge.<sup>185</sup>

**122.** Staff Witness Eaves advocates for a perfect correlation of 1.0 (or almost perfect all of the time) before hedging between natural gas prices and daily on-peak electricity prices could be highly effective.<sup>186</sup> Witness Eaves stated that he believed this was because there were other drivers, like coal, that should be factored into the analysis.<sup>187</sup> Witness Eaves disagrees with the accounting profession and the electric industry profession that finds if you have a correlation of 0.80 (R-squared) or above that you can effectively hedge natural gas and electricity prices.<sup>188</sup> There is no industry publication, nor is

<sup>181</sup> GMO's weighted heat rate average reflects turbine efficiencies that are better than the 9 MMBTU/MWh heat rate being used for comparison. It is a reasonable inference that the correlation coefficients for GMO's generators would be even higher and would reflect a stronger correlation or more highly effective hedge.

<sup>182</sup> GMO Exh. 9, Woo Surrebuttal, pp. 3, 7.

<sup>183</sup> See Finding of Fact Number 67 – the parties stipulated that the purchased power and natural gas markets were characterized by high volatility.

<sup>184</sup> GMO Exh. 8, Woo Direct; GMO Exh. 9, Woo Surrebuttal.

<sup>185</sup> Dr. C. K. Woo, is an economist and an expert on cross-hedging of natural gas futures contracts and spot purchase power. He received his PhD from the University of California-Davis, and he specializes in public utility economics, applied microeconomics and applied finance. He has 30 years of experience in the electricity industry, and has testified and prepared expert testimony for use in regulatory and legal proceedings in California, British Columbia and Ontario. He has published over 100 reference articles on electricity deregulation, procurement, risk management, and numerous other topics. More specifically, he has published sixteen professional journal articles on electricity procurement and risk management. GMO Exh. 8, Woo Direct, pp. 1-4.

<sup>186</sup> Transcript, pp. 313-332. Mr. Eaves holds a BS Degree in Business Administration with an emphasis in accounting. He has worked for the Commission as a Regulatory Auditor since April, 2001. He has participated in numerous cases before the Commission. According to Staff Witness Mantle, Mr. Eaves is currently the most knowledgeable person on the Commission's Staff with regard to electricity price hedging. Transcript, p. 203.

<sup>187</sup> Transcript, pp. 348-350. In relation to the perfect correlation Mr. Eaves advocated for, he testified that the Commission should look at the outcome of the hedging program. Examining the outcome is a hindsight analysis and not appropriate under the prudence standard.

<sup>188</sup> Transcript, p 320, 323. Mr. Eaves also took issue with the application of FAS 133, stating it should not apply to regulated utilities. Transcript, pp. 321-322. However, this is in direct contradiction with the language in the AAO which requires these hedging costs to be recorded on a Mark-To-Market basis, as required by Financial Accounting Standard No. 133. EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012. File No. ER-2006-0436, EFIS Docket Entry No. 244, *Nonunanimous Stipulation and Agreement*, Paragraph 17, filed January 31, 2006. See also Transcript, pp. 171-178; GMO Exh. 12, Transcript of Proceedings, On-the-Record Presentation, February 9, 2006, Volume 7, pp. 149-152.

there a Commission order or opinion, that requires a perfect, or almost perfect, correlation coefficient before it would be prudent to cross hedge electricity prices with natural gas prices.<sup>189</sup> Mr. Eaves opinion is not supported by the industry. Staff offers no evidence to support a perfect correlation test other than Mr. Eaves opinion.

**123.** While natural gas prices should be correlated on a monthly basis with spot market electricity prices, these prices do not have to be perfectly correlated because of the impact that monthly load variations can have on electricity prices.<sup>190</sup>

**124.** Using the first post-validation test, i.e., the Dollar Offset test, GMO demonstrated that the estimated physical market change of value for on-peak electricity was 109.6% of the actual change in the value of the natural gas cross hedges. This falls within the range of 80-120 percent highly effective range for this test.<sup>191</sup>

**125.** Applying the second post-validation test involves examining the total effective rate by examining the total variable fuel and purchased power cost. GMO demonstrated that for the relevant prudence review period, total costs dropped to values lower than the prior prudence review periods. Purchased power costs did not skyrocket.<sup>192</sup>

**126.** The third post-validation study establishes that the cost of the hedge to cover the risk during the prudence review period was 9%. This cost falls within the industry range of being less than 30%. The hedging insurance was worth the cost.<sup>193</sup>

**127.** GMO's hedges did what they were supposed to do. GMO's hedging strategy achieved the goal of avoiding rate risk from skyrocketing fuel and purchased power prices.<sup>194</sup> The electricity price movement was offset by a similar movement in the price of natural gas.<sup>195</sup> GMO's hedge program protected its customers from large unexpected upward market price fluctuations while holding the cost of natural gas and purchased power below budget.<sup>196</sup> No harm resulted to GMO's ratepayers.<sup>197</sup>

<sup>189</sup> Transcript, p. 326.

<sup>190</sup> GMO Exh. 22, Surrebuttal Testimony of Dr. Michael Proctor in File Number ER-2009-0090, pp. 6-7. Dr. Proctor holds Bachelors, Masters and Ph.D. degrees in Economics. He has held positions as an Assistant Professor of Economics at Purdue University and the University of Missouri-Columbia. He was previously a member of the PSC's Staff, and held positions as the Chairman of SPP's Regional State Committee's Cost Allocation Working Group and Chairman of the Organization of Midwest ISO States' Financial Transmission rights Working Group.

<sup>191</sup> GMO Exh. 2, Blunk Surrebuttal pp. 12-13, 24; Schedules WEB-8 and WEB-9. The Commission's Staff offered no evidence on post-validation studies; however, Staff Counsel, in its Reply Brief, argues that performing a post-validation test "opened the door to hindsight." EFIS Docket Entry No. 129, Staff's Reply Brief, p.9. Staff Counsel is incorrect. While the post-validation study cannot be used to determine the prudence of GMO's hedging program the existence of this test does not change the prudence standard. Post-validation tests are instead used to confirm the effectiveness of a hedging program and demonstrate that no harm was caused by the hedging program.

<sup>192</sup> GMO Exh. 1, Blunk Direct, pp. 31-33; GMO Exh. 20, Graph - Total Variable Fuel and Purchased Power Cost; Transcript, pp. 335-338. For the period 2008 through 2011 the \$/MWh equivalent value constructed from actual results was slightly less than the budgeted value. GMO Exh. 1, Blunk Direct, p. 32

<sup>193</sup> Transcript, pp. 117-120.

<sup>194</sup> GMO Exh. 1, Blunk Direct, pp. 31-35.

<sup>195</sup> GMO Exh. 2, Blunk Surrebuttal pp. 12-13.

<sup>196</sup> GMO Exh. 1, Blunk Direct, pp. 32-33; Transcript, pp. 316-317.

<sup>197</sup> The post-validation tests confirm there was no harm to the ratepayers.

### **Conclusions of Law - The Prudence of GMO's Hedging Practices**

The substantial and competent evidence on the record as a whole supports the conclusion that the Commission's Staff failed to produce substantial controverting evidence demonstrating serious doubt, as required, to rebut the presumption of prudence with regard to GMO's hedging practices for the prudence review period of June 1, 2009 through November 30, 2010. While the parties agreed that correlation analysis was the industry-accepted method for evaluating if the hedge between natural gas futures and spot market purchased power prices was highly effective and prudent, Staff offered no proper analysis pursuant to the prudence standard that was prospective, or forward-looking. Staff failed to analyze whether the utility's conduct was reasonable at the time, under all of the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. Because all of Staff's studies were totally in hindsight, or else a mixed hindsight and prospective study, none are relevant to the Commission's determination. The Commission's analysis could end at this point because Staff failed to rebut the presumption of the prudence of GMO's hedging practices and the burden of production never shifted to GMO to require it to offer any evidence on the prudence of its hedging practices.

Although not required, GMO, in response to Staff's allegations, did produce substantial and competent evidence demonstrating that its hedging program was prudent by industry standards. GMO's prospective correlation coefficient analyses demonstrate that its hedging practices during the review period were prudent. GMO's analyses produced correlation coefficients that satisfied Dr. Woo's test, the "Rule of Thumb" test, and the SEC's test for highly effective hedges. The only test not satisfied was Staff Witness Eave's perfect correlation test; a test that is not accepted by the industry and that was fully discredited.

Additionally, post-validation tests, while not a measure of prudence, confirm that GMO's hedging accomplished the goal of avoiding rate risk from skyrocketing fuel and purchased power prices, i.e. the ratepayers benefited from the hedging program. During the FAC audit period in this case, GMO chose to enter into a hedge to protect its customers against skyrocketing electric prices. GMO chose this approach based upon: (a) its own professional judgment that hedging was the prudent thing to do to protect its customers, (b) the policy statement contained in Commission's *Natural Gas Price Volatility Mitigation Rule* (4 CSR 240-40.018) that encourages local distribution companies to hedge, and (c) Commission orders and other signals received from the regulatory community that hedging was expected or at least strongly encouraged.<sup>198</sup>

<sup>198</sup> *Id.* See also Findings of Fact Numbers 83-106.

While not included in the parties' issues list, Staff Counsel, at the evidentiary hearing and in its post-hearing brief, raised another argument regarding GMO's conduct. That argument was that GMO had over-relied on purchased power due to its lack of sufficient efficient generation capacity. However, as the record demonstrates, Staff's witnesses testified that: (1) this argument, the need for additional capacity, was not the basis for the disallowance it had proposed in this case; (2) no Staff witness testified that GMO over-relied on spot market electricity; (3) as long as spot market prices for electricity are lower than GMO's cost to generate energy with its own generation, GMO should be buying electricity on the spot market; and (4) during the FAC prudence audit period, purchasing power on the spot market was prudent for GMO to meet its customers' needs. Moreover, it was established that additional generation capacity would not eliminate GMO's electricity and natural gas spot market price risks – neither building nor buying natural gas-fired power plants protects either the Company or its customers from power market prices in a market driven by the price of natural gas.<sup>199</sup>

In addition to increased capacity, Staff also suggested that another alternative to spot market purchased power was to enter into purchase power agreements. However, entering such contracts eliminates the liquidity and flexibility associated with spot market purchases and can result in additional costs or penalties if modifications are required.<sup>200</sup> Neither of these alternatives, increased capacity nor purchased power agreements, are realistic methods of hedging electric prices in the near term since the lead times on such projects are several years. And no party offered any evidence to demonstrate a cost-benefit analysis of how either of these alternatives would be least cost alternatives as opposed to spot market purchased power. There is no competent or substantial evidence to support Staff's additional arguments.

The substantial and competent evidence on the record as a whole supports the conclusion that GMO's hedging practices during the relevant review period were prudent. They were reasonable at the time, under all of the circumstances, considering that GMO had to solve its problem prospectively rather than in reliance on hindsight. The substantial and competent evidence on the record as a whole also supports the conclusion that no harm came to GMO's ratepayers in relation to GMO's hedging practices.

## **G. GMO's Accounting for Its Hedging Costs**

### **Findings of Fact:**

**128.** In the Non-Unanimous Stipulation and Agreement in Aquila's 2005 rate case, File No. ER-2005-0436, the Signatory Parties, including Aquila (now GMO) and Staff, agreed to the following language in the Stipulation and Agreement for an Accounting Authority Order ("AAO"):

Accounting Authority Order

<sup>199</sup> See Findings of Fact Numbers 70-72; Staff Ex. No. 2, Mantle Rebuttal, pp. 1-6; Tr. 122-124, 132, 205, 211-212, 361-362.

<sup>200</sup> See Findings of Fact Numbers 86-88

17. The Signatory Parties agree, for accounting and ratemaking purposes, that hedge settlements, both positive and negative, and related costs (e.g. option premiums, interest on margin accounts, and carrying cost on option premiums) directly related to natural gas generation and on-peak purchased power transactions under a formal Aquila Networks- MPS hedging plan will be considered part of the fuel cost and purchased power costs recorded in FERC Account 547 or Account 555 when the hedge arrangement is settled. These hedging costs will continue to be recorded on a Mark-To-Market basis, as required by Financial Accounting Standard No. 133, with an offsetting regulatory asset FERC Account 182.3 or regulatory liability FERC Account 254 entry that recognizes the change in the timing of value recognition under Financial Accounting Standard No. 71. Aquila agrees there will be no rate base treatment afforded to hedging expenditures recorded on the Mark-To-Market basis. Aquila agrees to maintain separate accounting in Accounts 547 and 555 to track the hedging transaction expenditures recorded under this agreement.<sup>201</sup>

**129.** No party objected to the Nonunanimous Stipulation and Agreement.<sup>202</sup>

**130.** No party sought to modify or supplement the language of the AAO.<sup>203</sup>

**131.** “Staff’s Suggestions In Support Of Nonunanimous Stipulation and Agreement,” filed on February 7, 2006 in Case No. ER-2005-0436, state:

As part of the Stipulation (paragraph 17) the Signatory Parties agree Aquila should be permitted to match its natural gas and purchased power hedging transaction settlements and associated hedging costs with the cost of fuel for accounting and ratemaking purposes and, therefore, as part of this Stipulation, if the Commission accepts the Stipulation, the Commission must grant Aquila an accounting authority order to do so. This accounting authority is acceptable to the Staff and should be implemented by the Commission because it allows Aquila to track the benefits and related costs for its hedging program consistent with how fuel costs are developed and be in compliance with generally accepted accounting principles once the Commission grants the authority.<sup>204</sup>

**132.** No party objected to, or sought to clarify the language in, Staff’s Suggestions, as quoted in the above Finding of Fact.<sup>205</sup>

<sup>201</sup> EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012. File No. ER-2006-0436, EFIS Docket Entry No. 244, *Nonunanimous Stipulation and Agreement*, Paragraph 17, filed January 31, 2006.

<sup>202</sup> See File No. ER-2005-0436.

<sup>203</sup> *Id.*

<sup>204</sup> Transcript, pp. 166-170; GMO Exh. 11, *Staff’s Suggestions in Support of Nonunanimous Stipulation and Agreement*, Paragraph 4, EFIS Docket Entry No. 249 in File No. ER-2005-0436. Official notice was also taken of this public document. Transcript, pp. 371-373.

<sup>205</sup> See File No. ER-2005-0436. Presumably, Staff, who is Staff Counsel’s client, reviewed and approved of this filing. Commission Rule 4 CSR 240-2.080 makes clear that any attorney signing a pleading is representing that he or she is so authorized to act.

**133.** At the On-the-Record Presentation, held on February 9, 2006, Staff Witness Robert Schallenberg provided the following sworn testimony, in pertinent part, explaining the AAO to which the Signatory Parties agreed:

What that does, there is an – in accounting terms it's called FASB 133. If you buy a financial instrument related to a commodity, between the time you buy it and the time it closes or settles, you are required to adjust it on your books as to its market value, unless it is tied to a physical transaction. In fact, we call FASB 133, it's related to speculation. You're buying financial instruments without having physical transactions just hoping that the thing will settle in the money or you'll sell it while it's in the money. So you're just speculating on a financial transaction without any physical control.

Our utilities, and that would include not only electricians but natural gas, under risk management that I'm aware of, they tie the financial transaction to the physical transaction, so that if they've agreed to buy a certain amount of gas at a certain time, they have gone and gotten a financial transaction to hedge that to a price certain, not that the physical price will fluctuate, but when you look at that and combine it with the financial transaction, it will result in a price that's fixed.

By making that connection, and that's what this portion of the stipulation is, they do not have to adjust their books based on the market value fluctuations of that financial instrument. And so it was designed to, one, allow Aquila to use what's called FASB 171, which is a regulatory one, so they no longer have to do a mark to market, **and it also makes the connection between the physical transaction and the financial transaction for fuel expense more definite, so it can actually be booked as fuel expense.**<sup>206</sup>

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Generally speaking, I'd say probably the main cause for the need is that their external auditor claims that they needed more documentation than we have. The reason you won't normally see it is, most of the other utilities' external auditors have not insisted on an Accounting Authority Order.

Now, the practice that's reflected in this agreement is consistent with the practice that's taking place in our other utilities. It's just that their external auditors have not insisted on language in a Commission Order to the same extent that Aquila has a requirement.<sup>207</sup>

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<sup>206</sup> Transcript, pp. 171-178; GMO Exh. 12, Transcript of Proceedings, On-the-Record Presentation, February 9, 2006, Volume 7, pp. 149-152.

<sup>207</sup> *Id.*

But I also want to point out, though, **this agreement has the benefit of tying the financial instrument as fuel expense so -- and without that, they would actually book the financial instrument in another account, and you would [be] susceptible to the argument that the financial instrument and the gain could be separated from fuel expense.**<sup>208</sup> (Emphasis added).

**134.** No party objected to, or sought to clarify, Staff's sworn testimony, as quoted in the above Finding of Fact.<sup>209</sup>

**135.** The AAO applied to Aquila's, now GMO's, hedging program, which included both natural gas and purchased power hedging.<sup>210</sup>

**136.** The AAO provided that GMO's natural gas and purchased power hedging transaction settlements and associated hedging costs would be matched with the cost of fuel for accounting and ratemaking purposes.<sup>211</sup>

**137.** The physical transaction and the financial transaction of GMO's hedging program were connected by means of the AAO to be specifically recorded as being fuel costs.<sup>212</sup>

**138.** The AAO provided that hedge settlements and related costs, both positive and negative, were to be included.<sup>213</sup>

<sup>208</sup> *Id.* All of the Signatory Parties to the Nonunanimous Stipulation and Agreement in File No. ER-2005-0436 entered appearances at the On-the-Record Presentation held on February 9, 2006. *Id.* It is worthy of note that the last sentence of this passage makes clear that granting the AAO precluded the argument that hedging cost should be booked separate from fuel cost. Official notice was also taken of this public document. Transcript, pp. 371-373.

<sup>209</sup> See File No. ER-2005-0436. It should be noted that Staff Counsel raised two objections with regard to the Regulatory Law Judge ("RLJ") asking Staff Witness Hyneman to explain Staff's position on the accounting methods authorized in the AAO approved in File No. ER-2005-0436. The first was the parol evidence rule. (Transcript, pp. 185-187, 368-371). That objection was overruled because the issue involves a Commission order, specifically an AAO, not a contract. The second objection was that Mr. Schallenberg should have been called to witness stand to explain his prior testimony. At the evidentiary hearing, Staff provided no legal basis for this objection rendering it an improper objection. In its post-hearing brief, Staff cites to Commission Rule 4 CSR 240-2.130(10) for the proposition that Staff did not have a reasonable opportunity to respond to the two public records in ER-2005-0436, which the RLJ inquired about – public documents Staff now claims, by reference to the rule, were not disclosed prior to the hearing. Staff's belated argument is erroneous. First, Staff is the party that interjected this issue into the case when it alleged GMO engaged in deceptive accounting practices in relation to what GMO was authorized to do in the AAO. The inquiry was relevant to interpreting the Commission's order approving that AAO and the AAO itself. Second, Staff's chosen witness for this matter, Mr. Hyneman, testified that he was the "primary auditor for Aquila's hedging program" in ER-2005-0436. (Transcript p. 166). Mr. Hyneman claimed expertise in interpreting the AAO, and he was Staff's chosen witness on this issue. He was Staff's witness raising the allegation that GMO violated the terms of the AAO. (Staff Exh. 3, Hyneman Rebuttal, pp. 15-27, Transcript, p.167). Mr. Hyneman was the appropriate witness to offer an explanation of Staff's prior position on the hedging practices and the accounting methods for the hedging costs authorized by the Commission with the AAO. Mr. Hyneman was given a full and fair opportunity to address the documents delineating Staff's position on the AAO. Finally, Staff's contention that it was unaware of its own prior position on what the AAO authorized, and that Staff's own prior position needed to be disclosed to Staff, so Staff could have a greater opportunity to respond to itself at the hearing, is meritless. Commission Rule 4 CSR 204-2.130(2) allows documents that are part of a public record to be received into evidence by reference and without production. Staff's claim that the filings and testimony in ER-2005-0436 (which are not only a matter of public record and fully disclosed in the primary case involved in this dispute raised by Staff, but which include a document authored and filed by Staff and sworn testimony provided by Staff) somehow surprised it at the evidentiary hearing is beyond comprehension.

<sup>210</sup> GMO Exh. 11, *Staff's Suggestions in Support of Nonunanimous Stipulation and Agreement*, Paragraph 4, EFIS Docket Entry No. 249 in File No. ER-2005-0436. Official notice was also taken of this public document. Transcript, pp. 371-373.

<sup>211</sup> GMO Exh. 11, *Staff's Suggestions in Support of Nonunanimous Stipulation and Agreement*, Paragraph 4, EFIS Docket Entry No. 249 in File No. ER-2005-0436.

<sup>212</sup> GMO Exh. 12, Transcript of Proceedings, On-the-Record Presentation, February 9, 2006, Volume 7, pp. 149-152.

<sup>213</sup> GMO Exh. 11, *Staff's Suggestions in Support of Nonunanimous Stipulation and Agreement*, Paragraph 4, EFIS Docket Entry No. 249 in File No. ER-2005-0436.

**139.** Staff and GMO understood that the practice of accounting authorized by the AAO was consistent with the practice taking place in other regulated utilities.<sup>214</sup> No other party to File No. ER-2005-0436 disputed this fact.

**140.** Staff and GMO understood that the accounting practices authorized in the AAO were in compliance with generally accepted accounting principles once the Commission granted the AAO.<sup>215</sup> No other party to File No. ER-2005-0436 disputed this fact.

**141.** The Commission approved the AAO in ER-2005-0436.<sup>216</sup>

**142.** In the Stipulation and Agreement as to Certain Issues in Case No. ER-2007-0004, the Signatories, including Aquila (now GMO) and the Staff, agreed:

**Hedge Costs.** Aquila agrees not to seek recovery of its 2006 hedge settlement losses of \$11.5 million in this or any future regulatory proceedings. The Signatories agree that ultimate settlement values of Aquila's hedge contracts in place on March 27, 2007 for the period June 1, 2007 through December 31, 2009 will be subject to the provisions of any fuel cost recovery mechanism approved by the Commission in this case. However, the ultimate settlement values will not be subject to challenge as to a prudence disallowance relative to Aquila's original decisions to enter into these hedge positions. The market values for these contracts as of March 27, 2007 are reflected on the attached Schedule 1. In the event that the Commission does not implement a fuel cost recovery mechanism for Aquila, then the treatment for hedge costs shall be determined in a future proceeding. While Aquila believes that its current hedging practices are prudent, Aquila acknowledges that its continued use of its current hedging practices is subject to a prudence review and potential disallowances relative to hedge positions taken after March 27, 2007.<sup>217</sup>

**143.** None of the non-signatory parties to the Stipulation and Agreement as to Certain Issues objected to or opposed the agreement.<sup>218</sup>

**144.** The Commission approved the Stipulation and Agreement as to Certain Issues in File No. ER-2007-0004, Effective April 22, 2007.<sup>219</sup>

<sup>214</sup> GMO Exh. 12, Transcript of Proceedings, On-the-Record Presentation, February 9, 2006, Volume 7, pp. 149-152.

<sup>215</sup> GMO Exh. 11, *Staff's Suggestions in Support of Nonunanimous Stipulation and Agreement*, Paragraph 4, EFIS Docket Entry No. 249 in File No. ER-2005-0436; See also Transcript, pp. 166-170.

<sup>216</sup> File No. ER-2005-0436: EFIS Docket Entry Number 253, *Order Approving Stipulation and Agreement*, issued February 23, 2006, Effective March 1, 2006.

<sup>217</sup> File No. ER-2007-0004: EFIS Docket Entry No. 215, *Stipulation and Agreement as to Certain Issues*, filed April 4, 2007. File No. ER-2011-0390: EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012.

<sup>218</sup> The Commercial Group, Ameren Missouri, Jackson County, and the City of Kansas City, all filed statements of non-opposition. File No. ER-2007-0004: EFIS Docket Entry Numbers 216-219.

<sup>219</sup> File No. ER-2007-0004: EFIS Docket Entry No. 224, *Order Approving Stipulation and Agreement as to Certain Issues*, Effective April 22, 2007.

**145.** In the Commission's Order Clarifying Report and Order issued on May 22, 2007 in File No. ER-2007-0004 (Aquila's 2007 rate case), the Commission stated:

On May 17, 2007, the Commission issued its Report and Order. In that order, at page 44, the Commission stated that "it would be improper to allow Aquila to flow hedging costs or demand costs associated with any purchased power contract through its fuel adjustment clause." Hedging costs and demand costs are also referred to collectively on page 43. **In each instance the phrase "hedging costs" was inadvertently included.** The language in question was only intended to address appropriate treatment of demand costs.

The treatment of hedging costs was addressed by the parties in the Stipulation and Agreement as to Certain Issues (Stipulation and Agreement). On April 12, 2007, the Commission approved the Stipulation and Agreement. **Under the Stipulation and Agreement, prudently incurred hedging costs will flow through the fuel adjustment clause,** but Aquila's 2006 hedge settlement losses of \$11.5 million were expressly excluded. The Stipulation and Agreement further provides that the ultimate settlement values of Aquila's hedge contracts in place on March 27, 2007, will not be subject to prudence review. Any hedge position taken after March 27, 2007, however, is subject to a prudence review and potential disallowance. (Emphasis added).<sup>220</sup> (Emphasis added).

**146.** No party to Case No. ER-2007-0004 objected to the Commission's clarification of how prudently incurred hedging costs were to be flowed through the FAC.<sup>221</sup>

**147.** Tariffs were filed to implement the FAC.<sup>222</sup>

<sup>220</sup> File No. ER-2007-0004: EFIS Docket Entry No. 368, *Order Clarifying Report and Order*, Effective May 27, 2007; File No. ER-2011-0390: EFIS Docket Entry No. 66, *Joint Stipulation of Non-Disputed Material Facts*, filed on June 1, 2012. Official notice was also taken of this public document. Transcript, pp. 371-373. "And since we've had quite a bit of testimony that's been heavily reliant on these prior cases, the Commission's going to take official notice of ER-2005-0436, ER-2007-0004, ER-2009-009, EO-2009-0115, EO-2010-0167 and ER-2010-0356, and specifically that would be official notice of any Stipulations & Agreements, any Commission Orders approving those, any filings in association with those, like suggestions in support thereof, for example, and any witness testimony admitted in those cases." *Id.*

<sup>221</sup> See File No ER-2007-0004. "Staff's Recommendation Regarding Aquila's Tariff Sheets and Staff's Position on Hedging Costs," filed on May 22, 2007, states in pertinent part:

The Staff agrees with how the Commission has clarified the treatment of hedging costs in its May 22, 2007 *Order Clarifying Report and Order*, since the **Staff had anticipated the Commission's Report and Order would allow the recovery of hedging costs in any fuel adjustment clause or other fuel cost recovery mechanism the Commission might order.**

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Further, the Staff states that the Commission's clarification of the treatment of hedging costs in its *Order Clarifying Report and Order* carries out the Staff's intent when it entered into the *Stipulation and Agreement as to Certain Issues*.<sup>221</sup> (Emphasis added).

File No. ER-2007-0004: EFIS Docket Entry No. 370, *Staff's Recommendation Regarding Aquila's Tariff Sheets and Staff's Position on Hedging Costs*, filed May 22, 2007. Official notice was also taken of this public document. Transcript, pp. 371-373.

<sup>222</sup> GMO Exh. 7, Rush Surrebuttal, Schedule TMR-1, TMR-2, TMR-4, TMR-5; Staff Exh. 13.

**148.** The Prudence Review Period of June 1, 2009 to November 30, 2010, covers three six-month accumulation periods. Tariff Sheet Nos. 124 - 127 were the first GMO FAC tariff sheets and these were effective through August 31, 2009. Tariff Sheet Nos. 127.1 - 127.5 were applicable to service provided September 1, 2009 through June 30, 2011.<sup>223</sup> The tariff sheets in operation during that relevant time frame include the following pertinent language:<sup>224</sup>

**For the first three months - June 1, 2009 to September 1, 2009:  
P.S.C. Mo. No. 1, Original Sheet 124**

“Costs eligible for Fuel Adjustment Clause (FAC) will be the Company’s allocated variable Missouri Jurisdictional cost for the fuel component of the Company’s generating units, purchased power energy charges, and emission allowance costs. Eligible costs do not include the purchased power demand costs associated with purchased power contracts.”

**P.S.C. Mo. No. 1, Original Sheet 125**

F = Actual variable cost of fuel in FERC Accounts 501 & 547  
P = Actual cost of purchased energy in FERC Account 555

**For the remaining fifteen months – September 1, 2009 through November 30, 2010:**

**P.S.C. Mo. No. 1, Original Sheet 127.1**

“Costs eligible for Fuel Adjustment Clause (FAC) will be the Company’s allocated variable Missouri Jurisdictional cost for the fuel component of the Company’s generating units, **including costs associated with the Company’s fuel hedging program**; purchased power energy charges, including applicable transmission fees; applicable Southwest Power Pool (SPP) costs, and emission allowance costs – all as incurred during the accumulation period.

These costs will be offset by off-system sales revenues, applicable net SPP revenues, and any emission allowance revenues collected during the accumulation period. Eligible costs do not include the purchased power demand costs associated with purchased power contracts in excess of one year.

<sup>223</sup> GMO Exh. 6, Rush Direct, pp. 4-5.

<sup>224</sup> *Id.*; GMO Exh. 7, Rush Surrebuttal, Schedule TMR-1, TMR-2, TMR-4, TMR-5; Staff Exh. 13;

**P.S.C. Mo. No. 1, Original Sheet 127.2 and 127.3**

FC = Fuel Costs Incurred to Support Energy Sales:

- The following costs reflected in Federal Energy Regulatory Commission (FERC) Account Numbers 501 & 502: coal commodity and railroad transportation, switching and demurrage charges, applicable taxes, natural gas costs, alternative fuel (i.e. tires and bio-fuel), fuel additives, quality adjustments assessed by coal suppliers, **fuel hedging cost (hedging is defined as realized losses and cost minus realized gains associated with mitigating volatility in the Company's cost of fuel, including but not limited to, the Company's use of futures, options and over-the-counter derivatives including, without limitation, futures contracts, puts, calls, caps, floors, collars, and swaps)**, fuel oil adjustments included in commodity and transportation costs, broker commissions and fees associated with price hedges, oil costs, ash disposal revenues and expenses, fuel used for fuel handling, and settlement proceeds, insurance recoveries, subrogation recoveries for increased fuel expenses **in Account 501**.

- The following costs reflected in FERC Account Number 547: natural gas generation costs related to commodity, oil, transportation, storage, fuel losses, **hedging costs**, fuel additives, fuel used for fuel handling, and settlement proceeds, insurance recoveries, subrogation recoveries for increased fuel expenses, broker commissions and fees **in Account 547**.

EC = Net Emissions Costs:

- The following costs reflected in FERC Account Number 509 or any other account FERC may designate for emissions expenses in the future: Emission allowances costs and revenues from the sale of SO<sub>2</sub> emission allowances.

PP = Purchased Power Costs:

- Purchased power costs reflected in FERC Account Numbers 555, 565, and 575: **Purchased power costs**, settlement proceeds,<sup>225</sup> insurance recoveries, and subrogation recoveries for increased purchased power expenses **in Account 555**, excluding SPP and MISO administrative fees and excluding capacity charges for purchased power contracts with terms in excess of one (1) year.

OSSR = Revenues from Off-System Sales:

- Revenues from Off-system Sales shall exclude long-term full & partial requirements sales associated with GMO. (Emphasis added).

**149.** The Commission-approved AAO in ER-2005-0436 coupled with the Commission's authorization to flow prudently-incurred hedging costs through the FAC and the pertinent tariff language demonstrate that prudently incurred costs of both sides of the hedge, the physical transaction and the financial transaction were linked so they could be booked as fuel expense in account 547.

<sup>225</sup> There is no evidence in the record that the term "settlement proceeds" is related to hedging practices. GMO witness Rush testified that these words were included in the PP description to cover any yet unknown changes to the way purchased power price volatility is mitigated. GMO Exh. 7, Rush Surrebuttal, p. 20.

**150.** The pertinent tariff language for the first three months of the prudence review period makes clear that only the actual cost of purchased energy was to be recorded in FERC Account 555, not the costs associated with hedging, which were developed consistently with, and linked with, the cost of fuel to be booked as fuel expense.

**151.** Since File No. ER-2005-0436, the settlement costs (both gains and losses) attributable to natural gas hedges for gas to be burned in its generating facilities, as well as natural gas hedges made to mitigate the risk of peak purchased power price volatility, have been recorded in Account 547.<sup>226</sup>

**152.** The FAC tariff language was changed in GMO's Rate Case No. ER-2009-0090, at the suggestion of Staff, to add more clarity to the components contained in the FAC. The purpose of this was to add clarity as to what costs should be included in the FAC. As such, if specific costs are not included in the descriptions, they may be subject to exclusion from recovery.<sup>227</sup>

**153.** Since the Company has been recording the settlement gains or losses associated with its hedging program to Account 547 since the 2005 rate case, and since these costs were expressly included in the FAC in Case No. ER-2007-0004, the tariff listed hedging costs in the description of FAC includable costs in Account 547. GMO, and apparently the Staff, did not see the need to explicitly include the word hedging in the description of Account 555. This is because the hedge settlement costs have been booked to Account 547 since the Company was ordered to record those costs above the line in Case No. ER-2005-0436.<sup>228</sup>

**154.** Consistent with the Commission's orders and GMO's FAC tariffs, GMO accounts for the natural gas hedge costs associated with its cross-hedging practice in Account 547 because at the time the hedges actually settle, the determination of whether or not the Company will generate or purchase power has not yet been made since that determination is based upon a review of the least cost option.<sup>229</sup> Consequently, all hedge settlements costs are natural gas settlement costs and are properly recorded in the 547 account, the natural gas account.<sup>230</sup>

**155.** GMO specifically records these natural gas hedging costs in a separate FERC subaccount, Account 547105. Throughout GMO's rate cases and FAC semi-annual filings, GMO has consistently recorded the hedge settlement costs in FERC subaccount, Account 547105.<sup>231</sup>

<sup>226</sup> GMO Exh. 6, Rush Direct, p. 5.

<sup>227</sup> GMO Exh. 6, Rush Direct, pp. 3-4, 7. The Commission does not believe that when the parties modified this language that they intended to exclude prudently incurred hedging costs, regardless if the hedge costs resulted from hedging to mitigate the price of natural gas for generation or if the hedge costs resulted from hedging to mitigate the cost of purchased power. In fact, these costs are indistinguishable because the hedge serves both purposes.

<sup>228</sup> GMO Exh. 6, Rush Direct, p. 8.

<sup>229</sup> GMO Exh. No. 7, Rush Surrebuttal, pp. 10-11.

<sup>230</sup> *Id.*

<sup>231</sup> GMO Exh. No. 7, Rush Surrebuttal, p. 11.

**156.** GMO fully complied with the language of the AAO, the Commission's orders and the tariffs by recording the hedge settlements for natural gas for generation to FERC Account 547. Natural gas hedge settlements to mitigate power price volatility were also appropriately recorded to FERC Account 547. The dual purpose of the cross hedge does not change the nature of the commodity being hedged, i.e. natural gas is fuel.<sup>232</sup>

**157.** The actual price of purchased power is recorded in FERC Account 555. This includes the non-cash gain or loss from the spot market or physical side of the hedge. The unrealized gain related to purchased power is included in FERC Account 555 because the Company paid less per MWh to external electricity suppliers.<sup>233</sup>

**158.** GMO did not incur any hedge settlements directly related to on-peak purchased power transactions that would have been appropriately charged to FERC Account 555.<sup>234</sup>

**159.** GMO has consistently disclosed its accounting practices with regard to its hedging practices.<sup>235</sup>

**160.** GMO maintains its books and records in accordance with Federal Energy Regulatory Commission's ("FERC") Uniform System of Accounts ("USOA").<sup>236</sup>

<sup>232</sup> GMO Witness Bryan Bresette testified that If GMO had started by booking its cross hedges as Staff is now saying it should, it would have had a very perverse impact on the pre-merger FAC. Since the pre-merger FAC did not include revenue from Account 447, GMO's customers would have effectively paid double for all electricity that was hedged. They would have paid when the physical electricity was purchased and recorded in Account 555, and they would have also paid for the futures contract as it was recorded in Account 555 but they would not have received the revenue from the sale of the futures contract because it would have been recorded in Account 447. GMO Exh. 3, Bresette Surrebuttal, p. 15.

<sup>233</sup> GMO Exh. 3, Bresette Surrebuttal, pp. 13-14. The cost for the natural gas is recorded in Account 547. The cost of the purchased power is recorded in Account 555. Since both of these accounts are accumulated in the FAC, the customers' risk of spiking power prices is offset with the hedge adjustments from the natural gas derivatives. The key, as with hedging in general, is the net effect. GMO Exh. 1, Blunk Direct, p. 13-15. GMO includes both sides of the hedges in its FAC. The natural gas derivative cash settlement is in FERC Account 547 as a component of Fuel Costs and the non-cash change in value is in FERC Account 555 as a component of Purchased Power Costs. GMO Exh. 3, Bresette Surrebuttal, p. 11. Under the Company's method, the customer is not harmed since any potential loss in FERC Account 547 is offset the non-cash gain in FERC Account 555 and both are included in the FAC. GMO Exh. 3, Bresette Surrebuttal, p. 15.

<sup>234</sup> GMO Exh. 3, Bresette Surrebuttal, p. 20. As explained by Mr. Bresette, there are instances where the hedge costs associated with the electricity that is hedged using NYMEX natural gas futures contracts are appropriately included in the "PP = Purchased Power Costs" component of the FAC. Sometimes GMO will convert a natural gas cross hedge to an electricity forward. When that happens, the hedge adjustment from the natural gas contract that effectively fixed the future price of electricity through the cross hedge is recorded in Account 547 and included in the "FC = Fuel Costs Incurred to Support Sales" component of the FAC. The price fix which began as a natural gas cross hedge is converted from one derivative to another derivative. It is converted from a NYMEX futures contract for natural gas to a forward contract for electricity. Much like the hedge adjustment recorded in Account 547 which occurred because the natural gas market had moved from the time the hedge was initiated to the time it was closed. The Company is locked into a price for electricity that ends up being either less or more than the prevailing spot price for electricity. That non-cash opportunity gain or loss on the electricity forward which began as a NYMEX natural gas futures contract is included in Account 555 and the PP = Purchased Power Costs" component of the FAC. GMO Ex. No. 3, Bresette Surrebuttal, p. 12.

<sup>235</sup> GMO Exh. 13, Data Request No. 0029 in File No. EO-2011-0390; GMO Exh. 14, Data Request No. 0029 in File No. EO-2010-0167 (HC); GMO Exh. 15, Data Request No. 0030 in File No. EO-2009-0115. See also GMO Exh. 3, Bresette Surrebuttal, Schedule RAB-1 for copies of GMO's derivative footnote from 2006 – 2011. The Staff members who prepared the Third Prudence Review Report were Dana Eaves, Leon Bender, Matthew Barnes and David Roos. Three members of Staff's management, Staff witness Lena Mantle and Staff Counsel reviewed the Report. Staff Witness Mantle's testimony that any given member of this team would not be knowledgeable about GMO's disclosures in its answers to Staff's Data Requests is not credible. See Transcript, pp. 191-196, 220-225, 254-255.

<sup>236</sup> GMO Exh. 3, Bresette Surrebuttal, p. 15-16; GMO Exh. 6, Rush Direct, p. 6.

**161.** GMO's accounting treatment of its hedging program is in accordance with the Generally Accepted Accounting Principles ("GAAP") and FERC accounting.<sup>237</sup>

**162.** Because GMO has complied 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)," it has also complied with Commission Rule 4 CSR 240-20.030.

**163.** GMO discloses its accounting methods in the notes to the financial statements of GMO's FERC Form 1.<sup>238</sup> In GMO's FERC Form 1, GMO discloses the fair value of these contracts that are subject to regulatory treatment. In addition, the Company has consistently disclosed the gain or loss on the contracts which mitigate both fuel and power price risk, and which are recorded to fuel expense (i.e. FERC Account 547).<sup>239</sup> In the derivative footnote in the FERC Form, GMO discloses the hedging program and the purpose of the program. GMO typically states:

GMO's risk management policy is to use derivative instruments to mitigate price exposure to natural gas price volatility in the market. The fair value of the portfolio relates to financial contracts that will settle against actual purchases of natural gas and purchased power.

In a table in the footnote, the Company discloses the fair value of the natural gas hedges recorded in a regulatory account and the amount of gain or loss recorded in fuel expense in 2009 and 2010.<sup>240</sup>

**164.** In GMO's FERC Form 1, Paragraph 13, Derivative Instrument, GMO also provides a disclosure that in GMO's 2005 Missouri electric rate case, it was agreed that the settlement costs of these contracts would be recognized in fuel expense and be included in GMO's FAC.<sup>241</sup>

**165.** GMO has followed the USOA rules for booking its hedge costs, and it has consistently done so since 2005.

**166.** Four rate cases and two FAC prudence reviews have been conducted since the beginning of the company's hedging practices, and no party to these actions has previously asserted that GMO has engaged in any improper accounting practices.<sup>242</sup>

<sup>237</sup> *Id.*; Schedule RAB-2, Independent Auditors' Reports. The Company has been audited by Staff for two previous FAC audit periods and had its rates and operations reviewed in four rate cases, and the Company also has external auditors who have given GMO unqualified statements related to its books and records during the relevant time period of the prudence review. Deloitte & Touche, LLP, the Company's external auditors, have stated in these opinions: "In our opinion, such regulatory-basis financial statements present fairly, in all material respects, the assets, liabilities, and proprietary capital of the Company [years ending December 31, 2009 and December 31, 2010] in accordance with the accounting requirements of the Federal Energy Regulatory Commission as set forth in the Uniform System of Accounts and published accounting releases." GMO Ex. No. 3, Bresette Surrebuttal, Schedule RAB-2, pp. 5-7.

<sup>238</sup> GMO Ex. 3, Bresette Surrebuttal, pp. 7-8.

<sup>239</sup> GMO Ex 3, Bresette Surrebuttal, Schedule RAB-1 for copies of GMO's derivative footnote from 2009 – 2011.

<sup>240</sup> GMO Ex. 3, Bresette Surrebuttal, p. 7.

<sup>241</sup> GMO Ex 3, Bresette Surrebuttal, Schedule RAB-1 for copies of GMO's derivative footnote from 2009 –2011.

<sup>242</sup> GMO Ex. 1, Blunk Direct, p. 4; GMO Ex. 4, Clemens direct, pp. 4-10; GMO Ex. 5, Heidtbrink Direct, p. 5; GMO Ex. 7, Rush Surrebuttal, p. 11, 16-19; Staff Ex. 15, [Second] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company; Staff Ex. 16, [Third] Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of KCP&L Greater Missouri Operations Company. See also File Numbers ER-2005-0436, ER-2007-0004, ER-2009-0090, EO-2009-0115, EO-2010-0167 and ER-2010-0356 See also GMO Ex. No. 4, Clemens Surrebuttal, pp. 4-10; GMO Ex. No. 5, Heidtbrink Direct, pp. 3-10; GMO Ex. No. 6, Rush Direct, pp. 8-10; Staff Ex No. 3, Hyneman Rebuttal, p. 10; GMO Ex Nos. 13, 14 and 15; Transcript, pp. 221-226.

167. Despite Staff's allegations that hedging costs related to spot market purchased power have been improperly accounted for and should not be recovered through the FAC, the Commission's Staff testified that it is not opposed to GMO recovering the prudently incurred hedging costs associated with purchased power through its FAC.<sup>243</sup>

### **Conclusions of Law Regarding GMO's Accounting for Its Hedging Costs**

The Commission ordered that all of GMO's prudently incurred hedging costs would be recovered through its FAC.<sup>244</sup> The Commission prescribed the accounting treatment for GMO's hedging costs by means of the AAO to ensure the physical and financial transactions would be connected and booked as fuel costs. The Commission's Staff has alleged that GMO engaged in improper accounting in order to improperly recover hedging costs associated with purchased power, while at the same time has testified that it is not opposed to GMO recovering its prudently incurred hedging costs associated with purchased power through its FAC.<sup>245</sup> And, the record reflects that GMO has properly, and openly, accounted for its hedging costs, consistent with the Uniform System of Accounts, previous stipulations and agreements, and orders of the Commission.

The substantial and competent evidence on the record as a whole supports the conclusions that GMO's accounting practices: (1) were authorized by the Commission-approved AAO and the relevant tariffs; (2) are not misleading or deceptive; and (3) do not result in distorted financial statements. The substantial and competent evidence on the record as a whole also supports the conclusions that GMO has consistently followed the USOA, FERC's accounting standards, the GAAP, and the Commission's rules for booking its hedging costs since the inception of its hedging program. The substantial and competent evidence on the record as a whole further supports the conclusion that GMO did not improperly attempt to over-collect unauthorized or imprudent hedging costs from its customers – GMO's ratepayers were not harmed.

<sup>243</sup> Transcript, p 247.

<sup>244</sup> Given that all prudently incurred hedging costs should be passed through the FAC mechanism, it should not matter in which account, Account 547 or Account 555 the hedge costs associated with the cross-hedging program were booked. Both accounts include hedging-related entries, and all prudently incurred hedging costs are supposed to be flowed through the FAC, as directed by the Commission's *Order Clarifying Report and Order* in the 2007 Aquila rate case, and agreed to by the parties to the Aquila 2005 stipulation. See also Finding of Fact 13 – the parties stipulated that "GMO's FAC allows GMO to recover from its ratepayers 95% of its prudently incurred variable fuel and purchased power costs above a base amount that is set in a general rate case."

<sup>245</sup> Staff's inconsistent positions do not aid its credibility. The evidence further supports that Staff has been aware of GMO's accounting practices throughout the implementation of GMO's hedging program.

#### **IV. 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, upon its impartial and independent review of the whole record, has reached the following final decision.

The Commission's Staff has failed to provide substantial controverting evidence to rebut the presumption of the prudence of GMO's hedging practices. The Commission's Staff has failed to meet its burden, by a preponderance of the evidence, of proving the GMO was imprudent with its hedging practices during the prudence review period of June 1, 2009 through November 30, 2010. The Commission's Staff has failed to meet its burden, by a preponderance of the evidence, of proving GMO engaged in improper accounting practices in violation of the Accounting Authority Order from File Number ER-2005-0436. The Commission's Staff has failed to meet its burden, by a preponderance of the evidence, of proving that GMO violated the Uniform System of Accounts. The Commission's Staff has failed to meet its burden, by a preponderance of the evidence, of proving GMO violated its Fuel Adjustment Clause Tariff. All of Staff's allegations, and the relief sought by Staff, will be denied.

In this proceeding, GMO suggested that additional guidance from the Commission regarding the appropriateness of the use of natural gas hedging by electric utilities such as GMO would be helpful. GMO also suggested that the Commission implement a process to avoid similar disputes over its hedging programs in the future. Having considered the request, the Commission agrees that this is a reasonable approach, and will open an investigatory docket to review policies or procedures with regard to electric companies' hedging programs that will hopefully assist the utilities with developing effective hedging programs that serve the public interest by mitigating the rising costs of fuel.

#### **THE COMMISSION ORDERS THAT:**

1. The Staff of the Missouri Public Service Commission's ("Staff") allegations of imprudence on the part of KCP&L Greater Missouri Operations Company ("GMO") are denied.
2. The Staff's allegations that GMO engaged in improper accounting practices in violation of the Accounting Authority Order from File Number ER-2005-0436 are denied.
3. The Staff's allegations that GMO violated the Uniform System of Accounts are denied.
4. The Staff's allegations that GMO violated its Fuel Adjustment Clause Tariff are denied.
5. The Staff's request for relief, that GMO provide a refund to its customers, is denied.

6. The Commission shall open a working docket to review policies or procedures with regard to electric companies' hedging programs.
7. This Report and Order shall become effective on September 14, 2012.
8. This file shall be closed on September 15, 2012.

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

Dated at Jefferson City, Missouri,  
on this 4<sup>th</sup> day of September, 2012.

**Eric C. Larson, Complainant, v. Woodland Manor Water Company, LLC, Respondent.****File No. WC-2011-0409**

**Water. §14 Maintenance.** The utility's tariff obligated it to maintain its mains. Generally, anything on the customer's side of the meter must be maintained by the customer.

**REPORT AND ORDER**

Issue Date: September 20, 2012

Effective Date: October 22, 2012

**FINAL DECISION**

The Missouri Public Service Commission is:

- Granting the complaint of Eric C. Larson ("Mr. Larson"), and
- Ordering an improvement to the water system.

Placing a meter on an existing system under the tariff at issue does not, alone, transfer any property or divest any duty of the Company. The Company must have the Commission's authorization under Section 393.190, RSMo 2000, before disposing of any necessary and useful part of the system. Necessary and useful parts of the system included the pipe that Mr. Larson fixed ("east curve"), and no order authorizing abandonment existed for the east curve, so the east curve remained within the Company's duty to maintain. This report and order is subject to rehearing<sup>2</sup> and appeal.<sup>3</sup>

**Appearances**

For Eric C Larson:

Eric C Larson  
31 Holiday Drive,  
Kimberling City, Missouri 65686

For Woodland Manor Water Company, LLC:

Gregory R. Gibson, Attorney at Law,  
P.O. Box 108  
Blue Eye, Missouri 65611

For Staff:

Rachel Lewis and Amy Moore, Deputy Staff Counsel  
Amy Moore, Staff Counsel

Missouri Public Service Commission  
200 Madison Street, Suite 800, P.O. Box 360, Jefferson City, MO 65102.

Senior Regulatory Law Judge: Daniel Jordan.

<sup>1</sup> The Commission is changing the caption of this action to correctly name the water company as discussed below.

<sup>2</sup> Section 386.500, S.B. 48, 96<sup>th</sup> Gen. Assem., First Reg. Sess.

<sup>3</sup> Section 386.510, S.B. 48, 96<sup>th</sup> Gen. Assem., First Reg. Sess.

### Procedure

Mr. Larson began this action by filing the complaint alleging that a public utility committed a violation of statute, regulation, tariff, or Commission order (“violation”).<sup>4</sup>

Mona L. Fennema filed an answer as chief operator of Woodland Manor Water Company, LLC (“the LLC”). The LLC also filed an answer through counsel.<sup>5</sup> Mr. Larson filed a reply.<sup>6</sup> The Commission’s staff (“Staff”) filed a recommendation.<sup>7</sup> Mr. Larson, the LLC, and Staff filed a stipulation.<sup>8</sup>

The Commission issued notice<sup>9</sup> that the Commission intended to conduct this action under the small complaint regulation.<sup>10</sup> The small complaint regulation sets time limits for deciding the case, but the parties<sup>11</sup> sought, agreed to, and received extensions of the procedural schedule, which constituted an extension of the time to issue a decision. Those facts also constitute good cause to extend the time for issuing the recommended report and order, so the time for issuing the recommended report and order is extended.

As required by the small complaint regulation, the Commission convened the evidentiary hearing on the merits of the complaint at a location within 30 miles of where the service was rendered.<sup>12</sup> The reporter filed the hearing transcript.<sup>13</sup> The Commission received briefs from Mr. Larson,<sup>14</sup> the company,<sup>15</sup> and Staff.<sup>16</sup> Mr. Larson also filed a reply<sup>17</sup> to Staff’s brief. The last briefs were due on July 11, 2012.<sup>18</sup> The regulatory law judge assigned to this case issued a recommended decision.<sup>19</sup> The Commission received comments from Mr. Larson,<sup>20</sup> the LLC,<sup>21</sup> and Staff.<sup>22</sup>

<sup>4</sup> On June 27, 2011.

<sup>5</sup> On August 5, 2011. Because the complaint and answer alleged that the respondent is a limited liability company, the Commission required the LLC to answer through counsel.

<sup>6</sup> On August 8, 2011.

<sup>7</sup> On August 11, 2011.

<sup>8</sup> *Joint Stipulated Facts*, filed on May 23, 2012.

<sup>9</sup> *Notice of a Contested Case and Orders for Small Contested Case*, issued on June 27, 2011.

<sup>10</sup> 4 CSR 240-2.070(15).

<sup>11</sup> The Office of the Public Counsel is a party to every action before the Commission, 4 CSR 240-2.010(10), but opted to enter no appearance, and so is not within the term “party” as used in this decision.

<sup>12</sup> 4 CSR 240-070(15)(E).

<sup>13</sup> On June 11, 2012.

<sup>14</sup> *Summary Brief*, filed on July 2, 2012.

<sup>15</sup> *Staff’s Brief*, filed on July 2, 2012.

<sup>16</sup> *Post-Hearing Brief*, filed on July 3, 2012; *Order Granting Leave to File out of Time*, issued on July 5, 2012.

<sup>17</sup> *Objection to the Lies in the Staff’s Brief*, filed on July 3, 2012.

<sup>18</sup> 4 CSR 240-2.140(2) and (3).

<sup>19</sup> *Recommended Report and Order*, issued on August 3, 2012.

<sup>20</sup> *Comments on the Recommended Report and Order*, filed on August 6, 2012.

<sup>21</sup> *Woodland Manor’s Comments on Recommended Decision*, filed on August 15, 2012.

<sup>22</sup> *Staff’s Comments and Response*, filed on August 16, 2012.

Mr. Larson has the burden of proof.<sup>23</sup> The burden is to show that a violation is more likely than not to have occurred.<sup>24</sup> Mr. Larson carries that burden with substantial evidence of probative value or by inferences reasonably drawn from the evidence.<sup>25</sup> The Commission resolves any factual dispute by determining the preponderance of the evidence,<sup>26</sup> which means the greater weight.<sup>27</sup> Applying those principles and the scientific and technical facts within the Commission's competence<sup>28</sup> to the record, the Commission independently finds the facts as follows.

### Findings of Fact

1. Woodland Manor Water Company, LLC ("the LLC") is a Missouri limited liability company.
2. Mona L. Fennema holds a certificate of convenience and necessity ("certificate") to provide water service in Missouri under the fictitious name of Woodland Manor Water Company<sup>29</sup> ("the Company").
3. The Company's service territory includes 31 Holiday Drive, Kimberling City, Missouri 65686, which is the location of Kimberling Oaks Resort ("the resort").
4. The resort's owner is Mr. Larson, who is the customer liable on the account for water service to the resort.
5. The resort is within a platted subdivision called Vista Haven Beach ("the subdivision"). The subdivision is entirely north of Holiday Drive ("the street"), which runs east and west. The subdivision consists of nine lots numbered 1 through 9, west to east, of which lots 2 through 9 constitute the resort.
6. When Mr. Larson bought the resort:
  - a. On Lot 1 was a house ("yellow house"). The yellow house's water supply has always been, and is, separate from the resort. The yellow house was not part of the resort. On October 23, 2006, Mr. Larson purchased the yellow house. As of the date of the hearing, Mr. Larson lived in the yellow house and leases the rest of the house.
  - b. Lots 2 and 9 were empty. On lots 3, 4, 5, 6, and 7, were cabins and a swimming pool. Lot 8 had a residence ("old house").
7. The resort's builder was Bob Connell. Mr. Connell was also the subdivision's developer. Mr. Connell installed and operated a water system ("the system") to serve the subdivision.

<sup>23</sup> *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Comm'n of Missouri*, 806 S.W.2d 432, 435 (Mo. App., W.D. 1991).

<sup>24</sup> *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

<sup>25</sup> *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

<sup>26</sup> 32 S.W.3d at 641.

<sup>27</sup> *Id.* at 642.

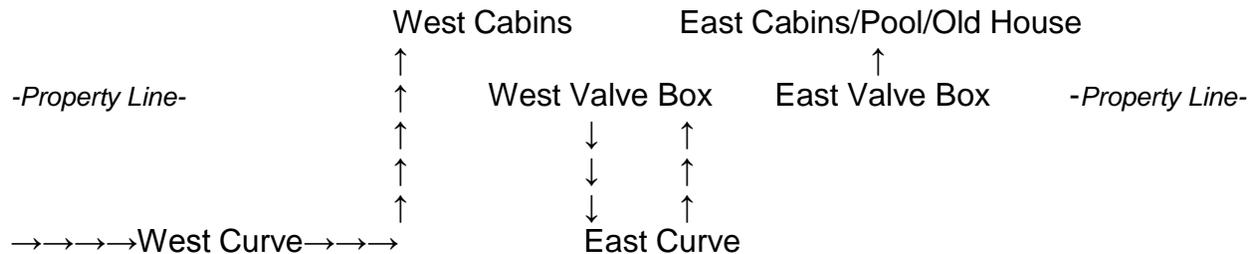
<sup>28</sup> Section 536.070(6), RSMo 2000.

<sup>29</sup> *In the Matter of the Application of Bob Connell d/b/a Woodland Manor Water Company to Sell his Water System in Stone County, Missouri to Stephen T. Fennema and Mona L. Fennema, Husband and Wife*, File No. WM-99-199, Order Approving tariff in Compliance with Commission Order, issued April 13, 1999.

A. Mr. Connell's System<sup>30</sup>

8. Originally, Mr. Connell did not operate the system as a public service. The system had no meters and Mr. Connell collected a flat fee for water service. As installed by Mr. Connell, the system included pipe made of one-inch flexible black plastic, gauged to copper tube size<sup>31</sup> ("old pipe").

9. The system served the resort as follows.



- a. From the west, under the middle of the street, old pipe ran to the east and curved north ("west curve") to the subdivision's boundary. There, Mr. Connell installed a valve box ("west valve box"). The west valve box served the cabins on the west side of the resort ("west cabins").
- b. From the west valve box, old pipe continued east, dipping south under the middle of the street, then curving north again ("east curve") to within one foot of the subdivision's boundary. There, Mr. Connell installed another valve box ("east valve box"). The east valve box served the cabins on the east side of the resort ("east cabins"), the pool, and the old house.

10. In the mid-1970s, the City of Kimberling, Missouri, ("the city") incorporated. The city's boundaries included the subdivision and the street. The street now has several layers of pavement and the city has right-of-way to the north and south.

11. Mr. Connell transitioned the system from an unregulated private service to a regulated public service. On December 12, 1992, the Company's "Rules and Regulations Governing Rendering of Water Service," P.S.C. MO No. 1 ("tariff") became effective. The tariff is based on template tariff language. Mr. Connell began installing meters and pipe made of metal ("new pipe"), including new pipe parallel to the street on the street's south side (new south pipe").

12. Effective April 19, 1999, Mr. Connell transferred the system to Stephen T. Fennema<sup>32</sup> and Mona L. Fennema as husband and wife ("the Fennemas") doing business as Woodland Manor Water Company, and the Fennemas adopted the tariff.

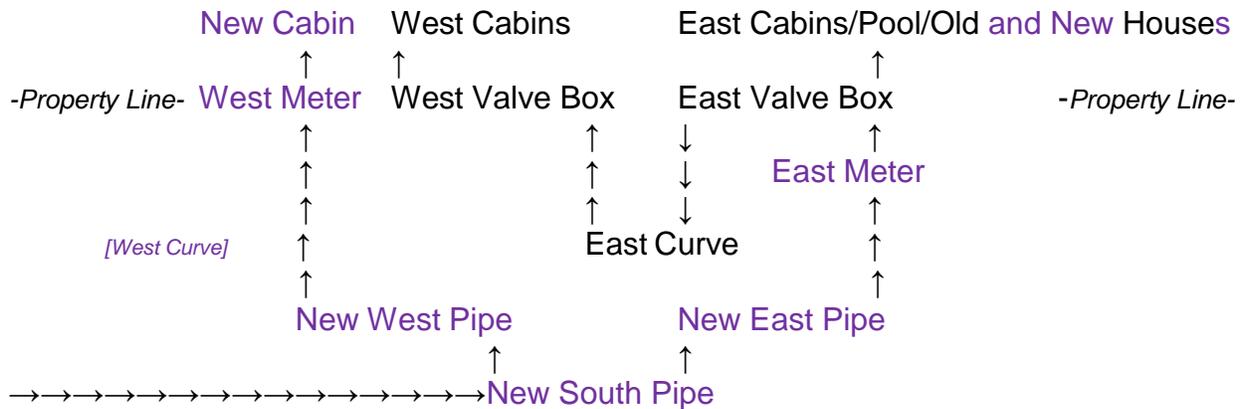
<sup>30</sup> Also depicted in the Appendix at paragraph A for comparison with later configurations.

<sup>31</sup> Called "CTS" in the record.

<sup>32</sup> The record is otherwise silent as to Stephen T. Fennema.

B. Alterations by Company and Mr. Larson<sup>33</sup>

13. The Company installed more new pipe and more meters. As to the resort, the Company’s intention was to develop service in a manner that would be most economical for Mr. Larson. The Company did not act with willful misconduct.



*i. New West Pipe*

14. In 2000, Mr. Larson built a cabin (“the new cabin”) on subdivision lot 2 (at the west end of the resort), and requested water service. The Company installed a meter (“the west meter”) at the subdivision boundary, ten feet from the west valve box. The company ran new pipe (“new west pipe”) from the new south pipe to the west meter, and Mr. Larson connected the new cabin to the west meter.

*ii. New East Pipe*

15. In November 2001, Mr. Larson added a new building on lot 9 (“new house”). The new house includes space for a residence, office, and laundry facility. The old pipe of the east curve and east valve box was not adequate to supply the new house,<sup>34</sup> so the Company installed new pipe (“new east pipe”) from the new south pipe to the east valve box.

16. On the new east pipe, the Company installed a meter (“east meter”) within the city’s north right-of-way, twelve feet south of the east valve box.

17. At the Company’s direction, Mr. Larson connected the new house to the new east pipe. Incident to that project, Mr. Larson also upgraded the connection to the old house, to which the supply was a separate old pipe that also ran under the street. Mr. Larson ran the connection for the old house and new house to the new east pipe between the east meter and east valve box. This arrangement was in lieu of installing a third meter, which Mr. Larson had originally requested, but would have cost him more.

*iii. The Leak*

18. With the new west pipe serving the new cabin and the new east pipe serving the rest of the resort through the east curve, the west curve was of no more use. The west curve was severed twice, during street-related work by the Company and the city, and each time the Company fixed it. The second time, the Company capped the west curve’s severed ends so that water no longer flowed through it from the west to the resort.

<sup>33</sup> Also depicted in the Appendix at paragraph B for comparison with other configurations.

<sup>34</sup> Transcript vol. III, page 109 line 10, to page 111 line 10.

19. The east curve could be eliminated from the system, if the west cabins connected to the west meter, which the Company assumed that Mr. Larson would do. But Mr. Larson did not believe that he had any right or duty under the tariff to cap off the east curve, and did not know the system’s details, so he did not connect the west cabins to the west meter. Therefore, the west cabins continue to receive their supply from the east curve.

20. In June 2011, beneath the street, the east curve leaked. The leak cut off water to the west cabins, and threatened the resort’s structures and threatened the resort’s water supply. Mr. Larson called the Company.

21. When the Company responded to Mr. Larson’s service call, Mr. Larson turned off the water at the east meter, and the leak stopped, which proved that the leak was on the far side of the east meter from the Company. Relying solely on the tariff, the Company concluded that placing a meter divested the Company of all duties (“abandoned”) as to any pipe beyond the meter. On that basis, the Company refused to fix the leak.

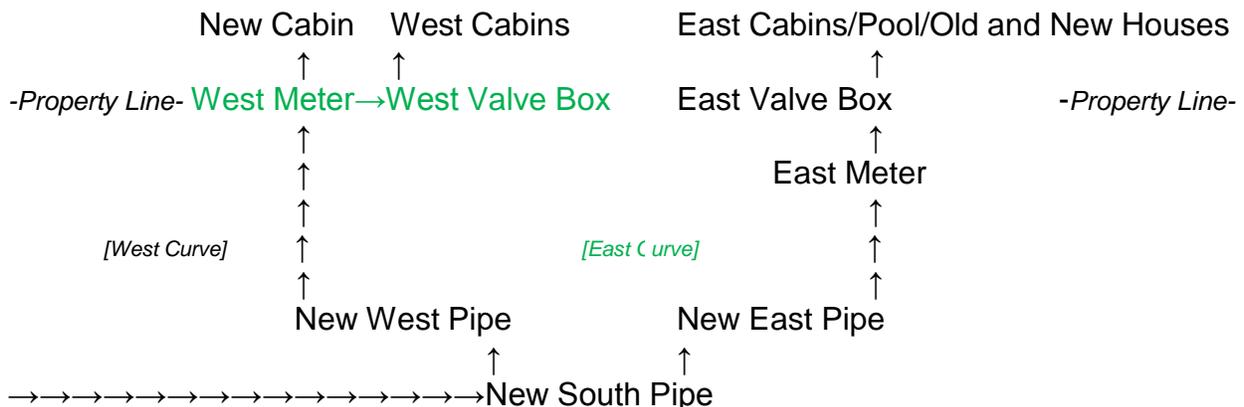
22. Mr. Larson dug up the street and fixed the leak at his own expense. Mr. Larson sought reimbursement from the Company, in the form of a credit against his water bill, in the following amounts:

<i>Item</i>	<i>Detail</i>	<i>Amount</i>
Labor	nine man-hours @\$35.00/hour	\$315.00
Materials	one compression fitting @ \$3.49	\$ 3.49
Total		\$318.49

Those amounts are reasonable.<sup>35</sup> The Company denied liability. This complaint followed.

C. Staff’s Solution<sup>36</sup>

23. The entire system may suffer contamination from a leak,<sup>37</sup> which is likely in the east curve because it is almost 55 years old, and subject to the shifting of the rock bed beneath the street. The east curve could be out of the system—disconnected at both ends—if the west meter connected to the west cabins.



<sup>35</sup> Section 536.070(6), RSMo 2000.

<sup>36</sup> Also depicted in the Appendix at paragraph C for comparison with earlier configurations.

<sup>37</sup> Section 536.070(6), RSMo 2000.

### Conclusions of Law

The Commission independently concludes as follows.

#### I. Procedure

The Commission has subject matter jurisdiction because the statutes provide that the Commission shall hear a complaint against any “public utility.”<sup>38</sup>

##### *a. Who the Public Utility Is*

The parties assert that the LLC supplies Mr. Larson. That assertion appears in the complaint, in Mona L. Fennema’s answer, in the LLC’s answer, and in the parties’ stipulation. The stipulation names the LLC as respondent and states:

Complainant is provided water service by Respondent, which is a Missouri public utility [.39]

But the identity of the public utility is not subject to the parties’ control by stipulation because it is not solely an issue of fact. It is a question of law because the statutes define a public utility.

Public utility:

. . . includes every . . . water corporation [as] defined in this section.[<sup>40</sup>]

That section defines a “water corporation” beyond general business corporation to include other entities including individuals:

"Water corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water [<sup>41</sup>]

“The parties’ stipulation cannot change the words of the statute. Nor can it ‘bind or circumscribe a court in its determination of questions of law.’”<sup>42</sup>

Contrary to their stipulation, the parties presented uncontroverted evidence showing that the public utility supplying water to Mr. Larson is Mona L. Fennema. Mona L. Fennema is named on the tariff’s adoption notice. Mona L. Fennema holds the certificate that the statutes require for anyone to sell water for gain.<sup>43</sup> The LLC appears in neither of those documents. The LLC’s only connection to the water business is in the conclusory allegations described, not in any substantial evidence.

<sup>38</sup> Section 386.390.1, RSMo 2000. The LLC argues that the passage of time since the placement of meters should bar the complaint but cites no supporting authority.

<sup>39</sup> *Joint Stipulated Facts*, filed on May 23, 2012.

<sup>40</sup> Section 386.020(43), RSMo Supp. 2010.

<sup>41</sup> Section 386.020(59), RSMo Supp. 2010.

<sup>42</sup> *La-Z-Boy Chair Co. v. Director of Econ. Dev.*, 983 S.W.2d 523, 525 (Mo. banc 1999).

<sup>43</sup> Section 393.170.2 and .3, RSMo 2000.

Therefore, the Commission concludes that Mona L. Fennema, doing business as Woodland Manor Water Company, (“the Company”) is the water corporation supplying Mr. Larson and the public utility subject to the complaint, notwithstanding contrary allegations in the stipulation.

*b. Notice*

The Commission has personal jurisdiction because it served the complaint as the statutes require:

Service in all hearings, investigations and proceedings pending before the commission may be made upon any person upon whom summons may be served in accordance with the provisions of the code of civil procedure of this state, and may be made personally or by mailing in a sealed envelope with postage prepaid. [<sup>44</sup>]

The Commission’s file shows certified mailing to “Woodland Manor Water Company [,]” which is Mona L. Fennema’s trade name for selling water service, and the signature of Mona L. Fennema. Mona L. Fennema filed an answer and appeared at the evidentiary hearing. And Mona L. Fennema is the public utility subject to the complaint because, according to the record, she is the water corporation supplying Mr. Larson.

*c. What this Action Is*

Also in the stipulation, the parties characterize the complaint as an appeal from an earlier decision:

The Complainant has duly appealed a prior unfavorable determination pursued within the Commission's informal complaint resolution process, and this complaint is therefore properly before the Public Service Commission of Missouri. No other parties have an interest in the dispute which is before the Commission nor are needed for full and final resolution of the dispute. [<sup>45</sup>]

That characterization has no basis in any authority<sup>46</sup> and is not controlling under the authorities cited above. No determination as to any violation occurs until the Commission makes its final decision as the statutes provide. This decision determines the legal rights and duties of the persons specified only.<sup>47</sup>

<sup>44</sup> Section 386.390.4, RSMo 2000.

<sup>45</sup> *Joint Stipulated Facts*, paragraph 2.

<sup>46</sup> Including the Commission’s regulation 4 CSR 240-2.070(1) on an “informal complaint.”

<sup>47</sup> Section 536.010(4) and (6)(d) RSMo Supp. 2010.

## II. Merits

A complaint determines whether the Company has committed a violation.<sup>48</sup> To show a violation, Mr. Larson focuses on the tariff's purpose. As detailed below, the tariff provides the Company's duty to maintain any pipe according to the pipe's classification. Classification of any pipe depends on its relation to geographical features including customer units,<sup>49</sup> public property lines, and an intervening meter or customer property line.<sup>50</sup> The property line/meter dichotomy reflects the tariff's context: a developing water system. No meter is necessary for a pipe to carry water so, when no meter is in place, classification defaults to the customer property line. The reverse of that premise constitutes the Company's and Staff's argument: that placing a meter on an existing pipe alone re-classifies that pipe. That argument is unsupported by the tariff and contrary to statute as follows.

### *a. Duty to Maintain: Tariff*

All parties correctly begin their analysis with a history of the system because that is where the tariff's purpose becomes plain. The system began its life unregulated because it was not a public service and did not have the duties associated with a public utility. There being no such duties, the tariff's purpose was not to divest such duties, but to impose them.

The east curve was in the exclusive care of Mr. Connell because he installed it entirely on public property. Because it was on public property, the tariff classified the east curve as either a main:

A "MAIN" is a pipeline which is owned and maintained by the Company, located on public property . . . , and used to transport water through the Company's service area . . .<sup>51</sup>

or as a service connection because it ran to the customer property line:

A "SERVICE CONNECTION" is the pipeline connecting the main to the customer's water service line at the property line, or outdoor meter setting including all necessary appurtenances.

This service connection will be installed, owned, and maintained by the company. [<sup>52</sup>]

In any event, the east curve was not a customer service line because it did not connect to a building:

A "CUSTOMER'S WATER SERVICE LINE" is a pipe with appurtenances installed, owned and maintained by the customer, used to conduct water to the customer's unit from the property line or outdoor meter setting, including the connection to the meter setting.[<sup>53</sup>]

<sup>48</sup> Section 386.390.1, RSMo 2000.

<sup>49</sup> Units are the customer's buildings. Tariff, Original Sheet 6, Rule 1(c).

<sup>50</sup> Property lines that run through a street, and private easements, also feature in those provisions but do not appear in the record.

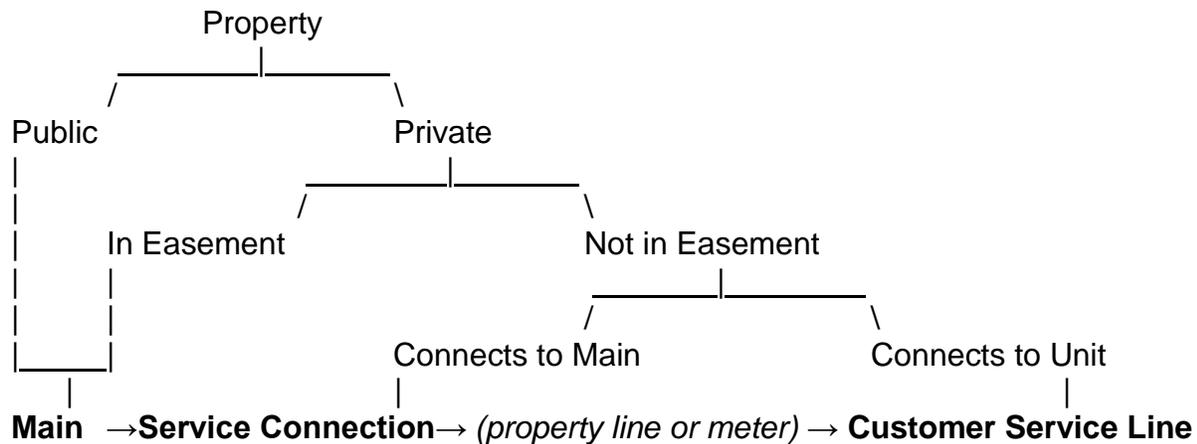
<sup>51</sup> Tariff, Original Sheet No. 5, Rule 1(d).

<sup>52</sup> Tariff, Original Sheet No. 5, Rule 1(f).

<sup>53</sup> Tariff, Original Sheet No. 5-6, Rule 1(e).

The customer service line was thus the only pipe outside Mr. Connell's duty to maintain. Without meters, the property line marked the customer service line's starting point, under the Commission-approved tariff.

The tariff's classification of water lines was therefore as follows.



Because there were no meters, Mr. Connell's maintenance duty covered everything south of the resort's property line.<sup>54</sup>

Those are the duties to which the Company succeeded as the adoption notice provides:

[The Company] hereby adopts, ratifies, and makes its own in every respect as if the same had been originally filed by it [the tariff] filed with the Public Service Commission, State of Missouri, by Bob Connell, d/b/a Woodland Manor Water Company currently on file with and approved by the Commission.[<sup>55</sup>]

The Commission approved that tariff sheet when it canceled Mr. Connell's certificate and issued a certificate to the Company in 1999. The east curve is south of Mr. Larson's property line. Therefore, the east curve is within the Company's maintenance duty unless something has altered that duty.

The Company, the LLC, and Staff offer an argument that Staff's summarizes in its maxim: anything on the customer side of the meter is the customer's responsibility. That is almost always true because the tariff requires meter placement at or near the property line<sup>56</sup> and, once pipe reaches from the main to the meter, it seldom turns back. But that is what the east curve does: the east curve is on Mr. Larson's side of the east meter, but not on his property.

<sup>54</sup> That is, unless an easement carried it through private property. The LLC cites a provision allowing the customer service line to extend outside the customer property line. But that applies only when necessary to reach a service connection that is in a utility easement. Original Sheet No. 11, Rule 5(i). Those facts are not present here.

<sup>55</sup> Tariff, Original Sheet No. A.

<sup>56</sup> Tariff, Original Page 26, Rule 11(f).

The Company, the LLC, and Staff argue that the Company's duty to maintain the east curve ended when the Company placed the east meter because placing a meter changes ("abandons") any pipe beyond that meter into a customer service line, divesting the Company of ownership and associated duties, and transferring the pipe to the customer's involuntary ownership. For example, the LLC cites Staff's analysis as follows:

"[O]ne of the primary purposes of setting meters was to provide a known and consistent point at which a service line became a customer's responsibility, and Mr. Spratt . . . concluded that any line used as a service line by the customer, on the customer's side of the meter (once placed), was the customer's responsibility (Trans. p.139). He noted that the water, once past the meter, belonged to the customer, so the lines would as well."<sup>57]</sup>

The Company, the LLC, and Staff argue that, because the east curve is now between Mr. Larson's units and the east meter, the east curve is now a customer service line that Mr. Larson must own and must maintain.

To show that placing a meter on an existing line transfers the maintenance duty to the customer, the Company, the LLC, and Staff cite tariff provisions relating the customer service line to the meter:

. . . Service Line construction and maintenance from the property line or meter setting . . . to the building shall be the responsibility of the Customer [<sup>58]</sup>

and:

[The customer service line is] a pipe . . . owned and maintained by the customer, used to conduct water to the customer's unit from the property line or outdoor meter [<sup>59]</sup>

But those provisions say nothing about changing the initial demarcation of duties from the property line to a meter (or vice versa), transferring maintenance duties, or abandoning pipe. And, if it were necessary to construe those provisions, such construction does not include the insertion of additional provisions.<sup>60</sup> Moreover, the law voids any unauthorized disposition of the east curve as follows.

<sup>57</sup> The *Post-Hearing Brief* of the LLC at page 6, first paragraph.

<sup>58</sup> Tariff, Original Sheet No. 11, Rule 5(b).

<sup>59</sup> Tariff, Original Sheet No. 6, Rule 1(e).

<sup>60</sup> *State ex rel. May Dep't Stores Co. v. Weinstein*, 395 S.W.2d 525, 527 (Mo. App., St.L. 1965).

*b. Abandonment: Statute*

The statutes provide that a Commission order is necessary before disposing of any necessary or useful part of any system:

No . . . water corporation . . . shall . . . transfer . . . or otherwise dispose of . . . any part of its . . . works or system,<sup>[61]</sup> necessary or useful in the performance of its duties to the public, . . . without having first secured from the commission an order authorizing it so to do. Every such . . . transfer [or] disposition . . . made other than in accordance with the order of the commission authorizing same shall be void. <sup>[62]</sup>

That procedure is also the subject of a Commission regulation describing the application for the order.<sup>63</sup>

The statute's only exemption is for unnecessary and non-useful parts of the system:

Nothing in this subsection contained shall be construed to prevent the . . . disposition by any [water company] of property which is not necessary or useful in the performance of its duties to the public [<sup>64</sup>]

For example, the west curve ceased to be necessary and useful as to the resort when the Company installed the new east pipe. Therefore, no authorization was necessary to abandon the west curve.

Also, the statute excludes any pipe that has never been part of the system. For example, the line that Mr. Larson ran from the west cabin to the west meter began as his property, was always a customer service line, and was never part of the Company's system under the tariff. Likewise, when a system is built under the tariff with meters from the beginning, Staff's maxim is correct: anything on the customer side of the meter is the customer's responsibility.

But neither the exclusion nor the exception applies to the east curve because the east curve has always been part of the system. Also, the tariff does not purport<sup>65</sup> to replace the statute because the tariff lacks any substitute for the statute's procedure. That procedure includes the filing of information:

<sup>61</sup> The statutes provide that the system ". . . includes all . . . pipes . . . owned, operated, controlled or managed in connection with or to facilitate the . . . supply, distribution, sale, furnishing or carriage of water for . . . domestic or other beneficial use." Section 386.020(60), RSMo Supp. 2010.

<sup>62</sup> Section 393.190.1, RSMo 2000.

<sup>63</sup> 4 CSR 240-2.605.

<sup>64</sup> Section 393.190.1, RSMo 2000.

<sup>65</sup> The Commission cannot overwrite Section 393.190 regardless of the passage of time. *Webster v. Joplin Water Works Co.*, 177 S.W.2d 447, 451-52 (Mo., Div. 2 1944).

Any person seeking any order under this subsection authorizing the . . . transfer . . . or other disposition, direct or indirect, of any . . . water 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 . . . transfer . . . 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. [<sup>66</sup>]

The statute also requires notice:

The commission shall send a copy of all information obtained by it as to what, if any, impact such . . . transfer . . . 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. [. <sup>67</sup>]

And, by requiring an order, the statute requires the Commission to make a decision. The information, notice, and decision-making due under the statute is absent from the tariff, so merely placing a meter does not substitute for the Commission's order. <sup>68</sup>

That reading avoids three unjust and oppressive consequences because it:<sup>69</sup>

- Ends the respective responsibilities of company and customer at the customer's property line.
- Does not require the customer to enter another's property to maintain his own service.
- Bars unilateral manipulation of maintenance duties by skillful meter placement.<sup>70</sup>

Those results are consistent with the public interest, because the public interest generally includes "substantial justice between patrons and public utilities[,]"<sup>71</sup> and safe water for Mr. Larson, his guests, and other persons using the Company's water. <sup>72</sup>

<sup>66</sup> Section 393.190.1, RSMo 2000.

<sup>67</sup> Section 393.190.1, RSMo 2000.

<sup>68</sup> Staff correctly notes that a tariff has the force and effect of law like the statute. But the statute and the tariff do not conflict so the Commission is reading them in harmony. *Reed v. Brown*, 706 S.W.2d 866, 868 (Mo. banc 1986). The interpretation of a statute is a question of law. *Richard v. Missouri Dept. of Corrections*, 162 S.W.3d 35, 37 (Mo. App., W.D. 2005). No party cites authority contrary to the Commission's reading, nor any Commission decision deciding these issues differently, including the chain cite at *Staff's Comment's and Response*, page 9, footnote 7. As to those cited decisions, the Commission is not giving a different answer, because the question was never asked.

<sup>69</sup> *Hyde v. City of Columbia*, 637 S.W.2d 251, 262-3 (Mo. App., W.D. 1982).

<sup>70</sup> Conduct not alleged and not found as to the Company, but perfectly permissible under Staff's maxim.

<sup>71</sup> Section 386.610, RSMo 2000.

<sup>72</sup> Section 386.310.1, RSMo 2000.

Substantial justice on these facts appears in the statute: the Company shall not reduce its service without disclosure, notice, and the Commission's decision on the public interest as a whole.<sup>73</sup>

*c. Summary: Tariff and Statute*

As the system went from private service to public service the tariff's purpose was to impose public duties. None of the cited tariff provisions say anything about disposing of property or transferring any duty to maintain. After the placement of the east meter, the east curve continued to serve the resort, so it remained necessary and useful in the performance of the Company's duties to the public.

Disposing of the system is the subject of the statute. The statute addresses precisely these facts and it requires a Commission order before the Company disposes of any water line.<sup>74</sup> No such order has issued for the east curve.

Absent that authorization, abandonment of the east curve is void. The east curve remains within the Company's system and within its duty to maintain. Therefore, the Commission concludes that the Company violated its duty to maintain the east curve.

III. Remedies

As recompense for that violation, Larson asks for relief in several forms.

*a. Street Repair and Billing Refund*

Mr. Larson asks that the Commission to order the Company to repair the street and to set off, against his water bill, the labor and expense he incurred. Mr. Larson cites the tariff's requirement that meters shall be at least "near" the customer property line,<sup>75</sup> alleges that all he wanted out of the east meter was to connect the new house, and argues that placing the meter on the property line would have avoided confusion over the east curve.

The LLC argues that Mr. Larson failed to enter the amounts of his damages into evidence and to testify that those amounts are reasonable. The Commission's expertise in public utilities includes the cost of maintenance, and the Commission concludes that the amounts that Mr. Larson seeks are reasonable. The Commission also concludes that it is unfair for the Company retain the benefit that Mr. Larson conferred on the Company without the Company paying the reasonable value of that benefit.

<sup>73</sup> Staff argues that the tariff trumps the statute. *Staff's Comments and Response*, pages 5 through 12. But see: Mo. Const. Art. II, Section 1; and Art. III, Sections 21 and 28.

<sup>74</sup> Staff argues that this reading requires an application for transfer of assets whenever the company places a meter. *Staff's Comments and Response*, page 11, second paragraph. Because placing a meter does not signify a transfer of assets, Staff's argument is incorrect. The statute applies only when a company purports to dispose of property as it has on these facts.

<sup>75</sup> Tariff, Original Page 26, Rule 11(f).

But Mr. Larson did not enter evidence of his damages into the record. The findings of fact must stand on the record.<sup>76</sup> Also the tariff bars any refund without proof of the Company's willful misconduct.<sup>77</sup> Mr. Larson states, and the Commission has found, that willful misconduct did not occur.<sup>78</sup> In any event, no statute provides an action for money damages before the Commission.<sup>79</sup> Similarly, the street is not part of the system.<sup>80</sup> Therefore, those matters are outside the Commission's jurisdiction.<sup>81</sup> The Commission has made findings and conclusions on the matter but the Commission will not order a payment or a billing adjustment.

*b. Meter Placement*

Mr. Larson asks that the east meter be moved to the east valve box's location on the property line because the tariff requires any meter to "be installed at or near the Customer's property line."<sup>82</sup> But Mr. Larson made that request assuming that the meter's placement determines the Company's maintenance duties and the Commission has concluded otherwise. The problem is not the meter's distance from the property line. The problem is that the Company's main reaches Mr. Larson's property line by crossing a third person's land. The Commission will deny that request.

*c. New Valves and New Valve Boxes*

Mr. Larson further asks for a new east box, a new west valve box, and new valves. The need for new valve boxes and new valves is not apparent from the record so Mr. Larson has not carried his burden of proving that the condition of the valve boxes and valves constitute a violation. Therefore, the Commission will make no order in that regard.

*d. East Curve*

Mr. Larson and Staff suggest elimination of the east curve from the system. The Commission may order that remedy under the following statutory provisions.

<sup>76</sup> *Hartley v. Spring River Christian Village*, 941 S.W.2d 4, 7 (Mo. App., S.D. 1997).

<sup>77</sup> Tariff, Original Page 20, Rule 9(c).

<sup>78</sup> For this reason, the Commission is also not directing its Chief Counsel to seek penalties against the Company. Section 386.570.1 and .2, RSMo 2000, allow the Commission to seek "a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense" per day for a violation. But, just as Mr. Larson complains that his difficulties come from following the Company's advice on meter placement, it would be unduly harsh to penalize the Company for following Staff's interpretation of the tariff.

<sup>79</sup> *State ex rel. Laundry, Inc. v. Public Serv. Comm'n*, 34 S.W.2d 37, 46 (Mo. Div. 1, 1931).

<sup>80</sup> Section 386.020(60), RSMo Supp. 2010.

<sup>81</sup> 34 S.W.2d at 46.

<sup>82</sup> Tariff, Original Page 26, Rule 11(f).

The commission shall:

\* \* \*

(2) . . . have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such . . . water . . . , and have power to order reasonable improvements and extensions of the works, . . . pipes, lines, conduits, . . . and other reasonable devices, apparatus and property of . . . water corporations [.]

\* \* \*

(5) [W]henever the commission shall be of the opinion, after a hearing had . . . upon complaints, that the property, equipment or appliances of any [public utility] are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law [<sup>83</sup>]

The tariff also addresses old system components:

Pre-existing facilities that do not comply with applicable regulations may remain [if] their existence does not constitute a service problem or improper use, and reconstruction is not impractical.<sup>84</sup>

Those provisions apply to the east curve as follows.

Mr. Larson expended considerable toil in fixing the leak. It is fortunate that he did so for the sake of safe and adequate service, because a leak may contaminate the system. The next customer may not know about a leak, possess the resources to fix it, and have urgent commercial interest to do so.

The Commission concludes that the east curve is unsafe, insufficient, inadequate, and constitutes a service problem, and will order the improvement to the system as Mr. Larson and Staff suggest. To promote the public interest, preserve the public health, and protect the people using the Company's water, the Commission will order the Company to improve the system by disconnecting the east curve. That reconstruction is not impractical because it requires only disconnecting the east curve from the west valve box and east valve box and extending the service connection from the west valve box ten feet to the west meter.

<sup>83</sup> Section 393.140, RSMo 2000.

<sup>84</sup> Tariff, Original Sheet No. 8, Rule 2(d).

*e. West Valve Box-West Meter Connection*

Mr. Larson asks the Commission to order the Company to install a connection from the west meter to the west valve box to make possible the elimination of the east curve from the system. As to the connection from the west valve box to the west meter, Mr. Larson has not carried his burden of showing that it is not on his side of the property line, so he has not shown that the Company has any duty toward it.

In its comments, the LLC suggests that the Commission order Mr. Larson to connect the west meter to the west valve box. In support, the LLC cites tariff provisions stating that the tariff binds the customer as a contract, and requiring a customer to bring the service line from the meter to the units.<sup>85</sup> Each unit is already connected to a meter, and the LLC cites no authority for the Commission to supervise customers or enforce a contract. Nevertheless, Mr. Larson has an incentive to supply the west cabins with safe and uncontaminated water, for which the west meter will be the only source once the Company disconnects the east curve from the west valve box. The tariff provides that the property line still marks the end of the Company's duty.

Therefore, the Commission will not order the Company to connect the west cabins to the west meter.

**THE COMMISSION ORDERS THAT:**

1. The complaint is granted because Mona L. Fennema d/b/a Woodland Manor Water Company ("the Company") violated the duty to maintain the water system.
2. No later than 30 days from the effective date of this decision, the Company shall disconnect the east curve (as described in the body of this order) from the west valve box (as described in the body of this order) and east valve box (as described in the body of this order).
3. This order shall become effective on October 22, 2012.

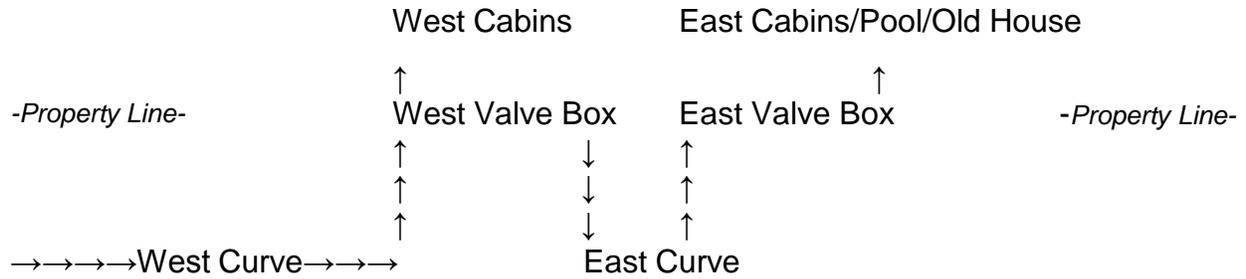
Gunn, Chm., Jarrett, Kenney, and  
Stoll, concur;  
and certify compliance with the  
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,  
on this 20<sup>th</sup> day of September 2012.

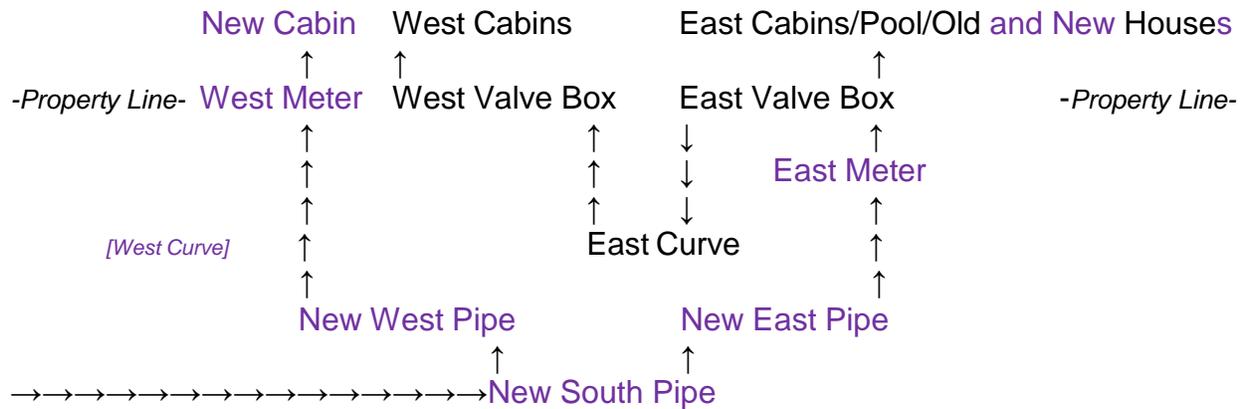
<sup>85</sup> *Woodland Manor's Comments on Recommended Decision*, fourth page, full paragraph.

**Appendix**

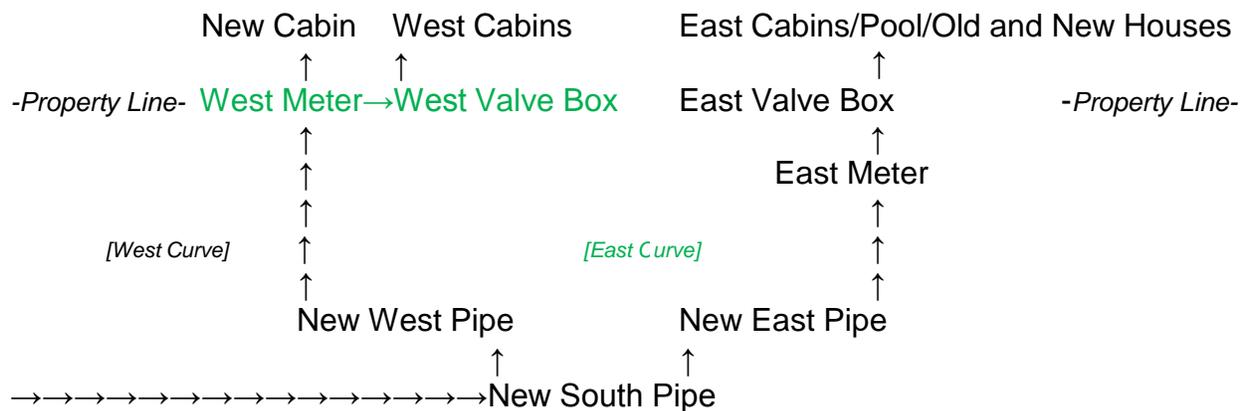
A. Mr. Connell's System



B. Alterations by Mr. Larson and the Company (in purple)



C. Staff's Solution (in green)



**In the Matter of Laclede Gas Company's Application to Establish Depreciation Rates for Enterprise Computer Software Systems****File No. GO-2012-0363**

**Gas. §27 Depreciation.** The Commission found that a utility's capital expenditures for a new computer operating system created a new type of asset for which a new depreciation rate could be established outside of a full depreciation study without constituting forbidden single-issue ratemaking.

**REPORT AND ORDER****Issue Date: October 3, 2012****Effective Date: October 13, 2012****APPEARANCES**

**Michael C. Pendergast**, Vice President and Associate General Counsel, and **Rick Zucker**, Asst. General Counsel - Regulatory, Laclede Gas Company, 720 Olive St., Room 1520, St. Louis, Missouri 63101.  
For Laclede Gas Company.

**Lera Shemwell**, Deputy Counsel, and **Goldie Tompkins**, Legal Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102  
For the Staff of the Missouri Public Service Commission.

**Mark D. Poston**, Deputy Public Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102  
For the Office of the Public Counsel and the Public.

**CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff**

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The Commission in making this decision has considered the positions and arguments of all of the parties. 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**

On May 18, 2012, Laclede Gas Company filed an application asking the Commission to establish a depreciation rate for the company's new Enterprise Information Management System (EIMS). In compliance with the established procedural schedule, the Commission's Staff, the Office of the Public Counsel, and Laclede prefiled direct, rebuttal, and surrebuttal testimony. The Commission conducted an evidentiary hearing on August 16 and the parties filed post-hearing briefs on September 14.

### Findings of Fact

1. Laclede is currently implementing a new enterprise information management system (EIMS). EIMS is intended to be a fully integrated and comprehensive information management system that will be capable of providing enhanced accounting tools, cross-functional communication, data tracking and analyses, and other essential business processes in the areas of customer service, billing and information, financial performance, supply chain/inventory, human resources and asset management.<sup>1</sup>

2. EIMS is composed of several integrated component software systems:

1) Oracle Enterprise Business Systems provides core system functionality, including accounting, reporting, payment processing and supply chain functionality; 2) PowerPlant is a utility-focused suite of applications supporting fixed asset and tax accounting; 3) Oracle Customer Care and Billing supports all customer-facing functionality, including billing, collections, and customer service functions; and 4) IBM Maximo is an enterprise asset management and workflow system.<sup>2</sup>

3. When Laclede has completed implementation of EIMS, it will have added approximately \$60.8 million to its rate base.<sup>3</sup> That is a large amount to add to rate base, even by Laclede's standards. In comparison, the company's annual construction expenditures, exclusive of its cast iron replacement program, amount to about \$50 million.<sup>4</sup>

4. As soon as the cost of EIMS is added to Laclede's rate base, the company will have to start depreciating the value of the asset on its books. However, Laclede will not be able to recover that depreciation expense through its rates until its rates are recalculated in its next general rate case.<sup>5</sup> Laclede has indicated it will file its next general rate case around December 2012.<sup>6</sup> Since the rates resulting from that rate case are unlikely to go into effect until eleven months after the rate case is filed,<sup>7</sup> Laclede will have to absorb roughly one year of depreciation before it can begin recovering depreciation expense related to the cost of EIMS through its rates.

<sup>1</sup> Buck Direct, Ex. 2, Page 3, Lines 4-9.

<sup>2</sup> Buck Direct, Ex. 2, Schedule GWB-D1.

<sup>3</sup> Robinett Rebuttal, Ex. 4, Page 3, Lines 14-16.

<sup>4</sup> Transcript, Page 68, Lines 5-9

<sup>5</sup> Robinett Rebuttal, Ex. 4, Page 6, Lines 1-2.

<sup>6</sup> Transcript, Page 67, Lines 3-5.

<sup>7</sup> Under Section 393.150, the Commission may suspend a rate tariff for up to eleven months while deciding whether a utility may increase its rates.

5. Because of the roughly one-year lag between the time Laclede implements EIMS and the time it will be able adjust its rates to recover future depreciation expenses related to that investment, the rate at which it depreciates the EIMS investment on its books will have a significant financial impact on both the company and ultimately on its ratepayers. If, as Laclede argues, the Commission allows Laclede to establish a new depreciation subaccount to depreciate EIMS at 7 percent, Laclede will be unable to recover approximately \$2.3 million in depreciation expense before new rates go into effect. If the company were to depreciate EIMS at 20 percent during that one-year period, it would be unable to recover approximately \$7 million in depreciation expense.<sup>8</sup>

6. The technical definition of depreciation is:

“the loss in service value, not restored by current maintenance, incurred in connection with the consumption or prospective retirement of utility plant in the course of service from causes which can be reasonably anticipated or contemplated, against which the Company is not protected by insurance.”<sup>9</sup>

7. To determine the amount of depreciation expense a utility will be allowed to recover for the loss in service value of a particular item, the Commission relies on expert testimony regarding the expected service life of that item. In the context of a general rate case, such expert testimony regarding an array of depreciable items owned by a utility is called a depreciation study. Laclede did not submit a depreciation study as part of this case.<sup>10</sup>

8. The expected service life of an item determines the depreciation rate. Thus, a two-year expected service life would result in a 50 percent depreciation rate to allow the utility to recover the cost of the item over its expected life. Similarly, a 100-year expected service life would result in a 1 percent depreciation rate.

9. For purposes of recording depreciation expense relating to computer equipment and software, Laclede currently maintains Uniform Systems of Accounts (USOA) sub-accounts 391.1 Data Processing System and 391.3 Data Processing Software. Both sub-accounts assume a 5-year service life for the equipment and software and record depreciation at an annual rate of 20 percent.<sup>11</sup> Laclede uses those sub-accounts to record depreciation related to desktop computers and associated software.<sup>12</sup> The depreciation rates for those sub-accounts were contained within the depreciation study Laclede submitted in 2010 as part of its last general rate case filing.<sup>13</sup>

10. Rather than record the cost of EIMS in the existing sub-accounts, Laclede asks the Commission for permission to record that cost in a new, separate sub-account, 391.5,<sup>14</sup> for which it asks the Commission to establish a 15-year service life and a 7 percent depreciation rate.<sup>15</sup>

<sup>8</sup> Transcript, Page 71, Lines 1-6.

<sup>9</sup> Spanos Surrebuttal, Ex. 1, Page 7, Lines 9-13.

<sup>10</sup> Transcript, Page 41, Lines 17-20.

<sup>11</sup> Robinett Rebuttal, Ex. 4, Page 3, Lines 17-20.

<sup>12</sup> Robinett Rebuttal, Ex. 4, Page 3, Lines 20-22.

<sup>13</sup> Transcript, Page 40, Lines 13-21.

<sup>14</sup> Buck Direct, Ex. 2, Page 6, Lines 14-18.

<sup>15</sup> Buck Surrebuttal, Ex. 3, Page 2, Lines 14-20

11. Staff's expert witness, John Robinett, and Laclede's expert witness, John Spanos, agree that EIMS is quite different from the computer software for which Laclede has been recording depreciation under the existing sub-accounts. EIMS is likely to have a service life expectancy much longer than five years based on the functions it will be required to perform.<sup>16</sup>

12. The expert testimony offered by Laclede and Staff is quite credible. In particular, the Commission finds it unreasonable to believe that Laclede would contemplate replacing a \$60 million management system after only five years when the existing core management systems have lasted between 10 and 25 years, with some modifications through periodic updates and workarounds.<sup>17</sup> The original core management software has already fully depreciated.<sup>18</sup>

13. Because this is in essence a new type of investment that does not fit into an existing depreciation account, it is necessary to establish a new sub-account to record depreciation for this investment. Extensive software applications similar to EIMS have been implemented by other utilities in the United States. The most commonly utilized life for purposes of establishing depreciation rates for those new systems has been 12-15 years.<sup>19</sup>

14. Establishing a new depreciation sub-account will allow the cost of the new EIMS to be tracked separately and analyzed as a part of a future comprehensive depreciation study to determine if the correct depreciation rate has been set for this type of equipment.<sup>20</sup> Laclede has committed to submit such a depreciation study as part of its next rate case.<sup>21</sup>

15. In the expert opinions of Laclede witness John Spanos and Staff witness John Robinett, an appropriate service life for EIMS is 15 years. Those opinions are based on a comparison to the assigned service life for software systems recently implemented by other utilities around the country, on the extensive functions performed by EIMS, and the magnitude of the cost of the system.<sup>22</sup> The Commission finds those expert opinions to be credible.

16. Furthermore, assigning this asset a 15-year life and corresponding depreciation rate will realistically match the consumption of the asset with the utilization of the asset.<sup>23</sup> That means the customers who will benefit from EIMS during its useful life will pay their fair share of the cost of the asset.

<sup>16</sup> Robinett Rebuttal, Ex. 4, Page 4, Lines 2-5. Spanos Surrebuttal, Ex. 1, Page 8, Lines 2-4.

<sup>17</sup> Buck Surrebuttal, Ex. 3, Page 4, Lines 6-23. See also, Transcript, Pages 49-51.

<sup>18</sup> Transcript, Page 55, Lines 9-12.

<sup>19</sup> Spanos Surrebuttal, Ex. 1, Page 8, Lines 13-18.

<sup>20</sup> Robinett Rebuttal, Ex. 4, Page 4, Lines 21-23.

<sup>21</sup> Buck Surrebuttal, Ex. 3, Page 12, Lines 18-22.

<sup>22</sup> Spanos Surrebuttal, Ex. 1, Page 8, Lines 13-23.

<sup>23</sup> Spanos Surrebuttal, Ex. 1, Page 9, Lines 1-3.

### Conclusions of Law

A. Laclede Gas Company is a Public Utility and a Gas Corporation as defined by Section 386.020(18) and (43) (RSMo Supp. 2011). As such, it is subject to the Commission's general jurisdiction as provided by Section 393.140, RSMo 2000.

B. Section 393.140(4), RSMo 2000 give the Commission power to "prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations, ... It may also, in its discretion, prescribe by order, forms of accounts, records and memoranda to be kept by such persons and corporations."

C. In giving the Commission authority to establish depreciation rates for gas corporations, Section 393.240.2 states "the commission may, from time to time, ascertain and determine and by order fix the proper and adequate rates of depreciation of the several classes of property of such corporation, person or public utility."

### Decision

Public Counsel argues the Commission must rely on the full depreciation study Laclede filed in its last rate case to impose a 5 year service life and 20 percent depreciation rate on Laclede's new EIMS investment. To do otherwise, Public Counsel argues, would be an exercise in single-issue ratemaking. However, Public Counsel's argument is predicated upon a factual finding that the EIMS is simply a replacement for the assets in the currently existing depreciation categories for computer software. Public Counsel's witness conceded that if the Commission found EIMS to be a new type of asset for which a depreciation rate did not exist, the Commission could establish a new depreciation rate for that asset in this proceeding.<sup>24</sup> The Commission has made that finding of fact in this report and order.

Because of that finding of fact, Public Counsel's single-issue ratemaking argument falls aside. As Public Counsel points out, in a recent Ameren Missouri rate case, ER-2008-0318, the Commission refused to modify some existing depreciation rates without examining all depreciation rates in a full depreciation study. To make such an isolated adjustment, the Commission stated, would be closely analogous to single-issue ratemaking. However, in this case, the Commission will authorize Laclede to record EIMS costs as a new type of investment in a new sub-account with a new depreciation rate. It is not modifying an existing depreciation rate as was proposed in the Ameren Missouri rate case. As a result, this decision is consistent with the Commission's earlier decision and the Commission is doing nothing analogous to single-issue ratemaking. The Commission will grant Laclede's Application.

<sup>24</sup> Transcript, Pages 134-135, Lines 22-25, 1-5.

**THE COMMISSION ORDERS THAT:**

1. A new subaccount (Account 391.5 Enterprise Information Management System) is established for the EIMS assets being placed in service by Laclede Gas Company to serve its Missouri ratepayers.

2. The depreciation rate for subaccount 391.5 Enterprise Information Management System is set at 7 percent.

3. Subaccount 391.5 Enterprise Information Management System and its depreciation rate shall be reviewed in Laclede Gas Company's next general rate case when all of the company's plant accounting and depreciation rates will be studied and examined in their totality.

4. Laclede Gas Company shall conduct and file a depreciation study in its next general rate case.

5. Subaccount 391.5 Enterprise Information Management System shall accrue depreciation expense for EIMS at a 7 percent depreciation rate until the Commission orders a different depreciation or amortization treatment for those assets.

6. No party shall be bound to recommend a 7 percent depreciation rate for subaccount 391.5 Enterprise Information Management System in any future proceeding.

7. The Commission makes no findings regarding either the prudence of Laclede's investment in EIMS, or the amount of that investment.

8. This report and order shall become effective on October 13, 2012.

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

Dated at Jefferson City, Missouri,  
on this 3<sup>rd</sup> day of October, 2012.

**In the Matter of the Application of Old National Bank for Authority to Seize the Assets of Tri-States Utility, Inc.**

**File No. WM-2012-0314**

**Water. §28 Financing practices.** The controlling statutes do not authorize the Commission to consider an application from a third party to seize the assets of a utility for payment of a debt of the utility.

**ORDER DISMISSING APPLICATION AND INITIATING INVESTIGATION**

Issue Date: October 18, 2012

Effective Date: November 17, 2012

The Missouri Public Service Commission is dismissing the application because the facts alleged do not support the relief sought under the authority cited. The Commission may dismiss any action for good cause,<sup>1</sup> which means reasonableness and good faith.<sup>2</sup> Dismissal for failure to cite law or fact in support of requested relief is within that standard.

Old National Bank (“Old National”) filed the application.<sup>3</sup> Tri-States Utility, Inc. (“Tri-States”) filed a response.<sup>4</sup> The Commission’s staff (“Staff”) filed a recommendation on the application.<sup>5</sup> Tri-States and Old National each filed a reply to the recommendation.<sup>6</sup> No law requires a hearing, and no party has requested one, so the Commission will decide the application as a noncontested case<sup>7</sup> without separately stating its findings of fact.

Old National seeks the Commission’s authorization for the sheriff of any county in which Tri-States’ assets are located (“sheriffs”) to seize those assets and sell them in satisfaction of a judgment. In support, Old National cites Section 393.190<sup>8</sup> (“the statute”). The statute bars a public utility from disposing of system assets without Commission authorization, provides a procedure to gain such authorization, and requires the application to include certain information:

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.

<sup>1</sup> 4 CSR 240-2.116(4).

<sup>2</sup> *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207, 210 (Mo. App., W.D. 1996).

<sup>3</sup> March 21, 2012.

<sup>4</sup> July 6, 2012.

<sup>5</sup> September 7, 2012.

<sup>6</sup> September 27, 2012.

<sup>7</sup> *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

<sup>8</sup> RSMo 2000.

\* \* \*

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 statute describes only a gas, electric, water, or sewer corporation “secur[ing] from the commission an order authorizing it” to dispose of assets. That plain language provides for an application from the public utility only because it forbids and permits action by a public utility only. Also, the application must include tax information, which means that the nature of the transaction must already be known. That does not describe the fact situation that Old National alleges.

Old National alleges that Tri-States is a water company, but Tri-States is not making the application. Old National is making the application but alleges that it is not a gas, electric, water, or sewer corporation seeking to dispose of its assets. Instead, Old National is a banking association seeking authority for the sheriffs to dispose of Tri-States’ assets. Those allegations do not support any relief under the statute so the Commission will dismiss the application.

However, the dismissal of the application does not end the Commission’s duty to the public. The parties suggest that, even after dismissing the application, the Commission should facilitate discussion among the parties. The Commission agrees. The existence of an outstanding judgment may constitute a threat to the continued financial health of Tri-States Utility, Inc. which is a matter within the Commission’s jurisdiction. Therefore, the Commission will direct Staff to investigate that matter and discuss it with the parties to this action, and file a report with the Commission setting forth Staff’s recommended course of action.

**THE COMMISSION ORDERS THAT:**

1. The application is dismissed.
2. This order shall become effective on November 17, 2012.
3. This file shall remain open, for the filing of the report described in the body of this order, which is due no later than November 15, 2012.

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

Jordan, Senior Regulatory Law Judge

**In the Matter of The Empire District Electric Company of Joplin, Missouri Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company**

**File No. ER-2012-0345  
YE-2013-0021**

**RATES. §114. Emergency and temporary rates generally.** The Commission has the implied authority to grant interim rates increases in emergency or near emergency situations where the utility is facing extraordinary circumstances and there is a compelling reason for the rate increase.

**RATES. §115. What constitutes an emergency.** An electric utility failed to present sufficient evidence to justify an interim rate increase where its revenues had increased compared to the previous year, its retained earnings balance had increased, the shareholder dividend was reinstated, it retained an investment grade credit rating, and it was able to access the capital markets.

**REPORT AND ORDER REGARDING INTERIM RATES**

**Issue Date: October 31, 2012  
Effective Date: November 30, 2012**

**APPEARANCES**

**For The Empire District Electric Company:**

**James C. Swearingen** and **Diana C. Carter**, Brydon, Swearingen & England, P.C., 312 Capitol Ave., PO Box 456, Jefferson City, MO 65102.

**For the Staff of the Missouri Public Service Commission:**

**Sarah L. Kliethermes**, Senior Counsel, and **Kevin A. Thompson**, Chief Staff Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102;

**For the Office of the Public Counsel and the Public:**

**Lewis R. Mills**, Public Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102;

**For the Midwest Energy Users' Association:**

**Stuart Conrad**, Finnegan, Conrad & Peterson, L.C., 3100 Broadway, Suite 1209, Kansas City, MO 64111

**For Midwest Energy Consumers Group:**

**David Woodsmall**, 807 Winston Court, Jefferson City, MO 65101;

**REGULATORY LAW JUDGE: Michael E. Bushmann**

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision.

### **Procedural History**

On July 6, 2012, The Empire District Electric Company (“Empire”) submitted a tariff with the Missouri Public Service Commission (“Commission”) designed to implement a general rate increase for electric service. The Commission suspended the effective date of that general rate increase tariff until June 3, 2013, and a hearing on the general rate increase is scheduled to begin on February 18, 2013. On July 23, 2012, the Commission granted the applications to intervene as parties of the Missouri Department of Natural Resources, Southern Union Company d/b/a Missouri Gas Energy, and the Midwest Energy Users’ Association. The Midwest Energy Consumers Group was granted intervention on August 3, 2012.

Empire also filed a separate tariff (YE-2013-0021) to increase Empire’s gross annual electric revenues on an interim basis by approximately \$6.2 million, subject to refund. The interim tariff proposes to increase each base rate or charge for electric service by 1.53 percent. In response to Empire’s interim tariff filing, the Commission’s Staff, the Office of Public Counsel, and an intervening party filed suggestions opposing Empire’s request for an interim rate increase. On July 23, 2012, the Commission suspended the interim rate tariff in order to allow Empire an opportunity to present evidence to show that it should be granted an interim rate increase. The Commission held an evidentiary hearing on September 10, 2012 to address the issue of whether it was appropriate under the circumstances to grant Empire’s request for interim rate relief.<sup>1</sup> The Missouri Department of Natural Resources and Southern Union Company d/b/a Missouri Gas Energy requested and were granted permission to be excused from attending and participating in the interim rate hearing.

### **Findings of Fact**

1. The Empire District Electric Company is a Kansas corporation with its principal place of business in Joplin, Missouri. Empire is an electrical corporation and public utility as defined in Section 386.020, RSMo, engaged in the business of the manufacture, transmission and distribution of electricity and subject to the regulatory authority of the Commission pursuant to Chapters 386 and 393, RSMo. In Missouri, as of March 31, 2012, Empire provided electric service to approximately 124,600 residential customers, 21,400 commercial customers, 283 industrial customers, 1,650 public authority and street and highway customers, and three wholesale customers.<sup>2</sup>

<sup>1</sup> Transcript, Volume 2. In total, the Commission admitted the testimony of 10 witnesses and received 22 exhibits into evidence. Final post-hearing briefs were filed on October 1, 2012 and the matter was deemed submitted for the Commission’s decision on that date when the Commission closed the record regarding the interim rate request. “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).

<sup>2</sup> Empire Ex. 1, Beecher Direct, p. 2-3.

2. 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.”<sup>3</sup> Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding”<sup>4</sup>, and Public Counsel participated as a party in this matter.

3 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.<sup>5</sup>

4. The Midwest Energy Users’ Association (“MEUA”) is an unincorporated association of large commercial and industrial users of electricity who combine resources and assert common interests in utility rate cases. On July 23, 2012, the Commission granted MEUA’s application to intervene as a party.

5. The Midwest Energy Consumers Group (“MECG”) is an unincorporated association of large users of electricity taking electric service from Empire. MECG was granted intervention on August 3, 2012.

6. On May 22, 2011, a tornado, rated by the National Weather Service as EF-5, struck Joplin, Missouri and other communities in Empire’s service area. The tornado caused extensive damage to these communities, including the destruction of approximately one-third of Joplin. The tornado destroyed approximately 4,000 of Empire’s electric poles, thousands of distribution transformers, 110 miles of line, and either damaged or destroyed several electric substations.<sup>6</sup>

7. In response to the destruction caused by the tornado, Empire mobilized its employees and crews from other utility companies to inspect for damage, to ensure lines were de-energized for the safety of emergency personnel, and to begin restoring service to its customers.<sup>7</sup>

8. Within a few days, Empire restored electrical power to a hospital and a major retail area in Joplin, and provided service to temporary FEMA housing units within two weeks. Empire employees and other crews worked long hours through weekends and holidays to repair and construct service lines, provide logistical support, and communicate with customers and the media.<sup>8</sup>

9. Three days after the tornado, Empire’s board of directors suspended the company’s dividend for two calendar quarters as a result of Empire’s low level of retained earnings, the anticipated lost revenue from lost and displaced customers, and a covenant in Empire’s mortgage indenture that tied the ability to pay dividends to retained earnings.<sup>9</sup>

10. Retained earnings are the earnings that a company keeps to reinvest in its business instead of distributing to shareholders as dividends.<sup>10</sup>

<sup>3</sup> Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

<sup>4</sup> Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

<sup>5</sup> Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

<sup>6</sup> Empire Ex. 1, Beecher Direct, p. 4-5.

<sup>7</sup> Empire Ex. 1, Beecher Direct, p. 6-8.

<sup>8</sup> Empire Ex. 1, Beecher Direct, p. 8-9.

<sup>9</sup> Empire Ex. 4, Sager Direct, p. 6.

<sup>10</sup> Staff Ex. 2, Atkinson Interim Rebuttal, p. 4.

11. Retained earnings provide a company with financial flexibility to deal with the impacts of unanticipated events.<sup>11</sup>

12. Empire's payout ratio, the ratio of dividends per share to earnings per share, has consistently been above the average payout ratio of U.S. shareholder-owned electric utilities since 1993.<sup>12</sup> Empire's retained earnings balance as of March 31, 2011 was \$4.1 million, and dividends of \$13.3 million had been declared in April 2011 which reduced the balance further.<sup>13</sup>

13. At the end of 2011, Empire's retained earnings balance had increased to \$33.7 million, which was the highest it had been since 2003.<sup>14</sup>

14. Empire reinstated its dividend in the first quarter of 2012, but reduced the dividend from \$1.28 per share to \$1.00 per share on an annual basis.<sup>15</sup>

15. After the tornado, Standard & Poor's Rating Services affirmed Empire's existing investment grade credit rating and revised its outlook from "positive" to "stable". Moody's Investor's Service determined that Empire's credit ratings and stable outlook should remain unchanged.<sup>16</sup>

16. In April 2012, Empire entered into a bond purchase agreement for private placement of \$88 million aggregate principal amount of mortgage bonds. Empire has an unsecured revolving credit facility of \$150 million.<sup>17</sup>

17. Empire invested over \$27.6 million to replace the electric infrastructure destroyed by the tornado.<sup>18</sup>

18. Immediately following the tornado, Empire lost approximately 8,000 customers.<sup>19</sup> As of June 2012, Empire had regained many of those customers, as the number of lost customers compared to June 2010 was reduced to 1,104.<sup>20</sup> It is unknown how many of those lost customers are attributable to the tornado and not to other causes.<sup>21</sup> The number of lost customers as of June 2012 constitutes an approximate decline of less than one percent of the total number of customers prior to the tornado.<sup>22</sup>

19. After the tornado, during the period of June 2011 through July 2012 Empire's revenues increased by approximately \$1.6 million, which is attributable to warmer than normal weather and increased electric sales caused by the clean-up, restoration and reconstruction activities.<sup>23</sup>

<sup>11</sup> Staff Ex. 2, Atkinson Interim Rebuttal, p. 5.

<sup>12</sup> Staff Ex. 2, Atkinson Interim Rebuttal, p. 4

<sup>13</sup> Empire Ex. 1, Beecher Direct, p. 10.

<sup>14</sup> MECG Ex. 1, p. 2.

<sup>15</sup> Staff Ex. 2, Atkinson Interim Rebuttal, p. 3.

<sup>16</sup> Staff Ex. 2, Atkinson Interim Rebuttal, Schedules SA-2 and SA-3.

<sup>17</sup> Staff Ex. 2, Atkinson Interim Rebuttal, p. 9.

<sup>18</sup> Empire Ex. 2, Walters Direct, p. 10.

<sup>19</sup> Empire Ex. 2, Walters Direct, p. 11.

<sup>20</sup> Staff Ex. 4, Lange Interim Rebuttal, p. 6-7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; Empire Ex. 1, Beecher Direct, p.3;  $1,104/147,936 + 1,104 = 0.0074$  or 0.74%.

<sup>23</sup> Staff Ex. 8; Staff Ex. 4, Lange Interim Rebuttal, p. 3-5; Staff Ex. 7, Oligschlaeger Interim Rebuttal, p. 12.

20. Empire's net income or earnings for 2011 was \$54,971,000, which was the highest amount of earnings during any year since 1992.<sup>24</sup>

21. On June 6, 2011, Empire filed an application with the Commission for an Accounting Authority Order (AAO) that would allow Empire to undertake certain accounting procedures in connection with the damage costs caused by the Joplin tornado.<sup>25</sup> On November 30, 2011, the Commission issued an *Order Approving and Incorporating Unanimous Stipulation and Agreement* in File No. EU-2011-0387, which authorized Empire, *inter alia*, "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".<sup>26</sup> This AAO allowed Empire to defer and capitalize expenses related to the tornado for possible future recovery in its next rate case.<sup>27</sup>

22. On July 6, 2012, Empire filed tariff sheets with tariff tracking number YE-2013-0021, the Electric Interim Rider, to increase Empire's gross annual electric revenues by approximately \$6.2 million, subject to refund, on an interim basis. This amount consists of \$4.7 million for the replacement of infrastructure and electric facilities, and the amount of \$1.4 million for the ongoing loss in pre-tax margin associated with lost customers.<sup>28</sup> The tariff proposed to increase each base rate or charge for electric service by 1.53 percent, and provided the following condition:

Rider INT shall remain in effect until the permanent rates authorized by the Missouri Public Service Commission (MPSC) in Case No. ER-2012-0345 become effective. The revenue generated by Rider INT shall be subject to refund, and the Company shall refund with annual simple interest equal to the Company's short term interest rate, the amount, if any, by which the revenues produced by Rider INT exceed the aggregate revenues that the Company would have received under the permanent rates approved by the MPSC in ER-2012-0345. Such refund, if any, shall be made based upon the billing units of the customer to which the interim charges applied.<sup>29</sup>

23. Empire's calculation of \$4.7 million for tornado-related capital additions did not include any offsets for depreciation reserve or accumulated deferred income tax reserve, which are customarily subtracted from rate base, thereby causing the requested amount of \$4.7 million to be overstated.<sup>30</sup>

<sup>24</sup> MEGG Ex. 1, p. 3-4.

<sup>25</sup> MEUA Ex. 2.

<sup>26</sup> MEUA Ex. 3.

<sup>27</sup> MEUA Ex. 3, p. 3.

<sup>28</sup> Empire Ex. 2, Walters Direct, p. 10-11.

<sup>29</sup> Empire Ex. 5, Keith Direct, Schedule WSK-4.

<sup>30</sup> Staff Ex. 7, Oligschlaeger Interim Rebuttal, p. 14; Transcript, Vol. 2, p. 99, 108-109.

24. As of the date of the hearing, Empire was not in an emergency financial situation, which was admitted by the company President and Vice-President.<sup>31</sup>

25. As of the date of the hearing, Empire was able to provide safe and adequate service to its customers<sup>32</sup>, regardless of whether Empire was granted interim rate relief.<sup>33</sup>

26. Staff's workload precluded it from performing an audit of Empire's current revenue requirement as of the date of the hearing.<sup>34</sup>

27. In 2009, the Commission authorized a return on equity for Empire of 10.8%.<sup>35</sup> In 2011, Empire's earned return on equity was 7.9%.<sup>36</sup>

### **Conclusions of Law**

Empire is an electrical corporation and a public utility, as those terms are defined by Section 386.020(15) and (43), RSMo 2000. As such, the Commission has jurisdiction over Empire pursuant to Sections 386.250(1), RSMo 2000, and 393.140, RSMo 2000.

Section 393.150, RSMo 2000, allows the Commission to suspend a tariff filed by an electric utility for a maximum of 120 days, plus six months, beyond the date the tariff would otherwise become effective. That statute provides that "after a full hearing ... the commission may make such order in reference to such rate...as would be proper in a proceeding initiated after the rate ... had become effective." The statute also states "[a]t any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the ... electrical corporation". In deciding whether a proposed rate is just and reasonable, the Commission must consider all relevant factors.<sup>37</sup> Ultimately, the Commission's purpose is to fix a rate that is just and reasonable both to the utility and to ratepayers.<sup>38</sup>

The Commission has the authority to grant interim rate relief, which is implied from the "file and suspend" statutes, Sections 393.140 and 393.150, RSMo.<sup>39</sup> While the statutes do not provide any specific legal standard regarding exercise of the Commission's implied authority<sup>40</sup>, it is clear that "[a]n interim rate increase may be requested where an emergency need exists".<sup>41</sup> This implied authority to grant interim rate increases is necessary to enable the Commission to "deal with a company in which immediate rate relief is required to maintain the economic life of the company so that it might continue to serve the public".<sup>42</sup>

<sup>31</sup> Transcript, Vol. 2, p. 88-89, 110.

<sup>32</sup> Transcript, Vol. 2, p. 88-89.

<sup>33</sup> Transcript, Vol. 2, p. 106-107.

<sup>34</sup> Staff Ex. 7, Oligschlaeger Interim Rebuttal, p. 10.

<sup>35</sup> Empire Ex. 4, Sager Direct, p. 4.

<sup>36</sup> Empire Ex. 4, Sager Direct, Schedule RWS-1.

<sup>37</sup> *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

<sup>38</sup> *State ex rel. Valley Sewage Co. v. Public Service Commission*, 515 S.W.2d 845, 850 (Mo. Ct. App. 1974).

<sup>39</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d 561, 566 (Mo. Ct. App. 1976).

<sup>40</sup> *Id.*

<sup>41</sup> *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d at 48.

<sup>42</sup> *State ex rel. Fischer v. Pub. Serv. Comm'n of Missouri*, 670 S.W.2d 24, 26 (Mo. Ct. App. 1984).

Previous Commissions have granted interim rate increases in emergency or near emergency situations or where the utility's financial integrity or ability to provide safe and adequate service was threatened.<sup>43</sup> In the most recent Commission rate case where a utility requested an interim rate increase, the Commission declined to grant interim relief "unless the utility is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase".<sup>44</sup>

The Commission's exercise of this implied authority is not limited to emergency situations, as the Commission's wide discretion to exercise its powers has been liberally recognized by the courts.<sup>45</sup> It may be theoretically possible for a utility to show on some extraordinary fact situation that its rate structure has become unjustly low without any existing financial emergency, such that the Commission may determine it is reasonable to grant interim rate relief.<sup>46</sup> Empire has the burden of proof in this case to show that the proposed increased rate is just and reasonable.<sup>47</sup> In order to carry its burden of proof, Empire must meet the preponderance of the evidence standard,<sup>48</sup> and must convince the Commission it is "more likely than not" that Empire's proposed rate increase is just and reasonable.<sup>49</sup> Therefore, in order to prevail it must present sufficient evidence of extraordinary circumstances and compelling reasons to grant the rate increase.

Empire's interim rate tariff would allow the company to recover approximately \$6.2 million of its total requested annual rate increase on an interim basis, subject to refund. The proposed interim rate would end when the Commission establishes "permanent" rates following completion of the general rate increase procedure. Empire contends that it should be permitted to charge its existing customers a higher rate immediately because expended \$27.6 million and lost many customers in the aftermath of the May 2011 tornado, which was a catastrophic disaster for Joplin and surrounding communities. The Commission agrees that the tornado was a devastating event for the people of those affected communities, and Empire deserves praise for its efforts in the clean-up and restoration following the storm. However, the issue for determination does not hinge on the past circumstances of May 2011, however extraordinary they may have been, but rather on Empire's financial situation today and whether there are any present circumstances that would justify immediate rate relief.

<sup>43</sup> *In re Missouri Public Service Co.*, Case No. ER-79-59, 28 P.U.R.4th 109, 22 Mo.P.S.C. (N.S.) 427 (Dec. 1, 1978); *Raytown Water Company*, Case No. WR-94-300, 1994 WL 321226; *In the Matter of Sho-Me Power Corporation of Marshfield, Missouri, for Authority to File Emergency Interim Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Case No. ER-83-20, 1982 WL 190892; *In the Matter of Timber Creek Sewer Company, Inc.'s Tariff Designed to Increase Rates for Sewer Service*, File No. SR-2008-0080, 2007 WL 3243348; *In the Matter of the Application of Citizens Electric Corporation for Approval of Interim Rates, Subject to Refund, and for a Permanent Rate Increase*, Case No. ER-2002-217, 2001 WL 1840788.

<sup>44</sup> *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service*, File No. ER-2010-0036, Report and Order Regarding Interim Rates, p. 12.

<sup>45</sup> *State ex rel. Laclède Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d at 568. See also, *State ex rel. Kansas City Transit, Inc. v. Pub. Serv. Comm'n*, 406 S.W.2d 5, 8 (Mo. 1966).

<sup>46</sup> *State ex rel. Laclède Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d at 574.

<sup>47</sup> Section 393.150.2, RSMo 2000.

<sup>48</sup> *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).

<sup>49</sup> *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 v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109 -111 (Mo. Banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

Immediately following the tornado in May 2011, Empire suspended its dividend payments for two calendar quarters, thereby causing hardship for its shareholders. While the financial uncertainty after the tornado undoubtedly played a role in that decision, Empire's retained earnings balance had been lower than similar electric utilities for years relative to the company's earnings. In fact, the retained earnings balance had gone negative just a month prior to the tornado because of a dividend payment in April 2011 that exceeded the balance in that account. This limited the amount of funds that Empire had available to deal with unforeseen circumstances, which is a reason for maintaining retained earnings. However, warmer than normal temperatures and increased sales from restoration activities during that period of time helped Empire to receive increased revenues for 2011 compared to the previous year, rather than the lower revenues that it anticipated. Empire experienced record earnings for 2011, which caused its retained earnings balance by the end of that year to reach the highest levels since 2003. The company was able to reinstate its dividend beginning in 2012, although at a lower level than in previous years.

Empire's financial position after the tornado did not negatively impact its standing with the financial services industry or prevent it from accessing the capital markets. Both Standard & Poor's and Moody's retained Empire's investment grade credit rating following the tornado, and the company was able to borrow \$88 million through a bond purchase agreement in April 2012. Empire also has access to its retained earnings balance and an unsecured revolving credit facility of \$150 million to ensure financial flexibility.

The overwhelming and undisputed evidence presented at the hearing shows that Empire is not now experiencing a financial emergency, or near emergency, and is able to provide safe and adequate service to its customers, regardless of whether or not it receives an interim rate increase. In addition, the Commission has already taken regulatory action concerning the Joplin tornado by issuing an accounting authority order to protect Empire's earnings until completion of its general rate proceedings. That order permits Empire to defer its tornado-related costs for potential recovery in rates until the conclusion of this rate case.

With regard to the issue of lost customers, any ungenerated revenue in the past due to the loss of customers after the tornado is not deferred under the accounting authority order.<sup>50</sup> "Services not provided and revenues not generated are mere expectancies" and cannot be deferred under an accounting authority order.<sup>51</sup> Empire claims that it is not seeking past ungenerated revenue, but rather requesting that an interim rate reflect its lower number of customers on a going-forward basis. However, the reduced number of customers constitutes less than 1% of the number of Empire customers prior to the tornado. The Commission concludes that this small number of lost customers does not substantially affect Empire's financial condition or justify interim rate relief prior to the completion of the general rate proceedings in this case.

<sup>50</sup> See, MEUA Ex. 4, where Empire withdrew its request for the "fixed cost components" of its rates as part of the stipulation and agreement settling the AAO case.

<sup>51</sup> Report and Order, *In the Matter of the Application of Southern Union Company for the Issuance of an Accounting Authority Order Relating to Its Natural Gas Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2)*, File No. GU-2011-0392, issued January 25, 2012, p. 25.

The Commission is required by law to consider all relevant factors in determining a just and reasonable rate to be charged, and it is within the Commission's discretion to decide which facts are relevant to that determination.<sup>52</sup> At this point in the case, Staff has not had time to conduct an audit to investigate and report on some factors that may affect the rate-making process. While it would be preferable to have the results of an audit in making any rate decision, the Commission determines that the most important facts to consider in relation to the granting of an interim rate increase are those describing the utility's present financial condition. The parties presented ample evidence of Empire's current financial circumstances at the hearing. The Commission concludes that it has considered all relevant factors in rendering a decision on the issue of the proposed interim rate increase.

Finally, Empire argues that it should receive interim rate relief because it is not earning its authorized return on equity. The Commission authorized a return of 10.8%, but Empire has recently earned 7.9%. Empire asserts that this difference between the authorized and earned returns makes its rates no longer just and reasonable. However, Missouri law does not require that rates yield any particular return<sup>53</sup>, and at the hearing Empire did not present sufficient evidence of why or how its earned return on equity is unjust or unreasonable. Since Empire's argument is not supported by the evidence, it has failed to meet its burden of proof on this issue.

### **Decision**

Based on its findings of fact and conclusions of law, the Commission concludes that Empire has failed to meet its burden of proof to demonstrate that an interim rate increase is just and reasonable at this point in time. The evidence presented at the hearing clearly shows that Empire is not now experiencing a financial emergency, or near emergency, and is able to provide safe and adequate service to its customers, regardless of whether or not it receives an interim rate increase. While the company experienced an extraordinary event in the past due to the May 2011 tornado and its aftermath, Empire's earnings are already protected through the accounting authority order and nothing relating to its current financial condition constitutes a compelling reason to impose an interim rate increase at this time. Since the Commission determines that interim rate relief is not warranted, it need not address the issue of whether Empire properly calculated the amount of the interim rate increase request.

Empire may be able to justify a rate increase after the consideration of all evidence at the conclusion of the general rate proceedings. However, there is insufficient evidence of the need for an interim increase now, and it would be unreasonable to grant such an increase under the present circumstances. Therefore, the Commission will reject the tariff that would implement the interim rate increase.

<sup>52</sup> "In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question ..." (emphasis added) Section 393.270.4, RSMo 2000; *State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n*, 308 S.W.2d 704, 719 (Mo. 1957); *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d at 49.

<sup>53</sup> *State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n of Missouri*, 298 Mo. 524, 252 S.W. 446, 456 (Mo. banc 1922); *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 383 (Mo. Ct. App. 2005).

**THE COMMISSION ORDERS THAT:**

1. The tariff sheets filed by The Empire District Electric Company on July 6, 2012, assigned tariff tracking number YE-2013-0021, are rejected.
2. This report and order shall become effective on November 30, 2012.

Gunn, Chm., Kenney and Stoll, CC.,  
concur;  
Jarrett, C., dissents, with separate  
dissenting opinion to follow;  
and certify compliance with the  
provisions of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 31<sup>st</sup> day of October, 2012

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

**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-2013-0104**

**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 31, 2012

Effective Date: November 1, 2012

A provision in the Missouri Public Services 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 provides that by September 15 of each year, Staff, Public Counsel, and other interested parties may file suggested issues for consideration. The regulation allows the utilities and other parties until October 1 to file comments regarding the suggested issues. 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 must address.

The Commission's Staff, the Missouri Department of Natural Resources (MDNR), and the Sierra Club filed suggested special contemporary issues for Union Electric Company d/b/a Ameren Missouri to analyze and respond to in its next integrated resource plan (IRP) filing. 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.<sup>1</sup> 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.<sup>2</sup>

<sup>1</sup> *State ex rel. Public Counsel v. Public Service Com'n*, 259 S.W.3d 23, 29 (Mo. App. W.D. 2008)

<sup>2</sup> 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 does not need to file its next full IRP study until April 1, 2014.<sup>3</sup> That means Ameren Missouri would need to address the special contemporary issues identified in this order in its 2013 annual update report, not in a full IRP study. This 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."<sup>4</sup> 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.

After considering these factors, the Commission will adopt the list of special contemporary issues set forth in this order.

**THE COMMISSION ORDERS THAT:**

1. Union Electric Company d/b/a Ameren Missouri shall analyze and document the following special contemporary issues in its 2013 annual update report:

- a. Investigate and document the impacts on the Company'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; and
- b. Analyze and document the impacts of opportunities to implement distributed generation, DSM programs and combined heat and power (CHP) 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.

2. This order shall become effective on November 1, 2012.

Gunn, Chm., Kenney and Stoll, CC., concur. Jarrett, C., dissent with dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

<sup>3</sup> 4 CSR 240-22.080(1)(A).

<sup>4</sup> 4 CSR 240-22.080(3)(B).

In the Matter of a Determination of Special	)	
Contemporary Resource Planning Issues	)	<b><u>File No. EO-2013-0104</u></b>
to be Addressed by Ameren Missouri in its	)	
Next Triennial Compliance Filing or Next	)	
Annual Update Report.	)	

**DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT**

I dissent.

In 2011, this Commission promulgated new and revised rules regarding Integrated Resource Planning (“IRP”)( EX – 2010 – 0254). During the rulemaking process, I expressed concerns about the sheer length and minutiae of the rules. To me, the new rules are more compliance-based than performance-based. In other words, the focus of the rules appears to encourage compliance with the rules and a “just check all the boxes” approach rather than encouraging actual long-range strategic planning. However, none of the utilities or stakeholders voiced any strong objections to that approach, so I voted for the rules as proposed.

Now, in one of the first tests of these new rules, this Commission was asked to evaluate whether to issue an order containing a list of “special contemporary issues” for the utility to analyze and address in its next annual update report. 4 CSR 240-22.020(55) defines a “special contemporary issue” as a “written list of issues contained in a commission order with input from staff, public counsel, and intervenors that are **evolving new issues, which may not have otherwise have been addressed by the utility or are continuations of unresolved issues from the preceding triennial compliance filing or annual update filing.**” (emphasis added).

In my opinion, none of the items designated by the majority as special contemporary issues meet the definition in 4 CSR 240-22.020(55). For example, one of them is: “Disclose and discuss the amount and impact of every state or federal subsidy the Company expects to receive with regard to any or all fuel sources it intends to use during the IRP study period.” State and Federal subsidies have been around for years and are neither new nor evolving. It is not a special contemporary issue according to our rules.

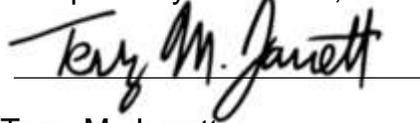
Further, in most cases, the Company has agreed to include the information in its next triennial compliance filing, or the information can be gained in more appropriate ways, such as through MEEIA filings or data requests. While I may agree that the information would be good to have, my concern is that the majority, to get the information, ignores the rule just by calling something a special contemporary issue when it is not.

I believe we should follow the rules, especially when we have other legal avenues to obtain the information. Doing it the right way sometimes is more difficult, but to me that does not justify ignoring the rule of law.

Also, in concurrent dockets with Ameren Missouri and The Empire District Electric Company regarding the same rule, different treatment on identical issues are given by the Commission regarding “special contemporary issue(s)” with regard to Kansas City Power & Light Company and Kansas City Power & Light Company Greater Missouri Operations. While what constitutes a “special contemporary issue” is fact based and utility specific, in this instance the disparate treatment is neither addressed nor distinguished by the majority.

The definition in the rule here is new, but it is not obscure or ambiguous. It had extensive input during workshops and the rulemaking process. Yet here the rule in its first test drive finds itself already off course.

Respectfully submitted,

A handwritten signature in black ink that reads "Terry M. Jarrett". The signature is written in a cursive style and is positioned above a horizontal line.

Terry M. Jarrett

This 30<sup>th</sup> day of November, 2012.

**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-2013-0105**

**Electric. §42. Planning and management.** The Commission determined that The Empire District Electric Company shall analyze and document the certain special contemporary issues in its 2013 triennial Integrated Resource Plan.

**ORDER ESTABLISHING SPECIAL CONTEMPORARY RESOURCE PLANNING ISSUES**

Issue Date: October 31, 2012

Effective Date: November 1, 2012

Commission Rule 4 CSR 240-22.080(4), requires Missouri's electric utilities to consider and analyze special contemporary electric resource planning 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 ("Empire") analysis and response in its next Integrated Resource Plan ("IRP") filing. Empire filed responses to those suggestions. The Commission must now determine what special contemporary issues Empire should address.

No law or regulation requires a hearing before determining what special contemporary issues Empire should address in its next IRP filing. Consequently, this is not a contested case.<sup>1</sup> Because this is a non-contested case, the Commission acts on evidence that is not formally adduced and preserved.<sup>2</sup> There is no evidentiary record.<sup>3</sup> Consequently, the Commission bases its decision on the parties' verified filings.

<sup>1</sup> Section 536.010(4) defines "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."

<sup>2</sup> *State ex rel. Public Counsel v. Public Service Comm'n*, 259 S.W.3d 23, 29-30 (Mo. App. 2008).

<sup>3</sup> *Id.* The competent and substantial evidence standard of Article V, Section 18, does not apply to administrative cases in which a hearing is not required by law."*Id.*

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.<sup>4</sup>

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 submitted an IRP annual update filing in March 2012 in File Number EO-2012-0294. Empire's next full IRP study is due on April 1, 2013.<sup>5</sup> Additionally, as agreed in Empire's previous IRP, File No. EO-2011-0066, Empire will be filing an application in relation to the Missouri Energy Efficiency Investment Act ("MEEIA") and the Commission's rules implementing that act.<sup>6</sup> Special contemporary issues should not include issues that are already required to be included in Empire's upcoming triennial compliance report or that would be addressed in the planned MEEIA filing.

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. The regulation setting the deadline for suggestions and Empire's response does not allow time for further exchanges of suggestions. Ultimately, it is up to the Commission to decide whether Empire should address a particular issue. Based on the Commission's independent and impartial review of the verified filings, and its consideration of the factors outlined above, the Commission finds that it is in the public interest to adopt the list of special contemporary issues set forth in this order.

#### **THE COMMISSION ORDERS THAT:**

1. The Empire District Electric Company shall analyze and document the following special contemporary issues in its 2013 triennial Integrated Resource Plan:

a. Analyze and document the impacts of opportunities to implement distributed generation, DSM programs and CHP 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.

b. Investigate and document the impacts on the Company's preferred resource plan and contingency plans of aggressive regulations by the FERC, regional transmission organizations or Missouri statutes or regulations to allow aggregators of retail customers to operate and market demand response services in Missouri.

<sup>4</sup> 4 CSR 240-22.080(4).

<sup>5</sup> 4 CSR 240-22.080(1)(B).

<sup>6</sup> See also File No. EO-2012-0206.

c. Disclose and discuss the amount and impact of every state or federal subsidy the Company 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 November 1, 2012.

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

Stearley, Deputy 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-2013-0105**

**DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT**

I dissent.

In 2011, this Commission promulgated new and revised rules regarding Integrated Resource Planning (“IRP”)( EX – 2010 – 0254). During the rulemaking process, I expressed concerns about the sheer length and minutiae of the rules. To me, the new rules are more compliance-based than performance-based. In other words, the focus of the rules appears to encourage compliance with the rules and a “just check all the boxes” approach rather than encouraging actual long-range strategic planning. However, none of the utilities or stakeholders voiced any strong objections to that approach, so I voted for the rules as proposed.

Now, in one of the first tests of these new rules, this Commission was asked to evaluate whether to issue an order containing a list of “special contemporary issues” for the utility to analyze and address in its next annual update report. 4 CSR 240-22.020(55) defines a “special contemporary issue” as a “written list of issues contained in a commission order with input from staff, public counsel, and intervenors that are **evolving new issues, which may not have otherwise have been addressed by the utility or are continuations of unresolved issues from the preceding triennial compliance filing or annual update filing.**” (emphasis added).

In my opinion, none of the items designated by the majority as special contemporary issues meet the definition in 4 CSR 240-22.020(55). For example, one of them is: “Disclose and discuss the amount and impact of every state or federal subsidy the Company expects to receive with regard to any or all fuel sources it intends to use during the IRP study period.” State and Federal subsidies have been around for years and are neither new nor evolving. It is not a special contemporary issue according to our rules.

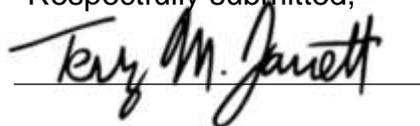
Further, in most cases, the Company has agreed to include the information in its next triennial compliance filing, or the information can be gained in more appropriate ways, such as through MEEIA filings or data requests. While I may agree that the information would be good to have, my concern is that the majority, to get the information, ignores the rule just by calling something a special contemporary issue when it is not.

I believe we should follow the rules, especially when we have other legal avenues to obtain the information. Doing it the right way sometimes is more difficult, but to me that does not justify ignoring the rule of law.

Also, in concurrent dockets with Ameren Missouri and The Empire District Electric Company regarding the same rule, different treatment on identical issues are given by the Commission regarding "special contemporary issue(s)" with regard to Kansas City Power & Light Company and Kansas City Power & Light Company Greater Missouri Operations. While what constitutes a "special contemporary issue" is fact based and utility specific, in this instance the disparate treatment is neither addressed nor distinguished by the majority.

The definition in the rule here is new, but it is not obscure or ambiguous. It had extensive input during workshops and the rulemaking process. Yet here the rule in its first test drive finds itself already off course.

Respectfully submitted,

A handwritten signature in black ink, reading "Terry M. Jarrett", written over a horizontal line.

Terry M. Jarrett

This 30<sup>th</sup> day of November, 2012.

**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-2013-0106**

**ELECTRIC. §42. Planning and management.** The Commission directed an electric utility to address certain contemporary planning issues in its next annual update report to the integrated resource plan.

**ORDER ESTABLISHING SPECIAL CONTEMPORARY RESOURCE PLANNING ISSUES**

Issue Date: October 31, 2012

Effective Date: November 1, 2012

A provision in the Missouri Public Services 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 provides that by September 15 of each year, Staff, Public Counsel, and other interested parties may file suggested issues for consideration. The regulation allows the utilities and other parties until October 1 to file comments regarding the suggested issues. 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 must address.

The Commission's Staff, the Missouri Department of Natural Resources (MDNR), and the Sierra Club filed suggested special contemporary issues for Kansas City Power & Light Company (KCP&L) to analyze and respond to in its next integrated resource plan (IRP) filing. 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.<sup>1</sup> 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.<sup>2</sup>

<sup>1</sup> *State ex rel. Public Counsel v. Public Service Com'n*, 259 S.W.3d 23, 29 (Mo. App. W.D. 2008)

<sup>2</sup> 4 CSR 240-22.080(4).

It is also important to note that the Commission's IRP rules require KCP&L to file a full IRP study once every three years. KCP&L does not need to file its next full IRP study until April 1, 2015.<sup>3</sup> That means KCP&L would need to address the special contemporary issues identified in this order in its 2013 annual update report, not in a full IRP study. This 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."<sup>4</sup> 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.

After considering these factors, the Commission will adopt the list of special contemporary issues set forth in this order.

**THE COMMISSION ORDERS THAT:**

1. Kansas City Power & Light Company shall analyze and document the following special contemporary issues in its 2013 annual update report:

a. Investigate and document the impacts on the Company'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 the Company'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 the Company'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 the Company'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: 1) a prolonged double- dip recession, and/or 2) the largest customer or a group of customers no longer taking service from Company;

e. Investigate and document the impacts of aggressive environmental regulations on Company's preferred resource plan and contingency plans;

<sup>3</sup> 4 CSR 240-22.080(1)(A).

<sup>4</sup> 4 CSR 240-22.080(3)(B).

f. Analyze, rank, and document existing coal plant fleet as retirement candidates that includes documentation indicating the date the plant was put in service, the original design life in years and the results of any subsequent life extension studies or modifications to extend the design life, the cost in \$/kw to produce energy, and any analysis, studies, inspections, calculations used to justify the continued operation of the plant beyond its original design life;

g. Analyze and document the impacts of opportunities to implement distributed generation, DSM programs, and combined heat and power (CHP) 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. In particular, develop a model or business case to identify the most cost effective CHP projects and a strategy to increase the deployment of identified cost effective CHP projects;

h. Analyze and document analysis of DSM programs targeted to achieve energy efficiency savings in the agricultural sector;

i. Analyze and document alternative customer information/behavior modification program options utilizing either in-house or outside industry experts or a combination of both to increase customer awareness and encourage more efficient use of energy;

j. Analyze potential or proposed changes in state and/or federal environmental and/or renewable energy standards and report how those changes would affect Company's plans for compliance with those standards;

k. 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;

l. Disclose and discuss the amount and impact of every state or federal subsidy the Company expects to receive with regard to any or all fuel sources it intends to use during the IRP study period;

m. Analyze and document nuclear powered small modular reactor (SMR) as a potential supply-side resource option;

n. In its annual update, KCPL should recalibrate its forecast of the number of households to reflect the existing economic situation. The analysis should describe and document any changes in the components of the load forecast made to account for changes in the economic situation;

o. In its annual update, KCPL should provide a more detailed analysis of the market status of a number of distribution technologies as well as their potential impacts. KCP&L should also explore more opportunities with customer-side CHP;

p. KCPL should describe and document the legal and administrative steps necessary to allow for IRP planning on a combined company basis;

q. In its annual update, KCP&L should describe and document its approach to constructing combined plans and its allocation procedures. If the Company uses a combined planning approach in the future, the combined plan should include an articulated methodology for sharing demand side, supply side and renewable resources between companies;

r. Address deficiencies raised by MDNR in the analysis of Special Contemporary Issues B, C, H, I, J, K and L from File No. EO-2012-0041;

s. The prospects for continued stability of natural gas prices, especially in light of unconventional gas supplies;

t. Analyzing and documenting the future capital and operating costs faced by each KCP&L coal-fired generating unit in order to comply with all existing, pending, or potential environmental standards, including:

- Clean Air Act New Source Review provisions
- 1-hour Sulfur Dioxide National Ambient Air Quality Standard
- Cross State Air Pollution Rule in the event the Rule is reinstated
- Clean Air Interstate Rule
- Mercury and Air Toxics Standard
- Clean Water Act 316(b) Cooling Water Intake Standards
- Clean Water Act Steam Electric Effluent Limitation Guidelines
- Clean Air Act Section 111 Greenhouse Gas New Source Performance Standards
- Clean Air Act Regional Haze requirements
- Coal Combustion Waste rules;

u. Analyzing and documenting the technical, maximum achievable, and realistic achievable energy and demand savings from demand side management, and incorporating each level of savings into KCP&L resource planning process; and

v. Analyzing and documenting the levels of achievable combined heat and power and incorporating such achievable CHP into KCP&L's evaluation of demand side management.

2. This order shall become effective on November 1, 2012.

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

Bushmann, Regulatory Law Judge

In the Matter of a Determination of Special )  
 Contemporary Resource Planning Issues to be ) **File No. EO-2013-0106**  
 Addressed by the Kansas City Power & Light )  
 Company ("KCP&L") in its Next )  
 Triennial Compliance Filing or Next Annual )  
 Update Report. )

**DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT**

I dissent.

In 2011, this Commission promulgated new and revised rules regarding Integrated Resource Planning ("IRP") (EX – 2010 – 0254). During the rulemaking process, I expressed concerns about the sheer length and minutiae of the rules. To me, the new rules are more compliance-based than performance-based. In other words, the focus of the rules appears to encourage compliance with the rules and a "just check all the boxes" approach rather than encouraging actual long-range strategic planning. However, none of the utilities or stakeholders voiced any strong objections to that approach, so I voted for the rules as proposed.

Now, in one of the first tests of these new rules, this Commission was asked to evaluate whether to issue an order containing a list of "special contemporary issues" for the utility to analyze and address in its next annual update report. 4 CSR 240-22.020(55) defines a "special contemporary issue" as a "written list of issues contained in a commission order with input from staff, public counsel, and intervenors that are **evolving new issues, which may not have otherwise have been addressed by the utility or are continuations of unresolved issues from the preceding triennial compliance filing or annual update filing.**" (emphasis added).

In my opinion, none of the items designated by the majority as special contemporary issues meet the definition in 4 CSR 240-22.020(55). For example, one of them is: "Disclose and discuss the amount and impact of every state or federal subsidy the Company expects to receive with regard to any or all fuel sources it intends to use during the IRP study period." State and Federal subsidies have been around for years and are neither new nor evolving. It is not a special contemporary issue according to our rules.

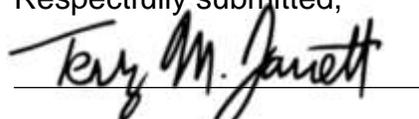
Further, in most cases, the Company has agreed to include the information in its next triennial compliance filing, or the information can be gained in more appropriate ways, such as through MEEIA filings or data requests. While I may agree that the information would be good to have, my concern is that the majority, to get the information, ignores the rule just by calling something a special contemporary issue when it is not.

I believe we should follow the rules, especially when we have other legal avenues to obtain the information. Doing it the right way sometimes is more difficult, but to me that does not justify ignoring the rule of law.

Also, in concurrent dockets with Ameren Missouri and The Empire District Electric Company regarding the same rule, different treatment on identical issues are given by the Commission regarding “special contemporary issue(s)” with regard to KCPL and KCPL-GMO. While what constitutes a “special contemporary issue” is fact based and utility specific, in this instance the disparate treatment is neither addressed nor distinguished by the majority.

The definition in the rule here is new, but it is not obscure or ambiguous. It had extensive input during workshops and the rulemaking process. Yet here the rule in its first test drive finds itself already off course.

Respectfully submitted,

A handwritten signature in black ink, reading "Terry M. Jarrett", is written over a horizontal line.

Terry M. Jarrett

This 30<sup>th</sup> day of November, 2012.

**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-2013-0107**

**ELECTRIC. §42. Planning and management.** The Commission directed an electric utility to address certain contemporary planning issues in its next annual update report to the integrated resource plan.

**ORDER ESTABLISHING SPECIAL CONTEMPORARY RESOURCE PLANNING ISSUES**

Issue Date: October 31, 2012

Effective Date: November 1, 2012

A provision in the Missouri Public Services 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 provides that by September 15 of each year, Staff, Public Counsel, and other interested parties may file suggested issues for consideration. The regulation allows the utilities and other parties until October 1 to file comments regarding the suggested issues. 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 must address.

The Commission's Staff, the Missouri Department of Natural Resources (MDNR), and the Sierra Club filed suggested special contemporary issues for KCP&L Greater Missouri Operations Company (GMO) to analyze and respond to in its next integrated resource plan (IRP) filing. GMO filed responses to those suggestions. The Commission must now determine what special contemporary issues 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.<sup>1</sup> 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.<sup>2</sup>

<sup>1</sup> *State ex rel. Public Counsel v. Public Service Com'n*, 259 S.W.3d 23, 29 (Mo. App. W.D. 2008)

<sup>2</sup> 4 CSR 240-22.080(4).

It is also important to note that the Commission's IRP rules require GMO to file a full IRP study once every three years. GMO does not need to file its next full IRP study until April 1, 2015.<sup>3</sup> That means GMO would need to address the special contemporary issues identified in this order in its 2013 annual update report, not in a full IRP study. This 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."<sup>4</sup> 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.

After considering these factors, the Commission will adopt the list of special contemporary issues set forth in this order.

#### **THE COMMISSION ORDERS THAT:**

1. KCP&L Greater Missouri Operations Company shall analyze and document the following special contemporary issues in its 2013 annual update report:

a. Investigate and document the impacts on the Company'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 the Company'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 the Company'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 the Company'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: 1) a prolonged double- dip recession, and/or 2) the largest customer or a group of customers no longer taking service from Company;

e. Investigate and document the impacts of aggressive environmental regulations on Company's preferred resource plan and contingency plans;

f. Analyze, rank, and document existing coal plant fleet as retirement candidates that includes documentation indicating the date the plant was put in service, the original design life in years and the results of any subsequent life extension studies or modifications to extend the design life, the cost in \$/kw to produce energy, and any analysis, studies, inspections, calculations used to justify the continued operation of the plant beyond its original design life;

<sup>3</sup> 4 CSR 240-22.080(1)(A).

<sup>4</sup> 4 CSR 240-22.080(3)(B).

g. Analyze and document the impacts of opportunities to implement distributed generation, DSM programs, and combined heat and power (CHP) 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. In particular, develop a model or business case to identify the most cost effective CHP projects and a strategy to increase the deployment of identified cost effective CHP projects;

h. Analyze and document analysis of DSM programs targeted to achieve energy efficiency savings in the agricultural sector;

i. Analyze and document alternative customer information/behavior modification program options utilizing either in-house or outside industry experts or a combination of both to increase customer awareness and encourage more efficient use of energy;

j. Analyze potential or proposed changes in state and/or federal environmental and/or renewable energy standards and report how those changes would affect Company's plans for compliance with those standards;

k. 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;

l. Disclose and discuss the amount and impact of every state or federal subsidy the Company expects to receive with regard to any or all fuel sources it intends to use during the IRP study period;

m. Analyze and document nuclear powered small modular reactor (SMR) as a potential supply-side resource option;

n. In its annual update, GMO should recalibrate its forecast of the number of households to reflect the existing economic situation. The analysis should describe and document any changes in the components of the load forecast made to account for changes in the economic situation;

o. In its annual update, GMO should provide a more detailed analysis of the market status of a number of distribution technologies as well as their potential impacts. GMO should also explore more opportunities with customer-side CHP;

p. GMOL should describe and document the legal and administrative steps necessary to allow for IRP planning on a combined company basis;

q. In its annual update, GMO should describe and document its approach to constructing combined plans and its allocation procedures. If the Company uses a combined planning approach in the future, the combined plan should include an articulated methodology for sharing demand side, supply side and renewable resources between companies;

r. Address deficiencies raised by MDNR in the analysis of Special Contemporary Issues B, C, H, I, J, K and L from File No. EO-2012-0041;

s. The prospects for continued stability of natural gas prices, especially in light of unconventional gas supplies;

t. Analyzing and documenting the future capital and operating costs faced by each GMO coal-fired generating unit in order to comply with all existing, pending, or potential environmental standards, including:

- Clean Air Act New Source Review provisions
- 1-hour Sulfur Dioxide National Ambient Air Quality Standard
- Cross State Air Pollution Rule in the event the Rule is reinstated
- Clean Air Interstate Rule
- Mercury and Air Toxics Standard
- Clean Water Act 316(b) Cooling Water Intake Standards
- Clean Water Act Steam Electric Effluent Limitation Guidelines
- Clean Air Act Section 111 Greenhouse Gas New Source Performance Standards
- Clean Air Act Regional Haze requirements
- Coal Combustion Waste rules;

u. Analyzing and documenting the technical, maximum achievable, and realistic achievable energy and demand savings from demand side management, and incorporating each level of savings into GMO resource planning process; and

v. Analyzing and documenting the levels of achievable combined heat and power and incorporating such achievable CHP into GMO's evaluation of demand side management.

2. This order shall become effective on November 1, 2012.

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

Bushmann, Regulatory Law Judge

In the Matter of a Determination of Special )  
 Contemporary Resource Planning Issues to be ) **File No. EO-2013-0107**  
 Addressed by the Kansas City Power & Light )  
 Company ("KCP&L") Greater Missouri )  
 Operations in its Next Triennial Compliance )  
 Filing or Next Annual Update Report )

**DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT**

I dissent.

In 2011, this Commission promulgated new and revised rules regarding Integrated Resource Planning ("IRP")( EX – 2010 – 0254). During the rulemaking process, I expressed concerns about the sheer length and minutiae of the rules. To me, the new rules are more compliance-based than performance-based. In other words, the focus of the rules appears to encourage compliance with the rules and a “just check all the boxes” approach rather than encouraging actual long-range strategic planning. However, none of the utilities or stakeholders voiced any strong objections to that approach, so I voted for the rules as proposed.

Now, in one of the first tests of these new rules, this Commission was asked to evaluate whether to issue an order containing a list of “special contemporary issues” for the utility to analyze and address in its next annual update report. 4 CSR 240-22.020(55) defines a “special contemporary issue” as a “written list of issues contained in a commission order with input from staff, public counsel, and intervenors that are **evolving new issues, which may not have otherwise have been addressed by the utility or are continuations of unresolved issues from the preceding triennial compliance filing or annual update filing.**” (emphasis added).

In my opinion, none of the items designated by the majority as special contemporary issues meet the definition in 4 CSR 240-22.020(55). For example, one of them is: “Disclose and discuss the amount and impact of every state or federal subsidy the Company expects to receive with regard to any or all fuel sources it intends to use during the IRP study period.” State and Federal subsidies have been around for years and are neither new nor evolving. It is not a special contemporary issue according to our rules.

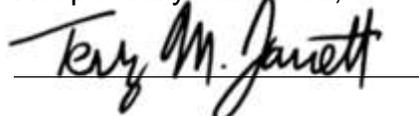
Further, in most cases, the Company has agreed to include the information in its next triennial compliance filing, or the information can be gained in more appropriate ways, such as through MEEIA filings or data requests. While I may agree that the information would be good to have, my concern is that the majority, to get the information, ignores the rule just by calling something a special contemporary issue when it is not.

I believe we should follow the rules, especially when we have other legal avenues to obtain the information. Doing it the right way sometimes is more difficult, but to me that does not justify ignoring the rule of law.

Also, in concurrent dockets with Ameren Missouri and The Empire District Electric Company regarding the same rule, different treatment on identical issues are given by the Commission regarding “special contemporary issue(s)” with regard to KCPL and KCPL-GMO. While what constitutes a “special contemporary issue” is fact based and utility specific, in this instance the disparate treatment is neither addressed nor distinguished by the majority.

The definition in the rule here is new, but it is not obscure or ambiguous. It had extensive input during workshops and the rulemaking process. Yet here the rule in its first test drive finds itself already off course.

Respectfully submitted,

A handwritten signature in black ink that reads "Terry M. Jarrett". The signature is written in a cursive style and is positioned above a horizontal line.

Terry M. Jarrett

This 30<sup>th</sup> day of November, 2012.

**In the Matter of KCP&L Greater Missouri Operations Company's Application for Approval of Demand-Side Programs and for Authority to Establish a Demand-Side Programs Investment Mechanism**

**File No. EO-2012-0009**

**Electric. §13.1 Energy efficiency.** The Commission approved a stipulation and agreement establishing the utility's demand-side program plan.

**ORDER APPROVING NON-UNANIMOUS STIPULATION  
AND AGREEMENT RESOLVING KCP&L GREATER  
MISSOURI OPERATIONS COMPANY'S MEEIA FILING**

Issue Date: November 15, 2012

Effective Date: November 25, 2012

This order approves a stipulation and agreement among the parties regarding KCP&L Greater Missouri Operations Company d/b/a GMO's application filed under the Missouri Energy Efficiency Investment Act (MEEIA).

MEEIA is designed to encourage Missouri's investor-owned electric utilities to wholeheartedly offer energy efficiency programs and projects designed to reduce the amount of electricity used by the utility's customers. The law recognizes that under traditional regulation, a utility has a strong financial incentive to sell as much electricity to its customers as possible because more sales result in greater profits. MEEIA creates an opportunity to change that financial incentive to better align the utility's financial interest with the public interest in encouraging the efficient use of energy.

On December 22, 2011, as it was allowed to do under MEEIA, GMO filed an application asking the Commission to approve certain energy efficiency and other demand-side programs described in a MEEIA Report attached to the application. GMO also asked the Commission to approve a Demand-Side Investment Mechanism (DSIM), intended to allow the company to more efficiently recover the costs of those programs and to mitigate the throughput disincentive that would otherwise discourage the company's investment in energy efficiency.

GMO's MEEIA application was of great interest to various stakeholders, and the Commission allowed the following parties to intervene: The Missouri Department of Natural Resources; Sierra Club, Earth Island Institute d/b/a Renew Missouri, and the Natural Resources Defense Council; the Missouri Industrial Energy Consumers; Wal-Mart Stores East, L.P. and Sam's East, Inc.; Southern Union Company d/b/a Missouri Gas Energy; Union Electric Company d/b/a Ameren Missouri; AG Processing, Inc., and Sedalia Industrial Energy Users' Association.

On October 29, 2012, the Commission's Staff; the Office of the Public Counsel; the Missouri Department of Natural Resources; the Natural Resources Defense Council, Sierra Club, and Earth Island Institute d/b/a Renew Missouri; the Missouri Industrial Energy Consumers; and Wal-Mart Stores East, L.P. and Sam's East, Inc. filed what they described as a Non-Unanimous Stipulation and Agreement Resolving GMO's Missouri's MEEIA Filing. MGE, Ameren Missouri, AG Processing and SIEUA did not sign the stipulation and agreement, but they did not object within seven days of its filing. Therefore, pursuant to Commission Rule 4 CSR 240-2.115, the Commission will treat the stipulation and agreement as unanimous.

The stipulation and agreement asks the Commission to approve GMO's three-year demand-side program plan. That plan consists of the fifteen demand-side programs described in GMO's MEEIA Report, and the demand-side programs investment mechanism (DSIM) described in the MEEIA Report, as modified by the stipulation and agreement.

Having considered GMO's MEEIA Application and Report and the stipulation and agreement, the Commission determines that the stipulation and agreement should be approved. Noting that the signatories agree that the exemplar tariffs filed contemporaneously with the stipulation and agreement should be filed as compliance tariffs in GMO's most recent rate case, File No. ER-2012-0175, the Commission will reject the pending tariff sheets in this case.

Because there is no remaining controversy among the parties and because this order needs to take effect promptly, the Commission will make this order effective in ten days.

**THE COMMISSION ORDERS THAT:**

1. The Non-Unanimous Stipulation and Agreement Resolving KCP&L Greater Missouri Operations Company's MEEIA Filing is approved.
2. The signatories to the stipulations and agreements shall comply with the terms of the stipulations and agreements.
3. The stipulation and agreement is incorporated into this order as Attachment A.
4. The following tariff sheets filed by KCP&L Greater Missouri Operations Company on December 22, 2011, and assigned Tariff File No. YE-2012-0298, are rejected:

**P.S.C. MO No. 1**

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Original Sheet No. R-  
62.21

Original Sheet No. R-  
62.22

Original Sheet No. R-  
62.23

Original Sheet No. R-  
62.24

Original Sheet No. R-62.25

Original Sheet No. R-62.26

Original Sheet No. R-62.27

Original Sheet No. R-62.28

Original Sheet No. R-62.29

Original Sheet No. R-62.30

Original Sheet No. R-62.31

Original Sheet No. R-62.32

Original Sheet No. R-62.33

Original Sheet No. R-62.34

Original Sheet No. R-62.35

Original Sheet No. R-62.36

Original Sheet No. R-62.37

Original Sheet No. R-62.38

Original Sheet No. R-62.39  
 Original Sheet No. R-62.40  
 Original Sheet No. R-62.41  
 Original Sheet No. R-62.42  
 Original Sheet No. R-62.43  
 Original Sheet No. R-62.44  
 Original Sheet No. R-62.45  
 Original Sheet No. R-62.46  
 Original Sheet No. R-62.47  
 Original Sheet No. R-62.48  
 Original Sheet No. R-62.49  
 Original Sheet No. R-64.06  
 Original Sheet No. R-64.07  
 Original Sheet No. R-64.08  
 Original Sheet No. R-64.09  
 Original Sheet No. R-64.10  
 Original Sheet No. R-68.1  
 Original Sheet No. 134  
 Original Sheet No. 135  
 Original Sheet No. 136  
 Original Sheet No. 137  
 Original Sheet No. 138  
 Original Sheet No. 139  
 Original Sheet No. 140  
 Original Sheet No. 141  
 Original Sheet No. 142  
 Original Sheet No. 143  
 4<sup>th</sup> Revised Sheet No. R-62.01, canceling 3<sup>rd</sup> Revised Sheet No. R-62.01  
 1<sup>st</sup> Revised Sheet No. R-62.01.1, canceling Original Sheet No. R-62.01.1  
 1<sup>st</sup> Revised Sheet No. R-62.02, canceling Original Sheet No. R-62.02  
 2<sup>nd</sup> Revised Sheet No. R-62.03, canceling 1<sup>st</sup> Revised Sheet No. R-62.03  
 2<sup>nd</sup> Revised Sheet No. R-62.04, canceling 1<sup>st</sup> Revised Sheet No. R-62.04  
 1<sup>st</sup> Revised Sheet No. 62.05, canceling Original Sheet No. R-62.05  
 1<sup>st</sup> Revised Sheet No. 62.06, canceling Original Sheet No. R-62.06  
 1<sup>st</sup> Revised Sheet No. 62.07, canceling Original Sheet No. R-62.07  
 1<sup>st</sup> Revised Sheet No. 62.08, canceling Original Sheet No. R-62.08  
 1<sup>st</sup> Revised Sheet No. 62.09, canceling Original Sheet No. R-62.09  
 1<sup>st</sup> Revised Sheet No. 62.10, canceling Original Sheet No. R-62.10  
 1<sup>st</sup> Revised Sheet No. 62.11, canceling Original Sheet No. R-62.11  
 1<sup>st</sup> Revised Sheet No. 62.12, canceling Original Sheet No. R-62.12  
 1<sup>st</sup> Revised Sheet No. 62.13, canceling Original Sheet No. R-62.13  
 1<sup>st</sup> Revised Sheet No. 62.14, canceling Original Sheet No. R-62.14  
 2<sup>nd</sup> Revised Sheet No. 64.01, canceling 1<sup>st</sup> Revised Sheet No. 64.01  
 2<sup>nd</sup> Revised Sheet No. 64.02, canceling 1<sup>st</sup> Revised Sheet No. 64.02  
 2<sup>nd</sup> Revised Sheet No. 64.03, canceling 1<sup>st</sup> Revised Sheet No. 64.03  
 2<sup>nd</sup> Revised Sheet No. 64.04, canceling 1<sup>st</sup> Revised Sheet No. 64.04  
 2<sup>nd</sup> Revised Sheet No. 64.05, canceling 1<sup>st</sup> Revised Sheet No. 64.05  
 4<sup>th</sup> Revised Sheet No. R-68, canceling 3<sup>rd</sup> Revised Sheet No. R-68  
 5<sup>th</sup> Revised Sheet No. 18, canceling 4<sup>th</sup> Revised Sheet No. 18

5<sup>th</sup> Revised Sheet No. 19, canceling 4<sup>th</sup> Revised Sheet No. 19  
 5<sup>th</sup> Revised Sheet No. 21, canceling 4<sup>th</sup> Revised Sheet No. 21  
 5<sup>th</sup> Revised Sheet No. 22, canceling 4<sup>th</sup> Revised Sheet No. 22  
 5<sup>th</sup> Revised Sheet No. 23, canceling 4<sup>th</sup> Revised Sheet No. 23  
 5<sup>th</sup> Revised Sheet No. 24, canceling 4<sup>th</sup> Revised Sheet No. 24  
 5<sup>th</sup> Revised Sheet No. 25, canceling 4<sup>th</sup> Revised Sheet No. 25  
 5<sup>th</sup> Revised Sheet No. 28, canceling 4<sup>th</sup> Revised Sheet No. 28  
 3<sup>rd</sup> Revised Sheet No. 30, canceling 2<sup>nd</sup> Revised Sheet No. 30  
 3<sup>rd</sup> Revised Sheet No. 33, canceling 2<sup>nd</sup> Revised Sheet No. 33  
 2<sup>nd</sup> Revised Sheet No. 36, canceling 1<sup>st</sup> Revised Sheet No. 36  
 5<sup>th</sup> Revised Sheet No. 52, canceling 4<sup>th</sup> Revised Sheet No. 52  
 3<sup>rd</sup> Revised Sheet No. 55, canceling 2<sup>nd</sup> Revised Sheet No. 55  
 2<sup>nd</sup> Revised Sheet No. 58, canceling 1<sup>st</sup> Revised Sheet No. 58  
 5<sup>th</sup> Revised Sheet No. 61, canceling 4<sup>th</sup> Revised Sheet No. 61  
 5<sup>th</sup> Revised Sheet No. 66, canceling 4<sup>th</sup> Revised Sheet No. 66  
 2<sup>nd</sup> Revised Sheet No. 69, canceling 1<sup>st</sup> Revised Sheet No. 69  
 5<sup>th</sup> Revised Sheet No. 71, canceling 4<sup>th</sup> Revised Sheet No. 71  
 1<sup>st</sup> Revised Sheet No. 77, canceling Original Sheet No. 77  
 2<sup>nd</sup> Revised Sheet No. 82, canceling 1<sup>st</sup> Revised Sheet No. 82  
 1<sup>st</sup> Revised Sheet No. 128, canceling Original Sheet No. 128  
 1<sup>st</sup> Revised Sheet No. 129 canceling Original Sheet No. 129  
 1<sup>st</sup> Revised Sheet No. 130, canceling Original Sheet No. 130  
 1<sup>st</sup> Revised Sheet No. 131, canceling Original Sheet No. 131  
 1<sup>st</sup> Revised Sheet No. 132, canceling Original Sheet No. 132

5. This order shall become effective on November 25, 2012.
6. This file shall be closed on November 26, 2012.

Gunn, Chm., Jarrett, Kenney,  
and Stoll, 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 Thomas L. Chaney for Change of Electric Supplier****File No. EO-2011-0391**

**Electric. §4.1 Change of supplier.** Application to change supplier from cooperative to investor-owned electric utility to take advantage of a solar installation rebate was denied as being contrary to the public interest.

**REPORT AND ORDER**

**Issue Date:** December 12, 2012  
**Effective Date:** January 11, 2013

**Appearances**

Thomas Chaney, *pro se* applicant,

Rodric A. Widger, Attorney for Cuivre River Electric Cooperative, Inc.

Wendy Tatro, Attorney for Union Electric Company d/b/a Ameren Missouri

Jennifer Hernandez, Attorney for the Staff of the Missouri Public Service Commission

Judge: Kennard Jones, Senior Regulatory Law Judge

**Syllabus:** Because it is not in the public interest to grant a change of supplier, this order denies Thomas Chaney's request to change his electric provider from Cuivre River Electric Cooperative, Inc. to Union Electric Company d/b/a Ameren Missouri.

**Background**

On June 10, 2011, Thomas L. Chaney filed an application to change his electric supplier from Cuivre River Electric Cooperative to Union Electric Company d/b/a Ameren Missouri. The Commission issued notice of the application. There were no requests to intervene.

Both Cuivre River and Ameren Missouri filed responses opposing the application. The Staff of the Commission later filed its Recommendation and subsequent update also opposing the application. After a prehearing conference was held, Cuivre River and Ameren Missouri filed a joint motion to dismiss the application for lack of subject matter jurisdiction. The Commission denied the motion and directed the parties to file statements of fact. Although the parties agree on the facts, the companies requested an evidentiary hearing, which was held on September 10, 2012. Thereafter, the parties filed post-hearing briefs.

The Commission may grant a change of supplier if the change is in the public interest and the request is for a reason other than a rate differential. Although the Commission concludes that Mr. Chaney's reason for wanting a change of supplier is for a reason other than a rate differential, the Commission will deny his request because it is not in the public interest. As Mr. Chaney argues, the use of solar power is generally in the public interest. And, to a large extent, Ameren Missouri has served this interest by last

year paying just under \$3 million in solar rebates with demand rising this year. However, the specific stranded investment, duplicative services and the potential for an exodus of customers from coops to investor-owned electric companies for the purpose of solar rebate eligibility outweigh the interest germane to the use of solar energy.

After considering all of the facts presented, the Commission makes the following findings and conclusions.

### **Findings of Fact**

The parties have filed stipulations of fact. Although the Commission sets out the following facts, there are no facts in dispute.

1. Ameren Missouri is an electric utility.<sup>1</sup>
2. Cuivre River is a rural electric cooperative.<sup>2</sup>
3. Mr. Chaney is currently receiving electric service from Cuivre River at 1110 St. Theresa Lane in Dardenne Prairie.<sup>3</sup>
4. Cuivre River and Ameren Missouri have a territorial agreement which provides that Cuivre River will serve the property located at 1110 St. Theresa Lane in Dardenne Prairie.<sup>4</sup>
5. Mr. Chaney has filed an application with the Missouri Public Service Commission requesting that his electric service provider be changed from Cuivre River to Ameren Missouri.<sup>5</sup>
6. The basis for Mr. Chaney's request for a change of supplier is so he can take advantage of Ameren Missouri's solar rebate program.<sup>6</sup>
7. In 2008, the Missouri Secretary of State approved for circulation 4 initiative petitions relating to renewable energy.<sup>7</sup>
8. All 5 renewable energy petitions applied to electric corporations, but only 3 applied to electric corporations, cooperative and municipals.<sup>8</sup>
9. Missouri Proposition C, also known as the Clean Energy Initiative or the "Renewable Energy Standard" codified at Section 393.1020 is the voter initiated state statute that appeared on the November 4, 2008 ballot in Missouri.<sup>9</sup> Proposition C applies only to investor-owned electric utilities.
10. Ameren Missouri's tariff, MO P.S.C. Schedule No. 5, 3<sup>rd</sup> Revised Sheet No. 151 would require Mr. Chaney to install the necessary conduit for service, while Ameren Missouri would install the cable in the customer's conduit system.<sup>10</sup>

<sup>1</sup> Docket Item No. 46, Joint Stipulation of Facts and of Law, filed by Ameren Missouri and Cuivre River.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Docket Item No. 1.

<sup>6</sup> Docket item No. 46, Joint Stipulation of Facts and of Law, filed by Ameren Missouri and Cuivre River, paragraph 17.

<sup>7</sup> Docket Item No. 45, Staff's List of Facts, paragraph 4.

<sup>8</sup> *Id.*, paragraph 5.

<sup>9</sup> *Id.*, paragraph 6.

<sup>10</sup> *Id.*, paragraph 20.

11. At a cost of \$3,000, Mr. Chaney would need to install approximately 500 feet of conduit to connect and receive service from Ameren Missouri's system.<sup>11</sup>

12. Cuivre River could reuse some, but not all, of the equipment currently being used to serve Mr. Chaney.<sup>12</sup>

13. A change of supplier for Mr. Chaney from Cuivre River to Ameren Missouri would result in Cuivre River members paying for stranded equipment costs of \$3,525, instead of Mr. Chaney paying the costs through payment as a continuing customer.<sup>13</sup>

14. Mr. Chaney is knowledgeable about the solar panels he intends to install, the effectiveness of those panels, as well as the installer.<sup>14</sup>

15. The life expectancy of the solar array planned by Mr. Chaney is 25 years.<sup>15</sup>

16. Mr. Chaney does not intend to install solar panels if he cannot take advantage of the rebate program offered by Ameren Missouri.<sup>16</sup>

17. Cuivre River does not have a solar rebate program.<sup>17</sup>

18. In 2011 Ameren Missouri paid out \$2,964,306 toward 226 solar rebates<sup>18</sup>.

19. Requests for solar rebates have increased in 2012.<sup>19</sup>

20. A new part of Ameren Missouri's distribution system will have to be extended to Mr. Chaney's residence if he becomes an Ameren Missouri customer.<sup>20</sup>

21. The cost of the Ameren Missouri extension to Mr. Chaney's residence will be approximately \$7,100.<sup>21</sup>

22. Mr. Chaney would not incur the above cost. Instead the extension would go into Ameren Missouri's rate base and be recovered over time from Ameren Missouri's ratepayers.<sup>22</sup>

23. The stranded investment to Cuivre River will be \$3,525.<sup>23</sup>

24. Cuivre River offers rebates for ground source heat pumps and high efficiency air source heat pumps.<sup>24</sup>

25. There would be some duplication of facilities if this change of supplier is granted.<sup>25</sup>

<sup>11</sup> *Id.*, paragraph 21.

<sup>12</sup> *Id.*, paragraph 22.

<sup>13</sup> *Id.*, paragraph 23 and Tr. p. 75, lines 21-23.

<sup>14</sup> Tr. pp. 57-59.

<sup>15</sup> Tr. p. 56, line 24.

<sup>16</sup> Tr. p. 65, lines 23-25.

<sup>17</sup> Tr. p. 71, lines 19-21.

<sup>18</sup> Tr. p. 71, lines 8-10.

<sup>19</sup> Tr. p. 75, lines 1-3.

<sup>20</sup> Tr. p. 75, lines 16-20.

<sup>21</sup> Tr. p. 84, lines 23 – p. 85, line 1.

<sup>22</sup> Tr. p. 76, lines 16-17.

<sup>23</sup> Tr. p. 75, lines 21-23.

<sup>24</sup> Tr. p. 98, lines 2-12.

<sup>25</sup> Tr. p. 100, lines 6-11.

26. If Mr. Chaney is allowed to change suppliers, after the solar panel rebate, he would spend \$30,000 to install solar panels on his home.<sup>26</sup>

### Conclusions of Law

#### Jurisdiction

Because Cuivre River and Ameren Missouri have a territorial agreement governing Mr. Chaney's property, the companies insist that the Commission lacks jurisdiction. The Commission disposed of this issue in its Order Denying Joint Motion to Dismiss, issued on June 20, 2012.

Missouri statutes grant jurisdiction to the Commission to order a change of supplier with regard to both rural and investor-owned electric companies.<sup>27</sup> Those statutes state that the "public service commission, upon application made by an affected party, may order a change of supplier on the basis that it is in the public interest for a reason other than a rate differential. . . ." Through Missouri law, the Commission concludes that it has jurisdiction over this application.

Finally, as the party asserting this cause of action, the burden of proof lies with Mr. Chaney.<sup>28</sup>

#### Public Interest

Although the Commission's decisions have no precedential value,<sup>29</sup> the Commission has used 10 factors in analyzing the meaning of "public interest"<sup>30</sup> and will examine the application of those factors in this case as follows.

1. *Can the customer's needs be adequately met by the present supplier with respect to either the amount or quality of power?*

Mr. Chaney has not complained of the amount or quality of power he receives from Cuivre River. This factor is not an issue.

2. *Are there any health or safety issues involving the amount or quality of power of the current supplier?*

There are no health or safety issues involving the amount or quality of the power provided by Cuivre River.

3. *What alternatives has the customer considered, including alternatives with the present supplier?*

Cuivre River does not offer a solar rebate program to its customers. However, Cuivre River does offer other incentives or conservation programs to its customers; notably, rebates for ground source heat pumps and high efficiency air source heat pumps.

<sup>26</sup> Tr. page 65, lines 7 – 22.

<sup>27</sup> Sections 394.315 and 393.106, RSMo.

<sup>28</sup> *Stofer v. Dunham*, 208 S.W. 641 (Mo. App. 1919).

<sup>29</sup> *State ex rel. AG Processing, Inc. v. Public Service Comm'n*, 120 S.W.3d 732, 736 (Mo. Banc 2003).

<sup>30</sup> Commission Case Nos. EO-88-196, EO-87-314, EO-93-170, EO-93-295, EC-2007-0106 and EO-2011-0052.

4. *Has the customer's equipment been damaged or destroyed as a result of a problem with the electric supply*

Mr. Chaney has not alleged that anything has been damaged or destroyed as a result of any problem with Cuivre River's electric supply.

5. *What effect would the loss of the customer have on the present supplier?*

The stranded investment to Cuivre River would be \$3,525. Cuivre River's remaining customers would then have to bear the burden of Cuivre River's stranded investment.

6. *Would the change of supplier result in a duplication of services or facilities, especially in comparison with alternatives available from the present supplier, which would include (a) the distance involved and the cost of any new extension, including the burden on others, and (b) the burden on the customer relating to the cost of time involved, not including the cost of the electricity itself?*

Although Mr. Chaney would bear the costs of installing approximately 500 feet of conduit to receive service from Ameren Missouri, there will be a duplication of facilities and stranded investment by Cuivre River; the burden of which will fall to its remaining customers.

7. *What overall burdens on the customer are caused by the inadequate service, including any economic burden not related to the cost of electricity itself, and any burden not considered with respect to the previous above?*

Mr. Chaney has alleged no facts relevant to these types of burdens

8. *What efforts have been made by the present supplier to solve or mitigate the problems?*

Mr. Chaney has alleged no problems with his present supplier, Cuivre River. This factor is not an issue.

9. *What impact might the Commission's decision have on economic development, on an individual or cumulative basis?*

To grant Mr. Chaney's request would stimulate economic development in that \$30,000 worth of solar panels would be purchased. The Commission is concerned that customers of Cuivre River and perhaps other electric cooperatives, who live near the service area of an investor-owned electric company, may leave the cooperatives in order to take advantage of the solar-panel rebate. This would be devastating to cooperatives.

10. *What effect might the grant of authority have on any territorial agreements between the two suppliers in questions, or on the negotiation of territorial agreement between the two suppliers?*

Because the property in question is described in the territorial agreement between Cuivre River and Ameren Missouri as property that is to be served by Cuivre River, the grant of this authority would disturb the expressed wishes of both Cuivre River and Ameren Missouri as set out in that territorial agreement.

For a Reason Other than a Rate Differential

The second prong of the relevant statutes is that Mr. Chaney's reason for requesting the change of supplier must be for something other than a rate differential. Mr. Chaney has stated that he seeks to change suppliers in order to take advantage of Ameren Missouri's solar rebate program. He is knowledgeable about the project and is able to bring it to fruition. The veracity of his intentions are therefore not at issue.

Ameren Missouri's rates are described in its tariff. There has been no reference to those rates by any party. The Commission has reasoned that rates are defined as what a customer pays for a unit of service.<sup>31</sup> The Commission finds no reason to expand that very narrow definition and will therefore conclude that Mr. Chaney's reason for seeking a change of supplier is for a reason other than a rate differential.

### **Decision**

Ameren Missouri, Cuivre River and the Staff of the Commission all agree that a change of supplier in this case will not be in the public interest. The possible benefit stemming from Mr. Chaney's use of solar panels is realized through the success of Ameren Missouri's solar rebate program. The success of the program minimizes the potential marginal benefit of Mr. Chaney's use of solar panels. As such, the potential benefit of his participation is outweighed by the stranded investment, duplication of facilities and the potential of encouraging cooperative members to seek solar rebates through investor-owned electric companies. Finally, approval of the application will frustrate the intention of the companies' territorial agreement.

Though the Commission concludes that Mr. Chaney's reason for seeking a change of supplier is for a reason other than a rate differential, in light of the analysis of the public interest, the Commission must deny the application because it is not in the public interest to grant the change of supplier.

### **THE COMMISSION ORDERS THAT:**

1. The application for a change of supplier filed by Thomas L. Chaney is denied.
2. This order shall become effective on January 11, 2013.
3. This case shall be closed on January 12, 2013.

Gunn, Chm., Jarrett and Stoll, CC., concur;  
Kenney, C., dissents, with separate  
dissenting opinion to follow;  
certify compliance with the provisions of  
Section 536.080, RSMo.

Dated at Jefferson City, Missouri,  
on this 12<sup>th</sup> day of December, 2012.

<sup>31</sup> Commission Case No. EO-2011-0052.

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

**In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service****File No. ER-2012-0166**

Tariff No. YE-2012-0370

**Evidence. §6 Weight, effect and sufficiency.** Reliance on an old report as received wisdom with no analysis to demonstrate its continued accuracy is not competent and substantial evidence.

**Evidence. §6 Weight, effect and sufficiency.** A witnesses vague and unsupported statements about "little or no" or "most, if not all" do not constitute competent and substantial evidence to support his position.

**Electric. §22 Revenue.** Retained earnings belong to the company and its shareholders, not to ratepayers.

**Electric. §22 Revenue.** When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions.

**Electric. §27 Accounting.** Construction accounting is frequently used to help a utility recover the cost of single large construction projects.

**Rates. §8 Reasonableness generally.** Shareholders benefit when rates go up to a just and reasonable level, but so do ratepayers. Shareholders may receive higher dividends and benefit from higher stock prices, but ratepayers receive the benefit of safe, adequate, and reliable service. No one benefits when a utility is deprived of the ability to charge its customers a just and reasonable rate.

**Electric. §20 Rates.** The test year and true-up period is important because it allows the Commission to set rates while considering the relationship between revenues, expenses and rate base within a specified period.

**Electric. §20 Rates.** By going outside the specified test year and true-up period to make an isolated adjustment, the Commission would necessarily be ignoring other expenses and income items that might also change the company's revenue requirement.

**Electric. §29 Rate of return. Rates. §41 Return.** In determining a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in the utility rather than in some other investment opportunity.

**Electric. §29 Rate of return. Rates. §41 Return.** To comply with standards established by the United States Supreme Court, the Commission must authorize a return on equity sufficient to maintain financial integrity, attract capital under reasonable terms, and be commensurate with returns investors could earn by investing in other enterprises of comparable risk.

**Electric. §29 Rate of return. Rates. §41 Return.** The opinions offered by return on equity experts cannot be blindly accepted as scientifically or legally binding on the Commission.

**Rates. §119 Rate design, class cost of service for electric utilities.** An appropriate customer charge is a question of rate design, not a question of the company's revenue requirement.

**Rates. §119 Rate design, class cost of service for electric utilities.** Shifting customer costs from variable volumetric rates, which a customer can reduce through energy efficiency efforts, to fixed customer charges, that cannot be reduced through energy efficiency efforts, will tend to reduce a customers incentive to save electricity.

**REPORT AND ORDER****Issue Date: December 12, 2012****Effective Date: December 22, 2012**

**APPEARANCES**

**Thomas M. Byrne**, Managing Assoc. General Counsel, and **Wendy K. Tatro**, Asst. General Counsel, Ameren Services Company, P.O. Box 66149, 1901 Chouteau Ave., St. Louis, Missouri 63103;

**James B. Lowery**, Attorney at Law, and **Michael Tripp**, Smith Lewis, LLP, P.O. Box 918, Suite 200, City Centre Building, 111 South Ninth St. Columbia, Missouri 65205-0918; and

**Russ Mitten**, Attorney at Law, Brydon, Swearingen & England, 312 E. Capital Ave., Jefferson City, Missouri 65102.

For Union Electric Company, d/b/a Ameren Missouri.

**Kevin Thompson**, Chief Staff Counsel, **Jennifer Hernandez**, Senior Legal Counsel, **Sarah Kliethermes**, Senior Legal Counsel, **Meghan McClowery**, Legal Counsel, and **Amy Moore**, Legal Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102

For the Staff of the Missouri Public Service Commission.

**Lewis R. Mills, Jr.**, Public Counsel, and **Christina Baker**, Legal Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102

For the Office of the Public Counsel and the Public.

**Jennifer S. Frazier**, Assistant Attorney General, and **Jessica L. Blume**, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102

For the Missouri Department of Natural Resources.

**David Woodsmall**, Attorney at Law, WOODSMALL LAW OFFICE, 807 Winston Court, Jefferson City, Missouri 65101

For the Missouri Energy Consumers Group.

**Diana Vuylsteke**, Attorney at Law, **Brent Roam**, Attorney at Law, **Edward F. Downey**, Attorney at Law, and **Carol Iles**, Attorney at Law, Bryan Cave, LLP, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102

For Missouri Industrial Energy Consumers.

**Lisa C. Langeneckert**, Attorney at Law, Sandberg, Phoenix & Von Gontard, P.C., 600 Washington Ave, 15<sup>th</sup> Floor, St. Louis, Missouri 63101.

For Barnes-Jewish Hospital.

**John B. Coffman**, Attorney at Law, John B. Coffman, LLC, 871 Tuxedo Blvd, St. Louis, Missouri 63119-2044.

For AARP and the Consumers Council of Missouri.

**Thomas R. Schwarz**, Attorney at Law, Blitz, Bardgett & Deutsch, L.C. 308 East High Street, Suite 301, Jefferson City, Missouri 65101.

For the Missouri Retailers Association.

**Henry B. Robertson**, Attorney at Law, Great Rivers Environmental Law Center, 705 Olive St., Suite 614, St. Louis, Missouri 63101  
For Natural Resources Defense Council, Sierra Club, and Earth Island Institute d/b/a Renew Missouri.

**Larry W. Dority**, Attorney at Law and **James M. Fischer**, Attorney at Law, FISCHER & DORITY, PC, 101 Madison St., Suite 400, Jefferson City, Missouri 65101  
For Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company.

**Sherrie A. Hall**, Attorney at Law, **Michael A. Evans**, Hammond and Shinnors, P.C. 7730 Carondelet Ave., Suite 200, St. Louis, Missouri 63105.  
For International Brotherhood of Electrical Workers Locals 2, 309, 649, 702, 1439, 1455, AFL-CIO and International Brotherhood of Operating Engineers Local 148, AFL-CIO.

**CHIEF REGULATORY LAW JUDGE:** **Morris L. Woodruff**

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

### **Summary**

This order allows Ameren Missouri to increase the revenue it may collect from its Missouri customers by approximately \$260.2 million, based on the data contained in the Revised True-up Reconciliation filed by the Missouri Public Service Commission Staff on October 12, 2012.<sup>1</sup> Over \$100 million of that increase is related to Ameren Missouri's increased net fuel costs and would otherwise be recovered by the company through its fuel adjustment clause. Another \$89 million of that increase is for the cost of increasing Ameren Missouri's energy efficiency efforts under Missouri's Energy Efficiency Investment Act, MEEIA. Those efforts will enable Ameren Missouri's customers to take steps to decrease their usage of electricity and thereby decrease their electric bills.

### **Procedural History**

On February 3, 2012, Union Electric Company, d/b/a Ameren Missouri filed a tariff designed to implement a general rate increase for electric service. The tariff would have increased Ameren Missouri's annual electric revenues by approximately \$375.6 million. The tariff revisions carried an effective date of March 4, 2012.

<sup>1</sup> This number is only an estimate of the overall impact of the decisions described later in this report and order. This estimate does not in any way control or modify those decisions.

By order issued on February 6, 2012, the Commission suspended Ameren Missouri's general rate increase tariff until January 2, 2013, the maximum amount of time allowed by the controlling statute.<sup>2</sup> In the same order, the Commission directed that notice of Ameren Missouri's tariff filing be provided to interested parties and the public. The Commission also established February 23, 2012, as the deadline for submission of applications to intervene. The following parties filed applications and were allowed to intervene: The International Brotherhood of Electrical Workers Locals 2, 309, 649, 702, 1439, and 1455, AFL-CIO and International Union of Operating Engineers Local 148 AFL- CIO (collectively the Unions); The Missouri Industrial Energy Consumers (MIEC);<sup>3</sup> The Midwest Energy Consumers Group (MECG);<sup>4</sup> Barnes-Jewish Hospital; The Missouri Department of Natural Resources (MDNR); Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company; The Consumers Council of Missouri; AARP; The Missouri Retailers Association; and The Sierra Club, Earth Island Institute d/b/a Renew Missouri and the Natural Resources Defense Council (collectively Sierra Club). On March 28, 2012, the Commission established the test year for this case as the 12-month period ending September 30, 2011, trued-up as of July 31, 2012. In its March 28 order, the Commission also established a procedural schedule leading to an evidentiary hearing.

In July and August 2012, the Commission conducted twelve local public hearings at various sites around Ameren Missouri's service area. At those hearings, the Commission heard comments from Ameren Missouri's customers and the public regarding Ameren Missouri's request for a rate increase.

In compliance with the established procedural schedule, the parties prefiled direct, rebuttal, and surrebuttal testimony. The evidentiary hearing began on September 27, 2012, and continued through October 11. The parties indicated they had no contested true-up issues and the Commission cancelled the scheduled true-up hearing. The parties filed post-hearing briefs on November 5, with reply briefs following on November 15.

### **The Partial Stipulations and Agreements**

During the course of the evidentiary hearing, various parties filed six nonunanimous partial stipulations and agreements resolving issues that would otherwise have been the subject of testimony at the hearing. No party opposed five of those partial stipulations and agreements. As permitted by its regulations, the Commission treated the unopposed partial stipulations and agreements as unanimous.<sup>5</sup> After considering the stipulations and agreements, the Commission approved them as a resolution of the issues addressed in those agreements. The issues resolved in those stipulations and agreements will not be further addressed in this report and order, except as they may relate to any unresolved issues.

<sup>2</sup> Section 393.150, RSMo 2000.

<sup>3</sup> The members of MIEC are as follows: Anheuser-Busch Companies, Inc.; BioKyowa, Inc.; The Boeing Company; Covidien; Doe Run; Enbridge; Explorer Pipeline; General Motors Corporation; GKN Aerospace; Hussmann Corporation; JW Aluminum; MEMC Electronic Materials; Monsanto; Proctor & Gamble Company; Nestlé Purina PetCare; Noranda Aluminum; and Saint Gobain.

<sup>4</sup> The members of MECG are Walmart Stores, Inc. and JC Penney.

<sup>5</sup> Commission Rule 4 CSR 240-2.115(C).

The sixth nonunanimous stipulation and agreement was signed by Ameren Missouri, Staff, and MIEC, and was filed on November 2. That stipulation and agreement dealt with some rather technical matters regarding 1) class kilowatt-hours, revenues and billing determinants; 2) fuel costs purchased power costs, off-system sales revenues and base factors; and 3) fuel adjustment clause tariff sheets. On November 9, AARP and Consumers Council filed a timely objection to that stipulation and agreement.

AARP and Consumers Council object to the stipulation and agreement because it purports to resolve all issues regarding Ameren Missouri's fuel adjustment clause (FAC) except the FAC-related issues specifically excepted from the settlement. That is, the stipulation and agreement assumes the Commission will approve a Fuel Adjustment Clause in this case, a result that would be contrary to AARP and Consumers Council's position. AARP and Consumers Council did not request any additional hearings regarding the stipulation and agreement other than the evidentiary hearing that was already held.

As provided in the Commission's rules, the Commission will treat that stipulation and agreement as merely a position of the signatory parties to which no party is bound.<sup>6</sup> The issues that were the subject of that stipulation and agreement will be determined in this report and order.

### **Overview**

Ameren Missouri is an investor-owned integrated electric utility providing retail electric service to large portions of Missouri, including the St. Louis Metropolitan area. Ameren Missouri has approximately 1.2 million retail electric customers in Missouri, more than 1 million of whom are residential customers.<sup>7</sup> Ameren Missouri also operates a natural gas utility in Missouri but the rates it charges for natural gas are not at issue in this case.

Ameren Missouri began the rate case process when it filed its tariff on February 3, 2012. In doing so, Ameren Missouri asserted it was entitled to increase its retail rates by approximately \$376 million per year, an increase of approximately 14.6 percent.<sup>8</sup> Ameren Missouri claimed a rate increase was necessary due to increases in net fuel costs, significant investments in infrastructure, significantly expanded energy efficiency programs, reduced normalized revenues due to decreased demand for electricity, higher pension/OPEB and medical costs, and higher operating costs.<sup>9</sup> The company attributed \$103 million of that increase to the rebasing of fuel costs that would otherwise be passed through to customers by operation of the company's existing fuel adjustment clause.<sup>10</sup>

<sup>6</sup> Commission Rule 4 CSR 240-2.115(2)(D).

<sup>7</sup> Baxter Direct, Ex. 1, Page 5, Lines 1-2.

<sup>8</sup> Baxter Direct, Ex. 1, Page 5, Lines 20-21.

<sup>9</sup> Baxter Direct, Ex. 1, Pages 5-6, Lines 21-23, 1-10.

<sup>10</sup> Baxter Direct, Ex. 1, Page 8, Lines 1-2.

Ameren Missouri set out its rationale for increasing its rates in the direct testimony it filed along with its tariff on February 3, 2012. In addition to its filed testimony, Ameren Missouri provided work papers and other detailed information and records to the Staff of the Commission, Public Counsel, and to the intervening parties. Those parties then had the opportunity to review Ameren Missouri's testimony and records to determine whether the requested rate increase was justified.

Where the parties disagreed, they prefiled written testimony to raise those issues to the attention of the Commission. All parties were given an opportunity to prefile three rounds of testimony – direct, rebuttal, and surrebuttal. The process of filing testimony and responding to the testimony filed by other parties revealed areas of agreement that resolved some issues and areas of disagreement that revealed new issues. On September 21, 2012, the parties filed a list of the issues they asked the Commission to resolve. The Commission will address those issues in the order submitted by the parties.

### **Conclusions of Law Regarding Jurisdiction**

A. Ameren Missouri is a public utility, and an electrical corporation, as those terms are defined in Section 386.020(43) and (15), RSMo (Supp. 2011). As such, Ameren Missouri is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo 2000.

B. Section 393.140(11), RSMo 2000, gives the Commission authority to regulate the rates Ameren Missouri may charge its customers for electricity. When Ameren Missouri filed a tariff designed to increase its rates, the Commission exercised its authority under Section 393.150, RSMo 2000, to suspend the effective date of that tariff for 120 days beyond the effective date of the tariff, plus an additional six months.

### **Conclusions of Law Regarding the Determination of Just and Reasonable Rates**

A. In determining the rates Ameren Missouri may charge its customers, the Commission is required to determine that the proposed rates are just and reasonable.<sup>11</sup>

Ameren Missouri has the burden of proving its proposed rates are just and reasonable.<sup>12</sup>

B. In determining whether the rates proposed by Ameren Missouri are just and reasonable, the Commission must balance the interests of the investor and the consumer.<sup>13</sup>

<sup>11</sup> Section 393.150.2, RSMo 2000.

<sup>12</sup> Section 393.150.2, RSMo 2000.

<sup>13</sup> *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1944).

In discussing the need for a regulatory body to institute just and reasonable rates, the United States Supreme Court has held as follows:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.<sup>14</sup>

In the same case, the Supreme Court provided the following guidance on what is a just and reasonable rate:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.<sup>15</sup>

The Supreme Court has further indicated:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.<sup>16</sup>

<sup>14</sup> *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

<sup>15</sup> *Bluefield*, at 692-93.

<sup>16</sup> *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (citations omitted).

C. In undertaking the balancing required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said:

Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.<sup>17</sup>

D. Furthermore, in quoting the United States Supreme Court in *Hope Natural Gas*, the Missouri Court of Appeals said:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' ... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.<sup>18</sup>

### **The Rate Making Process**

The rates Ameren Missouri will be allowed to charge its customers are based on a determination of the company's revenue requirement. Ameren Missouri's revenue requirement is calculated by adding the company's operating expenses, its depreciation on plant in rate base, taxes, and its rate of return multiplied by its rate base. The revenue requirement can be expressed as the following formula:

Revenue Requirement = E + D + T + R(V-AD+A) Where:

E = Operating expense requirement

D = Depreciation on plant in rate base

T = Taxes including income tax related to return

R = Return requirement

(V-AD+A) = Rate base

For the rate base

calculatio

n: V =

Gross

Plant

AD = Accumulated depreciation

A = Other rate base items

All parties accept the basic formula. Disagreements arise over the amounts that should be included in the formula.

<sup>17</sup> *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942).

<sup>18</sup> *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W. 2d 870, 873 (Mo. App. W.D. 1985).

## The Issues

### 1. Regulatory Policy and Economic Considerations:

This is not a true issue in that the parties do not ask the Commission to resolve any questions regarding the particulars of Ameren Missouri's request for a rate increase. Instead, the parties presented testimony regarding general policy matters that affect the Commission's decision making regarding the detailed issues that will be addressed later in this report and order. Because this is only a general policy discussion, the Commission will not make findings of fact or conclusions of law about these policy matters.

A great deal of testimony was offered by the parties regarding the difficult economic situation that is currently facing individuals and businesses in Missouri in general and in Ameren Missouri's service territory in particular. Aside from the testimony offered at the evidentiary hearing, the Commission also heard the message of hard times loud and clear from Ameren Missouri's customers during the twelve, well-attended, local public hearings the Commission conducted throughout Ameren Missouri's service territory.

The Commission was created to serve the public interest and it takes that responsibility very seriously. The Commission serves the public interest by establishing just and reasonable rates and the Commission has endeavored to do so in this report and order.

Many customers are already having a hard time paying their electric bills. Increasing Ameren Missouri's rates may make it even harder for some customers to pay their bills. However, a just and reasonable rate does not necessarily mean a lower rate.

The Commission has said many times that no one benefits when a utility is deprived of the ability to charge its customers a just and reasonable rate. Customers may initially be happy when the rates they pay are kept low, but if a utility's rates are kept unreasonably low, the reliability of the service the utility offers will inevitably suffer. No one likes to pay increased rates, but no one likes to sit in the cold and dark when the lights go out.

The other side of the just and reasonable rate argument is offered by Ameren Missouri. The theme of much of the company's testimony and argument is that the regulatory system in Missouri is broken because Ameren Missouri has been unable to earn its allowed rate of return in recent years. In accord with that theme, Ameren Missouri has offered several ideas to fix the "broken" regulatory system, some of which the Commission has accepted, others of which it has rejected.

Perhaps Ameren Missouri's earnings have not been as healthy in the last five years as it would like, but many of the company's customers have also suffered from earnings that are not as large as they would like. In previous rate cases, the Commission has adopted some proposals designed to improve the regulatory system and it has adopted some additional proposals in this report and order. The Commission is willing to listen to and consider additional ideas for ways in which the system can be improved. However, what may be only a temporary downturn in the company's earnings does not mean the current regulatory system is broken. That conclusion is reflected throughout the remaining issues addressed in this report and order.

## 2. Cash Working Capital:

### A. Should the collection lag be calculated using the CURST 246 Report for the 12-month period ending October 31, 2010, or the Accounts Receivable Breakdown Report?

#### Findings of Fact:

1. Cash Working Capital is a measure of the amount of cash the company needs to keep on hand to handle its day-to-day business affairs.<sup>19</sup> That amount is included in rate base and the company is allowed to earn a return on that investment.<sup>20</sup>

2. To determine the appropriate amount to allow for Cash Working Capital, Ameren Missouri performed a lead-lag study. As the name implies, a lead-lag study has two aspects. The revenue lag portion of the study seeks to determine the lag time between the date customers receive service and the date the company receives payment from those customers. The other half of the equation is the expense lead, which seeks to determine the time between when the company receives goods and services and when it pays for those goods and services.<sup>21</sup>

3. This issue concerns the company's collection lag, the measure of the amount of time between when Ameren Missouri sends a bill to its customers and when the company receives payment from those customers.<sup>22</sup>

4. Ameren Missouri presented the testimony of Michael Adams, a consultant with Concentric Energy Advisors,<sup>23</sup> who analyzed the company's aged accounts receivable breakdown report to support a collection lag of 28.75 days. In other words, Ameren Missouri contends that on average, it collects payment from a customer 28.75 days after it bills the customer for electric service.

5. In past rate cases, Ameren Missouri has calculated its collection lag using data from something called a CURST 246 report that the company prepared until 2010.<sup>24</sup>

Staff and MIEC contend Ameren Missouri's current estimation of its collection lag is inflated and would instead rely on the last available CURST 246 reports.<sup>25</sup>

6. Staff relies on the CURST 246 report for the twelve months ending October 31, 2010 to support a collection lag of 21.11 days.<sup>26</sup> MIEC relies on the CURST 246 report for the twelve months ending March 2010 to support a collection lag of 21.01 days.<sup>27</sup> MIEC did not explain why it uses the older CURST 246 report.

<sup>19</sup> Adams Direct, Ex. 8, Page 3, Lines 13-14.

<sup>20</sup> Adams Direct, Ex. 8, Page 4, Lines 18-19.

<sup>21</sup> Adams Direct, Ex. 8, Page 5, Lines 1-13.

<sup>22</sup> Adams Direct, Ex. 8, Page 7, Lines 6-12.

<sup>23</sup> Adams Direct, Ex. 8, Page 1, Line 13.

<sup>24</sup> Boateng Surrebuttal, Ex. 231, Page 3, Lines 1-14.

<sup>25</sup> Boateng Surrebuttal, Ex. 231, Page 2, Lines 14-17 and Meyer Direct, Ex. 510, Page 20, Lines 18- 19.

<sup>26</sup> Boateng Surrebuttal, Ex. 231, Page 2, Lines 14-15.

<sup>27</sup> Meyer Direct, Ex. 510, Page 21, Lines 13-14.

7. The test year for this case is the twelve-month period ending September 30, 2011, trued-up as of July 31, 2012. Therefore, the CURST 246 reports used by Staff and MIEC present information from outside the test year. In general, the use of out-of-test-year data, violates the matching principle behind the concept of a test year.

8. The CURST 246 report was developed some 25 years ago by Ameren Missouri's IT department<sup>28</sup> and purportedly showed Ameren Missouri's cash receipts on a daily basis as they were collected by the company. The report was compiled for over 25 years and was used by the company solely to calculate the collection lag for rate cases.<sup>29</sup>

9. No other electric utility in this state uses a collection report similar to the CURST 246 report.<sup>30</sup> Ameren Missouri's witness testified that to his knowledge, no other utility or regulatory agency relies on the CURST 246 report, or anything like it.<sup>31</sup>

10. Ameren Missouri questioned the accuracy of the CURST 246 report and found that it could not be replicated or validated. After 2010, Ameren Missouri decided to stop producing the CURST 246 report.<sup>32</sup>

11. Neither Staff's witness, nor MIEC's witness testified to having undertaken any study to verify the accuracy of the CURST 246 report.<sup>33</sup>

12. To calculate its collection lag, Ameren Missouri relied primarily on its Accounts Receivable Breakdown Report. When a customer is billed, an amount is added to the company's accounts receivable. When the customer pays the bill, accounts receivable are reduced by the amount of the payment. The company monitors its accounts receivable by maintaining a monthly aging report to determine which customers pay their bills on time and which accounts receivable are delinquent. The aging report indicates in aggregate which receivables are current, or within 30 days outstanding, 30-59 days outstanding, 60-89 days outstanding, 90-119 days outstanding, and 120 or more days outstanding.<sup>34</sup>

13. Ameren Missouri adjusted that Accounts Receivable Breakdown Report to account for those accounts receivable that would never be collected and would instead be treated as bad debt. The uncollectable amounts were removed for purposes of the collection lag calculation by removing a percentage of accounts receivable that the company believed, based on a historical analysis,<sup>35</sup> were likely to be uncollectable for each period.<sup>36</sup>

<sup>28</sup> Transcript, Page 461, Lines 19-21.

<sup>29</sup> Adams Rebuttal, Ex. 9, Page 6, Lines 14-20.

<sup>30</sup> Adams Rebuttal, Ex. 9, Page 16, Lines 1-3.

<sup>31</sup> Transcript, Page 463, Lines 15-17.

<sup>32</sup> Adams Rebuttal, Ex. 9, Page 7, Lines 10-13.

<sup>33</sup> Transcript, Page 479, Lines 21-24.

<sup>34</sup> Adams Rebuttal, Ex. 9, Page 4, Lines 9-19.

<sup>35</sup> Transcript, Page 471-472, Lines 22-25, 1-4.

<sup>36</sup> Transcript, Page 462, Lines 14-25.

14. When his calculation of a collection lead was challenged by MIEC and Staff, Ameren Missouri's witness undertook steps to verify the accuracy of that calculation. The company provided him with five months of data from the test year showing 1) the date customers were billed; 2) the due date on the bill; and 3) the date the bill was paid in full. Using that data, he calculated a collection lag of 32.72 days. The collection lag was calculated at 27.79 days when outstanding balances were treated as if they had been outstanding for no more than 120 days.<sup>37</sup>

15. As a further verification of his analysis, Ameren Missouri's witness performed a turnover ratio analysis. This is the analysis that Laclede Gas Company and Atmos Energy Corporation use to calculate their collection lag. The analysis of Ameren Missouri's turnover ratio produced a collection lag of 26.02 days, which is closer to the collection lag proposed by the company than it is to the collection lags based on the old CURST 246 reports.<sup>38</sup>

16. The 28.75-day collection lag utilized by Ameren Missouri is consistent with collection lags calculated for other utilities around the country, including that used by Ameren Illinois.<sup>39</sup>

17. Staff and MIEC raised several additional criticisms of Ameren Missouri's aged accounts receivable breakdown analysis and its proposed collection lag, but all were refuted by Ameren Missouri.

18. Staff and MIEC sought to rely on the out of test year CURST 246 report. However, they performed no analysis to demonstrate that the old report was still accurate for use in this test year or indeed that it was ever accurate. Simply relying on an old familiar report as received wisdom is not competent and substantial evidence. After reviewing the competent and substantial evidence presented on this issue, the Commission finds that the 28.75-day collection lag utilized by Ameren Missouri in its lead-lag study is a reasonable and accurate measure of the company's collection lag.

#### **Conclusions of Law:**

There are no additional conclusions of law for this issue.

#### **Decision:**

The appropriate collection lag to be used in Ameren Missouri's lead-lag study is 28.75 days as proposed by Ameren Missouri.

#### **B. Should the income tax calculation be removed from Ameren Missouri's cash working capital requirement?**

<sup>37</sup> Adams Rebuttal, Ex. 9, Page 14, lines 5-10.

<sup>38</sup> Adams Rebuttal, Ex. 9, Page 16, Lines 16-20.

<sup>39</sup> Transcript, Page 467, Lines 10-22.

**Findings of Fact:**

1. This sub-issue concerns another aspect of Ameren Missouri's calculation of its cash working capital requirement. MIEC's witness, Greg Meyer, points out that Ameren Missouri's calculation of cash working capital includes provisions recognizing the cash requirement associated with making income tax payments to the IRS. However, he asserts that due to favorable tax provisions, Ameren Corporation has paid little or no corporate income tax in recent years. For that reason, Meyer asserts that no cash working capital requirement should be calculated for income tax expense.<sup>40</sup> Ameren Missouri and Staff oppose the proposed adjustment to cash working capital.

2. Ameren Missouri's witness regarding cash working capital was Michael J. Adams. Adams is Senior Vice President of Concentric Energy Advisors, Inc. Concentric is a management consulting and economic advisory firm. Adams has an MBA in finance from the University of Illinois-Springfield.<sup>41</sup>

3. Ameren Missouri's cash working capital analysis reflected an expense lead of 37.88 days associated with Federal Income Tax expense.<sup>42</sup>

4. Ameren Missouri employs statutory tax rates and payment dates when calculating its income tax expense for revenue requirement purposes. As such, there would still be an income tax component of the cash working capital requirement regardless of whether a tax expense was actually incurred or paid.<sup>43</sup>

5. No party challenged Ameren Missouri's calculation of the lead associated with income tax expense. Rather, MIEC's witness asserted that no allowance should be made in cash working capital for income taxes if no cash will be paid out for income taxes.<sup>44</sup>

6. Ameren Missouri's witness agreed that any company activity that does not represent a cash inflow or outflow should not be included in a lead-lag study.<sup>45</sup>

7. Staff's witness on cash working capital never addressed the income tax component. However, Staff supports Ameren Missouri's position on this issue.<sup>46</sup>

8. MIEC's witness on this issue was Greg Meyer. Meyer is also a consultant on public utility regulation and is an associate with Brubaker and Associates, Inc. He has a Bachelor of Science degree in business administration, with a major in accounting, from the University of Missouri. He was also a long-time employee of this Commission before becoming a consultant in 2008.<sup>47</sup>

<sup>40</sup> Meyer Direct, Ex. 510, Pages 19-20, Lines 10-19, 1-5.

<sup>41</sup> Adams Direct, Ex. 8, Pages 1-2, Lines 12-23, 1-4.

<sup>42</sup> Adams Rebuttal, Ex. 9, Page 22, Lines 13-16.

<sup>43</sup> Adams Rebuttal, Ex. 9, Pages 22-23, Lines 22-23, 1-3.

<sup>44</sup> Transcript, Page 493, Lines 13-25.

<sup>45</sup> Transcript, Page 452, Lines 10-15.

<sup>46</sup> Staff's Revised Statement of Positions on the Issues, filed October 3, 2012, Page 3.

<sup>47</sup> Meyer Direct, Ex. 510, Appendix A, Page 1, Lines 9-12.

9. MIEC's witness never quantified the amount of his proposed adjustment regarding income taxes and cash working capital in his testimony. Only in its reply brief does MIEC point to an accounting schedule attached to Ameren Missouri's true-up direct testimony to claim that \$2.6 million in cash working capital for income tax should be removed from rate base for cash working capital.<sup>48</sup>

10. MIEC's witness did not specifically challenge Ameren Missouri's calculation of its income taxes for cash working capital purposes as those taxes are laid out in Ameren Missouri's true-up accounting schedules. Instead, he broadly asserts that "Ameren Corporation has paid little or no income tax in recent years."<sup>49</sup> Similarly, in his surrebuttal testimony he asserts:

[D]ue to the fact that Ameren Missouri is able to take advantage of significant tax deductions, most, if not all, of its income tax expense represents deferred amounts that are not paid currently. As a result, this expense does not require cash and should not be considered in calculating the CWC requirement.<sup>50</sup>

### **Conclusions of Law:**

A. Any decision by the Commission must be supported by competent and substantial evidence upon the whole record.<sup>51</sup>

### **Decision:**

This is an underdeveloped issue that comes down to a question of witness credibility. MIEC's witness, Greg Meyer, while generally credible on accounting and regulatory issues, claims no special expertise on income tax questions. Yet, he asserts, in very broad terms, his belief that Ameren Corporation has "paid little or no income tax in recent years" and that "most, if not all, of its income tax expense represents deferred amounts that are not paid currently". Meyer did not attempt to calculate any actual figures on what income tax liability and cash payments Ameren Corporation would incur. The witness' vague and unsupported statements about "little or no" or "most, if not all" do not constitute competent and substantial evidence to support MIEC's position. In sum, the Commission finds Greg Meyer's testimony about Ameren Corporation's income tax liability to be not credible.

The credible testimony of Ameren Missouri's witness Michael Adams, and the credible accounting schedules sponsored by Ameren Missouri's witness, Gary Weiss, are sufficient competent and substantial evidence to support Ameren Missouri's position. The Commission finds that the income tax calculation should not be removed from Ameren Missouri's cash working capital requirement.

<sup>48</sup> Reply Brief of The Missouri Industrial Energy Consumers, Page 12. The brief cites to Weiss True-Up Direct, Ex. 78, Schedule GSW-TE 19-1.

<sup>49</sup> Meyer Direct, Ex. 510, Page 19, Line 17.

<sup>50</sup> Meyer Surrebuttal, Ex. 511, Page 22, Lines 11-16.

<sup>51</sup> Section 536.140.2(3), RSMo (Supp. 2011).

### 3. Income Tax & ADIT & NOL:

**A. Should a portion of the \$2.8 million income tax benefit realized on dividends paid on Ameren Corporation shares held in Employee Stock Ownership Plan (“ESOP”) accounts be a reduction to Ameren Missouri’s revenue requirement?**

#### Findings of Fact:

1. Ameren Corporation, Ameren Missouri’s corporate parent, maintains an employee stock ownership plan (ESOP) as one of a number of tax-qualified employee plans. The ESOP is offered as part of Ameren’s 401(k) plan and all employees of Ameren, including employees of Ameren Missouri are eligible to participate.<sup>52</sup>

2. Each year, eligible Ameren employees may designate a limited percentage of their salary to be withheld and contributed to the Ameren 401(k) plan. The corporate employer, be it Ameren Missouri or some other Ameren affiliate, will then match a percentage of the employee contribution and add it to the employee’s 401(k).<sup>53</sup>

3. Ameren Missouri’s cost to pay employee salaries and its share of the corporate match contributed to an employee’s 401(k) plan is included in the company’s cost of service and is recovered from ratepayers through rates.<sup>54</sup>

4. Ameren Corporation receives certain tax deductions from the federal government for employee salaries and for the match it contributes to the 401(k) to encourage it to offer a 401(k) plan to its employees. Those tax benefits are flowed back to ratepayers and are not in dispute.<sup>55</sup> Rather, the dispute arises from one particular 401(k) related tax deduction received by Ameren Corporation. Ameren Missouri contends that tax deduction belongs entirely to Ameren Corporation. Staff and MIEC claim that a proportionate share of the tax deduction should be included as an offset to the costs included in Ameren Missouri’s cost of service for ratemaking purposes. Approximately \$3.2 million is at issue.

5. As part of its 401(k) plan, each year an eligible Ameren employee may select one of twenty-one investment funds in which his or her contribution and the employer match will be invested. One of the available investment funds is the Ameren ESOP. Thus, each employee can decide to invest none, some, or all of his or her contribution, including the match, in Ameren stock.<sup>56</sup>

<sup>52</sup> Warren Rebuttal, Ex. 10, Page 4, Lines 5-13.

<sup>53</sup> Warren Rebuttal, Ex. 10, Page 4, Lines 15-17.

<sup>54</sup> Brosch Surrebuttal, Ex. 502, Pages 23-24, Lines 23-24, 1.

<sup>55</sup> Warren Rebuttal, Ex. 10, Page 6, Lines 5-10.

<sup>56</sup> Warren Rebuttal, Ex. 10, Page 4, Lines 15-23.

6. The particular tax deduction in dispute is a provision of the federal tax code that allows a corporation to take a Dividends Paid Deduction for a dividend it pays on its stock to the extent that stock is held in an ESOP.<sup>57</sup> Ameren Corporation from time to time pays dividends on its stock, including stock held in an ESOP. It is a portion of that ESOP– related tax deduction that Staff and MIEC seek to claim on behalf of Ameren Missouri’s ratepayers.

7. MIEC contends that the money Ameren Corporation uses to pay dividends is derived in large part from dividends paid by Ameren Missouri to its corporate parent. The argument is that since Ameren Missouri earns those dividends from rates paid by ratepayers, it is only fair that a portion of the tax benefits derived from those dividend payments should flow back to Ameren Missouri’s ratepayers.<sup>58</sup>

8. Staff reaches the same result by arguing that a significant portion of the stock held in the ESOP is the result of contributions made by Ameren Missouri employees. In addition, Staff argues that those employees’ salaries, as well as the match contributed by the company, are paid by ratepayers.<sup>59</sup>

9. Neither argument put forth by Staff and MIEC is well founded. Ameren Corporation pays its dividends out of its retained earnings at the sole discretion of its Board of Directors. Some of the money in its retained earnings may have ultimately been derived from money collected from ratepayers for the sale of electricity, but Ameren Corporation could just as easily use funds derived from one of its other subsidiaries to pay a dividend. It could, if it wished, even borrow the money to pay a dividend.<sup>60</sup>

10. The important fact is that retained earnings belong to the company and its shareholders, not to ratepayers. Ameren Corporation can do whatever it wants with its retained earnings. If it chooses to use those earnings to declare a dividend to its shareholders, it may do so. If it chooses to use those retained earnings to throw a giant party or invest in property on the moon, it must answer only to its shareholders, not to this Commission, and not to ratepayers. Ameren Corporation and its shareholders are entitled to keep any tax benefits that arise from its decision on how to spend its money.

11. The argument that ratepayers have a claim to Ameren Corporation’s tax deduction because the stock is purchased by Ameren Missouri’s employees whose compensation is paid by ratepayers is even more ill founded. Once salary is paid to an Ameren Missouri employee, it becomes the property of the employee. If that employee chooses to invest part of his or her money in shares of Ameren Corporation, Ameren Missouri’s ratepayers do not have any claim to that investment or any tax benefits that may result from that investment. This argument really is as invalid as an argument that the state should be able to claim the mortgage tax deduction of a state employee because the state employee used his or her taxpayer-funded salary to buy the house.

<sup>57</sup> Warren Rebuttal, Ex. 10, Page 5, Lines 11-15.

<sup>58</sup> Brosch Direct, Ex. 500, Page 29, Lines 5-23.

<sup>59</sup> Cassidy Surrebuttal, Ex. 234, Page 9, Lines 15-20.

<sup>60</sup> Warren Rebuttal, Ex. 10, Page 8, Lines 3-9.

12. Staff and MIEC complain that Ameren Corporation is trying to deny ratepayers their share of the tax benefits derived from the payment of these dividends by hiding behind the corporate distinctions between parent and subsidiary company. However, this argument misses the point. The results would be the same if Ameren Missouri were a stand-alone company paying the dividends directly instead of first contributing the money to its corporate parent. Either way, the dividends are paid from shareholder-owned funds to which ratepayers have no claim.

13. Furthermore, the tax deduction Ameren Corporation receives when it offers a dividend on stock held by an ESOP is presumably offered to increase the company's incentive to offer that benefit to its employees. Attempting to grab that incentive for Ameren Missouri's ratepayers could only reduce Ameren Corporation's incentive to offer that benefit to Ameren Missouri's employees, to the detriment of those employees.

### **Conclusions of Law:**

A. The law in Missouri is crystal-clear: "When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions."<sup>61</sup> Once Ameren Missouri has earned and retained a profit, ratepayers no longer have a claim to those earnings, whether they are passed to a parent corporation in the form of dividends or spent or invested in some other way by the company.

### **Decision:**

Ameren Missouri ratepayers are not entitled to claim a share of the tax benefits resulting from Ameren Corporation's decision to pay a dividend to Ameren Missouri employees who also happen to be shareholders under Ameren Corporation's ESOP. No portion of the income tax benefit realized on dividends paid on Ameren Corporation shares held in Employee Stock Ownership Plan ("ESOP") accounts should be a reduction to Ameren Missouri's revenue requirement.

**B. Should CWIP-related ADIT balances be included as an offset to rate base?**

### **Findings of Fact:**

1. Federal tax law allows Ameren Missouri to utilize accelerated and bonus depreciation and other means to effectively defer the payment of income taxes associated with construction projects. Because of differences between tax accounting and regulatory accounting, Ameren Missouri is able to collect money from ratepayers to cover those taxes before it must actually pay the taxes. Such deferred taxes are accumulated in Accumulated Deferred Income Tax (ADIT) accounts.<sup>62</sup>

<sup>61</sup> *Straube v. Bowling Green Gas Co.*, 360 Mo. 132, 142, 227 S.W.2d 666, 671 (Mo. 1950)

<sup>62</sup> Brosch Direct, Ex. 500, Pages 30-31.

2. The type of ADIT at issue in this case is created when tax law allows a utility to deduct costs associated with a construction project that, under financial and regulatory accounting rules, must be capitalized and depreciated over a period of time.<sup>63</sup>

3. Because the tax benefits resulting from deferred income taxes are not immediately flowed through to ratepayers, credit ADIT balances represent an essentially free source of capital funds available for use by the utility. In other words, that credit ADIT balance would be a free loan to the company from ratepayers.<sup>64</sup>

4. Credit ADIT balances have grown significantly in recent years because, Congress has added a number of deductions and bonus depreciation features to the tax code to help stimulate the economy.<sup>65</sup>

5. Because the credit ADIT balance would otherwise only benefit shareholders, those balances are usually subtracted from the utility's rate base when calculating the company's rates. By that means, the net amount of investor-supplied capital within the company's rate base can be quantified.<sup>66</sup>

6. Ameren Missouri does not disagree with the general principle to use credit ADIT balances as an off-set to rate base. However, disagreement arises over the treatment of that portion of the ADIT balance related to construction costs incurred for projects that remain in construction work in progress (CWIP) accounts at the end of the test period.<sup>67</sup>

7. Construction work in progress, or CWIP, is treated differently because of a voter-approved initiative that created a statutory prohibition on the inclusion of CWIP in an electric utility's rate base. Ameren Missouri contends that since it is prohibited from including CWIP in its rate base, it should not be required to recognize tax benefits associated with the CWIP as a reduction in rate base until the CWIP itself is added to rate base.<sup>68</sup>

8. Ameren Missouri has removed CWIP related ADIT balances from its rate base in previous rate cases. It explains that it has taken a different position in this case because those balances only became significant in recent years.<sup>69</sup>

<sup>63</sup> Warren Rebuttal, Ex. 10, Page 11, Lines 13-15.

<sup>64</sup> Brosch Direct, Ex. 500, Page 32, Lines 3-17.

<sup>65</sup> Transcript, Pages 803-804, Lines 24-25, 1-

<sup>66</sup> Brosch Direct, Page 32, Lines 15-17.

<sup>67</sup> Warren Rebuttal, Ex. 10, Page 12, Lines 2-4.

<sup>68</sup> Warren Rebuttal, Ex. 10, Page 12, Lines 5-14.

<sup>69</sup> Warren Rebuttal, Ex. 10, Page 13, Lines 10-14.

9. Even though Ameren Missouri cannot add CWIP to its rate base, and therefore cannot earn a return on that investment, until the property is fully operational and used for service, it is allowed to earn an Allowance for Funds Used for Construction (AFUDC) before the property under construction is added to rate base. AFUDC is accrued during the process of construction and is added to the balances of plant in service that is included in rate base when the plant is placed in service. It is then recovered from ratepayers over the remaining life of the property.<sup>70</sup>

10. Ameren Missouri contends that since current customers are not burdened with CWIP, they should not be allowed to benefit from lower rates that would result from including CWIP-related ADIT balances as an offset to rate base. To do otherwise would benefit current customers at the expense of future customers.<sup>71</sup> However, any “generational” mismatch will be slight. Ameren Missouri will begin recovering nearly all of these AFUDC amounts in its next rate case because all of Ameren Missouri’s CWIP projects that were active at the end of the true-up period on July 31, 2012, are estimated to be in service on or before July 31, 2013.<sup>72</sup>

11. CWIP related ADIT balances must be accounted for in rate base because AFUDC is applied to Ameren Missouri’s gross investment in CWIP, with no recognition given to the CWIP-related ADIT amounts that serve to reduce the company’s actual net capital requirements for CWIP.<sup>73</sup> An example offered by MIEC’s witness illustrates this problem:

Consider a simplified example, where a utility is assumed to be constructing a single asset costing \$1 million over a construction period of one year that will be funded fully at the beginning of construction, but will remain in CWIP and earning AFUDC at an assumed 10 percent rate throughout the year of construction. Assume also that the utility has elected ‘repairs’ tax accounting for this asset, allowing the full cost of the asset to be immediately deducted for income tax purposes in the current tax year. The value of the income tax deduction for this project being treated as a deductible ‘repair’ at a 38 percent federal/state tax rate would result in an immediate \$380,000 income tax deferral to the utility, requiring the accrual of CWIP-related ADIT that reduces the utility’s actual out-of-pocket investment in the new asset to only \$620,000 after taxes.

<sup>70</sup> Brosch Surrebuttal, Ex. 502, Page 29, Lines 8-13.

<sup>71</sup> Warren Rebuttal, Ex. 10, Page 12, Lines 7-14.

<sup>72</sup> Brosch Surrebuttal, Ex. 502, Page 27, Lines 10-12.

<sup>73</sup> Brosch Direct, Ex. 500, Page 37, Lines 8-12.

However, AFUDC will be accrued at 10 percent on the gross CWIP cost for the full year the asset is in CWIP, resulting in Plant-in-Service added to rate base of \$1.1 million (\$1 million plus \$100,000 of AFUDC) with no recognition given to the CWIP-related ADIT in accruing AFUDC. Clearly, when the AFUDC rate is applied to the entire \$1 million of gross investment, with no reduction for CWIP-related AFUDC, the utility is fully compensated for its gross investment in this asset. In this example, the \$100,000 of allowed AFUDC on a gross \$1 million investment, when the utility's after-tax net investment is only \$620,000, would significantly overstate AFUDC and future rate base.<sup>74</sup>

In other words, failure to recognize the CWIP-related ADIT balance in the company's rate base will overstate the companies AFUDC costs and future rate base, essentially allowing the company to earn AFUDC and a return on capital supplied by ratepayers.

#### **Conclusions of Law:**

A. Missouri's Anti-CWIP statute states:

Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.<sup>75</sup>

#### **Decision:**

As fully explained in the findings of fact, Ameren Missouri must include CWIP-related ADIT balances as an offset to rate base to avoid overstating AFUDC and future rate base, to the detriment of both current and future ratepayers.

**4. Plant in Service Accounting (PISA): Should the Commission grant Ameren Missouri accounting authority to accrue a return on invested capital and to defer depreciation for non-revenue-producing plant additions in a regulatory asset during the period between the date when those plant additions begin serving customers until the date they are reflected in rate base in a later rate case?**

<sup>74</sup> Brosch Direct, Ex. 500, Pages 37-38, Lines 13-25, 1-7.

<sup>75</sup> Section 393.135, RSMo 2000.

**Findings of Fact:**

1. This issue is closely tied to Ameren Missouri's frequently repeated concerns about its inability to earn its allowed rate of return due to what it believes to be excessive regulatory lag.<sup>76</sup> The regulatory lag that plant in service accounting (PISA) aims to address results from the regulatory treatment of newly constructed plant. While the plant is being constructed, the utility is able to accrue AFUDC to compensate it for the money that is being invested in the plant. That money cannot be added directly into rate base because of Missouri's anti-CWIP statute. The AFUDC is accumulated during the construction process and is moved into rate base when the plant goes into service. The utility recovers that AFUDC cost over the remaining service life of the plant.<sup>77</sup>

2. AFUDC stops when the plant goes into service. At that point, the cost of the plant is eligible to be included in rate base and the plant begins depreciating. However, the utility cannot begin to recover the cost of the plant in rates until that cost is added to rate base in a subsequent rate case. There will always be some gap after AFUDC stops and before the cost of the plant can be put into rate base.<sup>78</sup> It is that gap that Ameren Missouri seeks to bridge through its PISA proposal.

3. PISA is a new concept developed by Ameren Missouri's Vice President, Business Planning and Controller, Lynn Barnes.<sup>79</sup> Since it is a new concept, it has not been adopted by any other state utility commission.<sup>80</sup> The PISA proposal would only apply to the net change in plant in service that is unrelated to new business. In other words, it would not apply to new service connections that would generate new revenue for the company.<sup>81</sup>

4. In effect, PISA would allow Ameren Missouri to continue to accrue AFUDC on eligible plant additions until that new plant can be added to the company's rate base in a future rate case. In that, it is very similar to the well-known regulatory concept of construction accounting.

5. Construction accounting is frequently used to help a utility recover the cost of single large construction projects, such as Ameren Missouri's recent Sioux Scrubber project. Through PISA, Ameren Missouri would extend that principle of cost recovery to include the many small construction projects that do not produce new revenue for the company, but collectively tie up a large amount of the company's capital outlays.<sup>82</sup>

<sup>76</sup> Barnes Rebuttal, Ex. 12, Page 18, Lines 6-9.

<sup>77</sup> Barnes Rebuttal, Ex. 12, Page 20, Lines 4-11.

<sup>78</sup> Barnes Rebuttal, Ex. 12, Page 20, Lines 12-17.

<sup>79</sup> Transcript, Page 582, Lines 2-4.

<sup>80</sup> Transcript, Page 580, Lines 17-21.

<sup>81</sup> Barnes Direct, Ex. 11, Page 18, Lines 4-12.

<sup>82</sup> Barnes Rebuttal, Ex. 12, Page 21, Lines 3-13.

6. There are several problems with Ameren Missouri's PISA proposal. First, over time, PISA could place a very heavy financial burden on ratepayers. Adoption of PISA would have no impact on the rates established for this case because the proposal is only to allow Ameren Missouri to begin to defer certain costs for possible recovery in a future rate case. However, if the Commission allows Ameren Missouri to recover the deferred costs in its next rate case there would be an impact on rates at that time.<sup>83</sup>

7. If PISA had been implemented in the last rate case, \$637 million in plant additions would have qualified for PISA treatment during the period between the true-up date in the company's last rate case and the true-up date in this case. Lost depreciation and return that would be included in rate base under the PISA proposal amounted to \$37.6 million during that period. If PISA had been in effect for this rate case, the company's annual revenue requirement would have been increased by \$6.2 million.<sup>84</sup>

8. Although PISA would have an initial impact of around \$6.2 million per year in the next rate case, those costs would not end after one year. The additional revenue Ameren Missouri would recover through PISA would continue to accumulate throughout the 30-40 year life of the assets as they depreciate.<sup>85</sup> Over forty years, that \$6.2 million per year would total more than \$240 million.<sup>86</sup> Of course, the PISA would not necessarily end after a single rate case. If the Commission renewed PISA for additional years, additional recoveries would tend to pancake on top of each other and the numbers could quickly become very large.

9. Second, because PISA is a new concept that has never been tested, there are no clear standards for what would be treated as a non-revenue producing asset that should be excluded from the PISA.<sup>87</sup> Instead, the Commission's Staff would have to sort through all the company's data to determine whether the company has properly classified those assets.<sup>88</sup> The burden on Staff to review company information in rate cases is already substantial.

10. Third, PISA would violate the test-year principle in that it would routinely draw non-test year expenses into the test year for the next rate case. The test year principle is important because it is designed to match revenues and expenses at a given time to try to determine an appropriate revenue requirement for the company.<sup>89</sup> By drawing in certain out-of-test-year expenses to be matched against test year revenues, while not examining all factors that might demonstrate a corresponding increase in revenue or decrease in expenses, PISA would unfairly increase the company's revenue requirement at the expense of ratepayers.<sup>90</sup>

<sup>83</sup> Transcript, Page 607, Lines 17-23.

<sup>84</sup> Barnes Surrebuttal, Ex. 13, Pages 5-6, Lines 21-23, 1-5.

<sup>85</sup> Transcript, Page 669-670, Lines 7-25, 1-16.

<sup>86</sup> Transcript, Page 675, Lines 2-4.

<sup>87</sup> Brosch Direct, Ex. 500, Pages 21-22, Lines 17-23, 1-4.

<sup>88</sup> Transcript, Pages 743-744.

<sup>89</sup> Robertson Direct, Ex. 406, Page 6, Lines 3-6.

<sup>90</sup> Brosch Direct, Ex. 500, Pages 19-20, Lines 15-22, 1-12.

11. The Commission does on occasion authorize accounting authority orders and tracking mechanisms that allow a utility to defer certain extraordinary costs for possible recovery in a future rate case. Several such mechanisms are authorized in this case. In addition, the Commission has authorized the use of construction accounting to help utilities deal with the financial burden of large construction projects. However, those mechanisms are premised on the existence of some extraordinary circumstance. Ameren Missouri concedes the expenses it would recover through PISA are not extraordinary, are not volatile or unpredictable, and are not outside the company's control.<sup>91</sup>

12. Fourth, Ameren Missouri contends PISA is needed to provide the company with a greater incentive to invest limited capital in needed infrastructure repairs and replacement.<sup>92</sup> However, while Ameren Missouri's witness testified that there are some additional discretionary capital projects the company might like to undertake if it were allowed PISA, it did not demonstrate that there is any great un-met need for additional capital investment to ensure delivery of safe and adequate service.<sup>93</sup> Indeed, there is reason to be concerned that PISA would encourage Ameren Missouri to undertake capital projects that, while helpful, are not necessary to provide safe and adequate service, thereby unnecessarily driving up rates.

13. Finally, PISA seems to be a solution in search of a problem. Ameren Missouri has had difficulty earning its allowed ROE in the past several years. The company likes to blame that failure on systemic problems in Missouri's regulatory scheme that lead to excessive regulatory lag.<sup>94</sup> However, many businesses and individuals have been unable to earn as much as they might like in the economic conditions prevailing in recent years.

14. Furthermore, utility ratemaking is forward looking, concerned with current and anticipated financial conditions. What the company has earned in the past does not necessarily tell us what it will be able to earn in this future.<sup>95</sup> In the past several rate cases, the Commission has implemented several trackers and other regulatory measures that should enhance Ameren Missouri's ability to earn its allowed rate of return. Those previous measures should be allowed an opportunity to work before further measures are undertaken.

<sup>91</sup> Transcript, Page 656-657, Lines 18-23, 1-20.

<sup>92</sup> Barnes Direct, Ex. 11, Page 19, Lines 6-16.

<sup>93</sup> Transcript, Pages 699-700.

<sup>94</sup> Baxter Direct, Page 14, Lines 2-4.

<sup>95</sup> Brosch Direct, Ex. 500, Page 9, Lines 5-9.

15. Indeed, a surveillance report that Ameren Missouri supplied to Staff showed that for the 12 months ended June 30, 2012, within the true-up period for this case, Ameren Missouri's actual earned return on equity was 10.53 percent, which is above the 10.2 percent return on equity allowed in its last rate case.<sup>96</sup> Ameren Missouri attempted to dismiss that 10.53 percent return as being attributable to warmer than normal weather and to other anomalies, but there it is. Under the circumstances, it is not clear that there is a systemic problem that needs to be solved with PISA.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

After considering Ameren Missouri's PISA proposal, the Commission finds that PISA would be bad public policy and should not be authorized.

**5. Rate Case Expense: What is the appropriate amount to include in Ameren Missouri's revenue requirement for rate case expense?****Findings of Fact:**

1. Rate case expense is the amount Ameren Missouri has spent to present and defend its rate increase request before the Commission. Ameren Missouri incurs such costs to procure expert testimony and to pay its lawyers to present that testimony.

2. Ameren Missouri estimates it will spend \$1,903,000 for rate case expense in this case.<sup>97</sup> That number is necessarily an estimate because most rate case expenses are incurred in conjunction with the hearing, which, of course, occurs after the true-up date of July 31, 2012. Indeed, the actual final cost figures will not be known until after this report and order is issued.<sup>98</sup>

3. Ameren Missouri proposes to calculate the amount of rate case expense to be included in rates by averaging the actual rate case expenses from the company's two prior rate cases with its estimate of expenses for this case. Rate case expense for File No. ER-2010-0036 was \$2,128,352, for File No. ER-2011-0028 it was \$1,735,867, and the estimated of expenses for this case is \$1,903,000. Adding those three numbers and dividing by three results in an average of \$1,922,000. Since, on average Ameren Missouri has filed a new rate case every 15 months, Ameren Missouri would divide that number by 15, multiply it by 12, to reach a normalized rate case expense of \$1,538,000. That is the amount Ameren Missouri proposes to include in its annual cost of service for calculation of rates in this case.<sup>99</sup>

<sup>96</sup> Exhibit 237.

<sup>97</sup> Weiss Direct, Ex. 5, Page 28, Lines 7-8.

<sup>98</sup> Transcript, Pages 862-863, Lines 2-25, 1-12.

<sup>99</sup> Barnes Rebuttal, Ex. 12, Page 30, Lines 6-19.

4. Staff's witness, Lisa Hanneken, analyzed Ameren Missouri's recent rate cases and proposes that Ameren Missouri be allowed to \$1 million in its annual cost of service for rate case expense. That amount assumes a total rate case expense of \$1.5 million, which is then normalized on an assumption that Ameren Missouri will file its next rate case in 18 months. (\$1,500,000 divided by 18 months, multiplied by 12 months = \$1,000,000).

5. Public Counsel proposes a sharp departure from prior Commission treatment of rate case expense. First, it proposes that the Commission disallow as imprudent all the money Ameren Missouri has spent to hire outside consultants and lawyers.<sup>100</sup> Second, for expenses not disallowed, Public Counsel proposes the Commission allow Ameren Missouri to recover only half from ratepayers, with the remainder to be imposed on shareholders. Specifically, after disallowing all cost of outside consultants and lawyers, Public Counsel would allow Ameren Missouri to recover \$2,327<sup>101</sup>, annualized over 15 months.<sup>102</sup> That amounts to \$1,861.60 to be included in the cost of service for this case.

6. Public Counsel contends Ameren Missouri's use of outside consultants and attorneys to prepare and prosecute its rate case is imprudent. Public Counsel argues the company has "a large number of accountants, engineers, and others that that presumably could have been utilized to prepare, file and defend its rate increase request."<sup>103</sup> Public Counsel alleges Ameren Missouri therefore acted imprudently by hiring two outside legal firms and three outside consultants to develop and present significant portions of its case.<sup>104</sup>

7. Public Counsel assumes that since Ameren Missouri has many full-time employees with college degrees in relevant fields, those employees, with their relevant work experience, should be able to perform the work required to prepare and present a rate case to the Commission.<sup>105</sup> However, Public Counsel never performed any analysis of specific Ameren employees to determine if they would have any particular expertise or the time available from their regular duties to participate in the rate case.<sup>106</sup>

8. Much of the testimony offered in this case came from witnesses who were full-time Ameren employees, and much of that testimony was presented and defended by the two in-house attorney employed to represent Ameren Missouri. However, those Ameren Missouri employees have job duties in running the company that limit their availability to present a rate case. Furthermore, Ameren Missouri does not have full-time employees with the detailed, national expertise necessary to address certain policy issues.<sup>107</sup>

<sup>100</sup> Robertson Direct, Ex. 406, Pages 28-29, Lines 20-21, 1-12.

<sup>101</sup> Robertson True-Up Direct, Ex. 411, Page 3, Lines 10-12.

<sup>102</sup> Robertson Direct, Exhibit 406, Page 31, Lines 16-20.

<sup>103</sup> Robertson Direct, Ex. 406, Page 19, Lines 19-21.

<sup>104</sup> Robertson Direct, Ex. 406, Page 20, Line 1.

<sup>105</sup> Robertson Direct, Ex. 406, Page 15, Lines 4-9.

<sup>106</sup> Transcript, Page 926, Lines 17-20.

<sup>107</sup> Barnes Rebuttal, Ex. 12, Page 34, Lines 3-20.

9. Ameren Missouri did present testimony from several outside consultants on specific issues. Public Counsel complains that such testimony, specifically that offered by John Reed, James Guest, and James Warren, was duplicative of testimony that was offered by Ameren employees.<sup>108</sup> Having closely examined that testimony during the course of the hearing, the Commission finds that Ameren Missouri's outside witnesses offered detailed expert opinion that appropriately presented Ameren Missouri's positions on the issues. While Ameren employees offered testimony on the same broad issues, that testimony was not duplicative of the testimony offered by the outside experts.

10. The testimony of Mr. Hevert on cost of capital, whose fees Public Counsel would also disallow,<sup>109</sup> is a good illustration of why Ameren Missouri is sometimes justified in hiring outside expert witnesses. As indicated elsewhere in this report and order, the determination of an appropriate return on equity is a very difficult matter that requires a great deal of skill and expertise. There are Ameren employees who understand cost of capital questions, but they are engaged full-time in managing the capital needs of the company.<sup>110</sup> It is unreasonable to expect that Ameren Missouri should be precluded from recovering the cost of hiring an appropriate return on equity expert to counter the experts engaged by the other parties to the case.

11. Aside from its contention that Ameren Missouri was imprudent in hiring outside attorneys and expert witnesses, Public Counsel also contends that ratepayers should not be forced to pay for what it describes as an "elaborate defense of private interests".<sup>111</sup> Public Counsel contends Ameren Missouri has presented an elaborate defense in this case because it hired outside legal counsel and consultant services when the same services could likely have been provided by full-time Ameren employees.<sup>112</sup>

12. Although Public Counsel describes this argument as a separate basis for finding Ameren Missouri's use of non-employees to be imprudent,<sup>113</sup> it is just a restatement of the other prudence argument that the Commission has already rejected.

13. Aside from the prudence arguments, Public Counsel does not contend that the Commission should entirely disallow the company's rate case expense. It concedes that since rate case proceedings are a part of a regulated utility's normal cost of business those costs should be recoverable in rates.<sup>114</sup>

<sup>108</sup> Robertson Surrebuttal, Ex. 408, Pages 7-9.

<sup>109</sup> Robertson Direct, Ex. 406, Page 17, Lines 21-23.

<sup>110</sup> Barnes Rebuttal, Ex. 12, Page 34, Lines 16-20.

<sup>111</sup> Robertson Direct, Ex. 406, Page 23, Lines 7-11.

<sup>112</sup> Robertson Direct, Ex. 406, Page 24, Lines 9-13.

<sup>113</sup> Robertson Direct, Ex. 406, Page 29, Lines 9-12.

<sup>114</sup> Robertson Direct, Ex. 406, Page 11, Lines 17-21.

14. However, Public Counsel contends that as a matter of policy, the Commission should require shareholders to pay half of the admittedly prudent costs that Ameren Missouri incurred in prosecuting this rate case because shareholders, as well as ratepayers, benefit from any rate increase that results from this case.<sup>115</sup> Furthermore, Public Counsel suggest that a sharing of costs would provide Ameren Missouri with an incentive to control what it describes as a rising level of rate case expense.<sup>116</sup>

15. However, there is no “rising level of rate case expense”. Ameren Missouri’s estimated level of rate case expense for this case is in line with the amounts of rate case expense it has incurred in its last two rate cases.<sup>117</sup> Indeed, Staff premised its recommended level of allowed rate case expense on a perceived downward trend in rate case expense.<sup>118</sup>

16. Rate case expense is just another cost of doing business for a regulated utility. As a regulated utility, Ameren Missouri has a legal obligation to provide safe, adequate, and reliable service to ratepayers. Because it is a regulated utility, the only way Ameren Missouri can raise its rates to charge what this Commission determines to be just and reasonable is through the rate case process. The rate case process is adversarial, just as is any other civil litigation in this country. That means all parties, including the company, must be able to present their facts and arguments so the Commission can reach a proper and fair resolution.

17. Shareholders benefit when rates go up to a just and reasonable level, but so do ratepayers. Shareholders may receive higher dividends and benefit from higher stock prices, but ratepayers receive the benefit of safe, adequate, and reliable service. No one benefits when a utility is deprived of the ability to charge its customers a just and reasonable rate.

18. Staff does not propose that any part of Ameren Missouri’s rate case expense be disallowed as imprudent,<sup>119</sup> nor does it advocate for the sharing of costs between shareholders and ratepayers.<sup>120</sup> Instead, Staff looked at historical data regarding Ameren Missouri’s actual rate case expenses and discerned a downward trend in those expenses. Staff also concluded that Ameren Missouri tended to overestimate its expenses. Based on that information, Staff estimated the company’s rate case expense for this case to be \$1.5 million. Staff assumed the company would file its next rate case in 18 months and therefore normalized that \$1.5 million to allow Ameren Missouri to recover \$1 million per year for rate case expense.<sup>121</sup>

<sup>115</sup> Robertson Direct, Ex. 406, Page 11, Lines 1-7.

<sup>116</sup> Robertson Direct, Ex. 406, Page 14, Line 14

<sup>117</sup> Barnes Rebuttal, Ex. 12, Page 30, Lines 6-8.

<sup>118</sup> Hanneken Surrebuttal, Ex. 236, Page 7, Lines 20-22.

<sup>119</sup> Transcript, Pages 912-913, Lines 24-25, 1-2.

<sup>120</sup> Transcript, Page 879, Lines 17-20.

<sup>121</sup> Hanneken Surrebuttal, Ex. 236, Pages 7-8, Lines 13-24, 1-4.

19. The problem with Staff's estimate of \$1.5 million as Ameren Missouri's rate case expense for this case is that it seems to be little more than an educated guess based on past rate case expenses. Staff's witness did not compare the number of issues in this case with earlier cases, she did not compare the total number of witnesses in this case with earlier cases, she did not compare the number of outside consultants or the number of intervenors in this case with earlier cases, nor did she use any mathematical calculation to arrive at her cost estimate.<sup>122</sup> In sum, Staff's general cost estimate is less reasonable than the specific cost estimate offered by Ameren Missouri.

### **Conclusions of Law:**

A. The Commission established its standard for determining the prudence of a utility's expenditures in a 1985 decision regarding Union Electric's construction of the Callaway nuclear plant. 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.<sup>123</sup>

B. The Commission's use of that prudence standard has been upheld by reviewing courts in numerous cases.<sup>124</sup>

C. The Commission's prudence standard applies to Ameren Missouri's expenditures for rate case expense just as it would apply to any other expense that the Commission is reviewing in this case.

D. Based on the facts as set forth in its Finding of Fact for this issue, the Commission concludes that Public Counsel has failed to present sufficient evidence to create a serious doubt regarding the prudence of Ameren Missouri's decision to engage the services of outside expert consultants and legal counsel for the presentation of this rate case. Therefore, those costs are presumed to be prudently incurred.

### **Decision:**

Ameren Missouri's estimate of rate case expense for this case is reasonable and Ameren Missouri's cost of service for this case shall include an annualized rate case expense of \$1,538,000. The Commission has opened File No. AW-2011-0330 as a separate investigative case to examine the question of rate case expense in a more general manner. The Commission will renew its efforts to proceed with that investigation.

<sup>123</sup> *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, 193 (1985).

<sup>124</sup> For example see, *State ex rel. Assoc. Natural Gas Co. v. Public Serv. Com'n*, 954 S.W.2d 520 (Mo. App. W.D. 1977).

**6. Property Tax Refund: What portion, if any, of the \$2.9 million property tax refund received by Ameren Missouri should be credited to ratepayers? If an amount should be credited, over what period should the credit be amortized?**

**Findings of Fact:**

1. In the Report and Order that resolved Ameren Missouri's last rate case, ER- 2011-0028, the Commission set rates that allowed Ameren Missouri to recover roughly \$129 million for payment of property taxes. That amount was based on the \$119 million Ameren Missouri paid for property taxes in 2010, with an additional \$10 million allowed for the anticipated payment of property taxes associated with the Sioux Scrubber and Taum Sauk construction projects that were being taxed for the first time in 2011.<sup>125</sup>

2. While that rate case was pending, Ameren Missouri was in the process of appealing approximately \$29 million of its 2010 property tax liability to the Missouri State Tax Commission. Consequently, at the time rates were set, no one knew whether Ameren Missouri would be able to obtain a refund of all or part of the \$29 million tax payment that was under appeal.

3. To deal with the uncertainty of the possible \$29 million tax refund, the Commission's report and order found that Ameren Missouri had agreed to track any tax refund it might receive. Ameren Missouri's witness in this case confirms that the company agreed to track any tax refund.<sup>126</sup>

4. In its 2011 report and order, the Commission declined to order Ameren Missouri to return to its customers any tax refund it might receive as a result of its tax appeal. The Commission reasoned that it could not bind a future Commission and must leave the decision about how such tax refund should be handled to a future rate case.<sup>127</sup>

However, the Commission stated:

If Ameren Missouri does receive a tax refund, then the Commission would certainly expect that the company would return that refund to its customers who are ultimately paying the tax bill. It is hard to imagine any circumstance in which such a refund would not be ordered. However, such an order must wait until a future rate case in which that decision will be presented to the Commission.<sup>128</sup>

This is now the future rate case and the Commission must decide how the tax refund should be handled.

5. Late in the summer of 2011, after the Commission issued its report and order in the 2011 rate case, Ameren Missouri reached a settlement with the State Tax Commission by which it received tax refunds totaling \$2.9 million.<sup>129</sup>

<sup>125</sup> *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase its Annual Revenues for Electric Service*, File No. ER-2011-0028, Report and Order, Issued July 13, 2011, Pages 105-109.

<sup>126</sup> Transcript, Page 973, Lines 10-11.

<sup>127</sup> *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase its Annual Revenues for Electric Service*, File No. ER-2011-0028, Report and Order, Issued July 13, 2011, Page 111.

<sup>128</sup> *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase its Annual Revenues for Electric Service*, File No. ER-2011-0028, Report and Order, Issued July 13, 2011, Page 110.

<sup>129</sup> Weiss Rebuttal, Ex. 6, Page 27, Lines 18-21.

6. Staff and MIEC contend the \$2.9 million tax refund should be returned to ratepayers through a two-year amortization, beginning with the effective date of rates established by this order.<sup>130</sup>

7. Although the rates established in the 2011 rate case allowed Ameren Missouri to recover an amount equal to all its 2010 tax liability, including the \$2.9 million the company recovered as a tax refund, those rates did not necessarily allow the company to recover all it paid for property taxes in 2011. Tax liability may go up or down from year to year and rates are not changed to reflect the new tax amounts until the company files a new rate case.<sup>131</sup> Ordinarily that variation is simply treated as an element of regulatory lag and no adjustment is made to account for the variations.

8. However, this is a unique situation. In the previous rate case, the Commission set rates based on the assumption that Ameren Missouri would pay the full amount of taxes for which it had been billed, even though the company was appealing \$29 million of that tax bill. The Commission might have set Ameren Missouri's rates as much as \$29 million lower than it did on the assumption that Ameren Missouri would prevail on its tax appeal. However, the Commission did not do so based, at least in part, on Ameren Missouri's representation that it would track those costs.

9. Ameren Missouri now contends that when it agreed to track those costs it merely intended to keep track of the property tax refund so it could be identified for the audit in this case.<sup>132</sup>

10. That was not the purpose of tracking the costs that the Commission understood at the time it stated "It is hard to imagine any circumstance in which such a refund would not be ordered."

### **Conclusions of Law:**

There are no additional Conclusions of Law for this issue.

### **Decision:**

The Commission will require Ameren Missouri to comply with the implicit agreement that allowed Ameren Missouri to avoid a possible reduction in rates surrounding its appeal of its 2010 tax liability. Ameren Missouri shall return the \$2.9 million tax refund to rate payers, amortized over two years.

### **7. Property Taxes: What property tax rates should be used in calculating the allowance for property tax expense to be included in Ameren Missouri's revenue requirement?**

<sup>130</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 117, Lines 20-25. Meyer Direct, Ex. 510, Page 17, Lines 1-7.

<sup>131</sup> Transcript, Pages 984-988. See also, Exhibit 55.

<sup>132</sup> Ameren Missouri's Initial Post-Hearing Brief, Page 103. This explanation was not offered under oath by any witness.

**Findings of Fact:**

1. Each year, Ameren Missouri must pay property taxes on the property it owns around the state. All parties agree the company should be able to recover the cost of paying those property taxes from ratepayers as a cost of doing business. The question is, how much should the company be able to recover in rates?

2. Staff and MIEC contend the Commission should base the amount Ameren Missouri is allowed to recover for property taxes on the actual amount of property tax the company paid during the test year. The actual amount Ameren Missouri paid for property taxes during true-up period of the test year, specifically in December 2011, was \$127.2 million.<sup>133</sup>

3. Ameren Missouri contends use of the actual property tax paid during the test year would not allow the company to recover the actual amount of property tax it will likely incur going forward, as the tax imposed is likely to increase. Ameren Missouri offers two alternatives for calculation of the amount of property tax it should be allowed to recover in rates. The first alternative would apply the company's actual 2011 tax rates to the actual 2012 certified assessed valuation to arrive at a property tax amount of approximately \$128.3 million. The second alternative would assume a tax rate that increases by eleven percent from the actual 2011 tax rates, applied to the actual 2012 certified assessed valuation to arrive at a property tax amount of approximately \$130.4 million.<sup>134</sup>

4. The Missouri State Tax Commission is responsible each year to determine the valuation and assessment of the distributable commercial real and personal property of all Missouri utility companies, including Ameren Missouri.<sup>135</sup>

5. The Tax Commission determines the value of utility property as of January 1 of each year. Using the valuation certified by the Tax Commission, each taxing jurisdiction within Ameren Missouri's service territory determines its tax rate and applies that rate to the value of the utility party subject to its jurisdiction. Any of the taxing jurisdictions can choose to raise or lower its tax rate to meet its budgetary needs.<sup>136</sup>

6. After the taxing jurisdictions determine and report their rates, each of the 66 counties in which the company owns property sends a tax bill to Ameren Missouri in November or December. Ameren Missouri will pay its tax bill for 2012 in December 2012.<sup>137</sup>

7. The State Tax Commission certified its valuation of Ameren Missouri's property on June 28, 2012, which is within the true-up period for the test year in this case.<sup>138</sup>

<sup>133</sup> Carle Surrebuttal, Ex. 218, Page 8, Lines 20-22.

<sup>134</sup> Cudney Rebuttal, Ex. 14, Page 6, Lines 7-23.

<sup>135</sup> Cudney Rebuttal, Ex. 14, Page 3, Lines 1-3.

<sup>136</sup> Cudney Rebuttal, Ex. 14, Page 3, Lines 13-16.

<sup>137</sup> Transcript, Page 1012, Lines 12-22.

<sup>138</sup> Cudney Rebuttal, Ex. 14, Page 3, Lines 10-12.

8. Although the valuation of Ameren Missouri's property was certified within the test year, the actual amount of taxes Ameren Missouri will need to pay for 2012 is dependent upon the tax rate established by the myriad taxing authorities within its service territory. Those rates could go up or down and thereby affect Ameren Missouri's total tax bill. Ameren Missouri will not know those tax rates until it receives the last tax bill from 66 counties sometime in December.<sup>139</sup>

9. The test year and true-up period for this case ended on July 31, 2012. On December 31, 2011, within that test year and true-up period, Ameren Missouri paid property taxes totaling \$127.2 million. That amount is clearly known and measurable.

10. The amount Ameren Missouri will pay in property taxes in December 2012 is not yet known and measurable and falls outside the test year and true-up period for this case.

11. If the Commission were to set Ameren Missouri's rates based on projections about what it might pay in property taxes in December 2012, it would violate an important rate making principle. A December 2012 payment would be outside the test year and true-up period. The test year and true-up period is important because it allows the Commission to set rates while considering the relationship between revenues, expenses and rate base within a specified period. Ameren Missouri is asking the Commission to make an isolated adjustment for taxes paid outside that specified period. By going outside the specified test year and true-up period to make an isolated adjustment, the Commission would necessarily be ignoring other expense and income items that might also change the company's revenue requirement.

12. There are many such out of test year items that might affect the company's revenue requirement. A good example was raised by MIEC. Ameren Missouri refinanced some of its outstanding debt in September 2012 at a lower interest rate, thus saving the company money.<sup>140</sup> Since that transaction is outside the test year and true-up period it has no effect on the rates established in this case. But, if the Commission were to go outside the test year and true-up period to make an isolated adjustment for 2012 tax payments it would need to consider other out of period adjustments to maintain the matching principle of evaluating all relevant factors for that period. Quickly the integrity and relevance of the test year and true-up period would be lost

13. Nevertheless, the Commission sometimes makes isolated adjustment for certain known and measureable costs when doing so is necessary to ensure just and reasonable rates are established. However, Ameren Missouri's 2012 property taxes are not known and measureable and inclusion of those costs is not necessary to establish just and reasonable rates.

<sup>139</sup> Cudney Rebuttal, Ex. 14, Page 3, Lines 20-21.

<sup>140</sup> Transcript, Page 308, Lines 6-21.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

Ameren Missouri shall be allowed to recover \$127.2 million in rates for property taxes as proposed by Staff and MIEC.

**8. Renewable Energy Standard (RES) Costs:**

**A. Should the Commission order Ameren Missouri to include a base level of RES costs in permanent rates? If so, what is the base amount to include in permanent rates and should the level included in permanent rates in this case be netted against any future deferred expenditures that occur beyond the July 31, 2012, true-up date?**

**Findings of Fact:**

1. Ameren Missouri is required to incur certain costs to comply with Missouri's Renewable Energy Standard (RES) law. Thus far, the bulk of the RES costs incurred by the company are for rebate payments made to customers who install their own solar power systems.<sup>141</sup> During the updated test year, Ameren Missouri incurred approximately \$4.7 million in such RES costs.<sup>142</sup>

2. Ameren Missouri proposes to recover that \$4.7 million amount in its base rates in this case.<sup>143</sup> It would then track its future costs above or below that base amount and establish what would essentially be an AAO to recover or refund any variation from that base amount.<sup>144</sup> Staff supports Ameren Missouri's proposal.<sup>145</sup>

3. MIEC does not take issue with the amount of RES costs Ameren Missouri has incurred. However, it interprets the applicable Commission regulation to preclude the inclusion of any amount of those costs in base rates.<sup>146</sup>

**Conclusions of Law:**

A. Missouri's statute known as the Renewable Energy Standard is found at Sections 393.1025 and 393.1030, RSMo (Supp. 2011). That law requires Missouri's investor-owned electric utilities, including Ameren Missouri, to meet portfolio standards such that increasing percentages of the electric power sold by the utility are obtained from renewable energy resources. The percentage of power that must be obtained from renewable energy resources rises from two percent for 2011 through 2013 to fifteen percent beginning in 2021.<sup>147</sup>

<sup>141</sup> Transcript, Pages 1042-1043, Lines 23-25, 1-3.

<sup>142</sup> Transcript, Pages 1069-1070, Lines 23-25, 1-3.

<sup>143</sup> The exact amount is \$4,656,595. Transcript, Page 1073, Line 8.

<sup>144</sup> Transcript, Page 1047, Lines 17-23.

<sup>145</sup> Cassidy Surrebuttal, Ex. 234, Page 6, Lines 18-22.

<sup>146</sup> Meyer Direct, Ex. 510, Page 8, Lines 3-8.

<sup>147</sup> Section 393.1030.1, RSMo (Supp. 2011).

B. Another section of the Renewable Energy Standard requires each investor- owned electric utility, again including Ameren Missouri, to make available to its retail customers a standard rebate offer for new or expanded solar electric systems.<sup>148</sup>

C. The Renewable Energy Standard directs the Commission to make whatever rules are necessary to enforce the renewable energy standard. The statute specifically requires that the Commission's rule include "[p]rovision for recovery outside the context of a regular rate case of prudently incurred costs and the pass-through of benefits to customers of any savings achieved by an electrical corporation in meeting the requirements of this section."<sup>149</sup>

D. The Commission's RES rule is found at 4 CSR 240-20.100. That regulation describes in detail a Renewable Energy Standard Rate Adjustment Mechanism (RESRAM) by which a utility may recover its RES compliance costs outside a rate case. The RESRAM would operate in much the same manner as a fuel adjustment clause to allow periodic rate adjustments between general rate cases.

E. However, the regulation does not require an electric utility to implement a RESRAM to recover its costs. Instead, it states:

Alternatively, an electric utility may recover RES compliance costs without use of the RESRAM procedure through rates established in a general rate proceeding. In the interim between general rate proceedings the electric utility may defer the costs in a regulatory asset account, and monthly calculate a carrying charge on the balance in the regulatory asset account equal to its short-term cost of borrowing. ...<sup>150</sup>

F. Ameren Missouri and Staff interpret this provision of the regulation to allow the company to include a base level of compliance costs in rates and to then track any variation in those costs through an AAO for future recovery in the next rate case. That is the way the Commission handled the matter in the last rate case.<sup>151</sup>

G. MIEC interprets the regulation differently. MIEC would rely more heavily on the second sentence of the provision to argue that if the company does not have a RESRAM, which Ameren Missouri does not, it can only defer all costs in an AAO for recovery in a future rate case. It would not allow Ameren Missouri to establish a cost base within this rate case.<sup>152</sup> Under MIEC's interpretation, Ameren Missouri would likely eventually recover all its costs with interest, but its recovery of those costs would be delayed until it files another rate case.<sup>153</sup>

<sup>148</sup> Section 393.1030.3, RSMO (Supp. 2011).

<sup>149</sup> Section 393.1030.2(4).

<sup>150</sup> 4 CSR 240-20.100(6)(D).

<sup>151</sup> Transcript, Page 1070, Lines 18-23.

<sup>152</sup> Transcript, Page 1049, Lines 3-11.

<sup>153</sup> Transcript, Page 1054-1055, Lines 15-25, 1-23.

H. MIEC's interpretation of the regulation is incorrect because it ignores the plain dictate of the first sentence, which simply states that if it chooses not to use a RESRAM, the utility can recover its RES costs through rates established in a general rate case. The second sentence simply established the means by which the utility can track those costs between rate cases without using a RESRAM.

I. The purpose of the regulation is to enable the utility to recover its RES costs and thereby remove barriers to the implementation of renewable energy programs. The interpretation of the regulation espoused by Ameren Missouri and Staff assures that the intent of the regulation is met. In contrast, MIEC's interpretation of the regulation would assure that the utility would be unable to recover its RES costs in a timely manner. Instead, it would always be required to delay its recovery of costs until its next rate case. Such a delay would hurt the utility's cash flow and would cause matching problems in that future ratepayers would be required to pay the RES costs incurred by current ratepayers.

**Decision:**

Ameren Missouri shall include a base level of \$4,656,595 for REC compliance costs in the rates established in this case and shall track any variation in those costs through an Accounting Authority Order for future recovery in its next rate case.

**B. Over what period of years should the Commission order Ameren Missouri to amortize the deferred RES costs incurred from January 1, 2010, through July 31, 2012?**

**C. Should the Commission order Ameren Missouri to include the unamortized RES deferred regulatory asset balance from January 1, 2010, through July 31, 2012, in rate base?**

**Findings of Fact:**

1. In Ameren Missouri's last rate case, the Commission handled RES costs in the same manner it found to be appropriate in this case. A base level of RES costs was established at \$885,266 and Ameren Missouri was allowed to include additional expenditures in an AAO for consideration in its next rate case.<sup>154</sup>

2. This is the next rate case, and Ameren Missouri has deferred \$6.3 million in that AAO. All parties agree on that amount.<sup>155</sup> The Commission must now determine how Ameren Missouri will be allowed to recover that \$6.3 million.

3. Ameren Missouri proposes that it be allowed to amortize and recover that \$6.3 million over two years. It also wants to include the unamortized balance in its rate base.<sup>156</sup> Staff proposes to amortize that amount over three years,

<sup>154</sup> *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase its Annual Revenues for Electric Service*, File No. ER-2011-0028, Report and Order issued July 13, 2011, Page 101.

<sup>155</sup> Transcript, Page 1069, Lines 7-22.

<sup>156</sup> Weiss Rebuttal, Ex. 6, Page 7, Lines 3-4.

but would not allow the unamortized balance in rate base.<sup>157</sup> MIEC would amortize the \$6.3 million over six years and would allow the unamortized balance to be included in rate base.<sup>158</sup> Staff would also accept MIEC's proposal.<sup>159</sup>

4. The primary item included in Ameren Missouri's RES expense is the cost of paying solar rebates to customers who have installed solar equipment at their home. The customers, not Ameren Missouri, own and operate that solar equipment.<sup>160</sup> Another significant RES cost to Ameren Missouri is their program to purchase Renewable Energy Credits (RECs) to comply with RES requirements.<sup>161</sup> Ameren Missouri's RES costs do not include capital costs, such as the solar equipment Ameren Missouri has installed at its own headquarters.<sup>162</sup>

5. MIEC suggests that a relatively long six-year amortization period is appropriate because the solar equipment for which the rebates are paid has a service life of around ten years.<sup>163</sup> However, because the utility does not own the solar equipment, there is no reason to link the amortization period to the life of the solar equipment. From Ameren Missouri's perspective, RES costs are simply an expense that should be recovered quickly rather than over the life of the equipment. That suggests a short amortization period is appropriate.

6. Typically, the items the Commission will allow a utility to include in its rate base are investments in plant, fuel inventories and other capital items.<sup>164</sup> Since these RES costs are not capital items and will be amortized over a short period, inclusion of those costs in rate base would not be appropriate.

#### **Conclusions of Law:**

There are no additional conclusions of law for this issue.

#### **Decision:**

Ameren Missouri shall recover \$6.3 million in past RES costs amortized over three years with the unamortized balance not included in rate base.

### **9. Coal Inventory, Including Coal-in-Transit: Should the value of Ameren Missouri's coal inventory include the value of coal in transit?**

<sup>157</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 133, Lines 28-31.

<sup>158</sup> Meyer Surrebuttal, Ex. 511, Page 5, Lines 20-21.

<sup>159</sup> Cassidy Surrebuttal, Ex. 234, Page 7, Lines 9-16.

<sup>160</sup> Transcript, Pages 1042-1043, Lines 23-25, 1-13.

<sup>161</sup> Transcript, Pages 1406-1047, Lines 18-25, 1-3.

<sup>162</sup> Transcript, Page 1047, Lines 4-10.

<sup>163</sup> Meyer Surrebuttal, Ex. 511, Pages 5-6, Lines 22-23, 1-7.

<sup>164</sup> Transcript, Page 1057, Lines 9-13.

**Findings of Fact:**

1. Ameren Missouri must purchase massive amounts of coal to be burned in its coal-fired electric generating plants. That coal must be shipped to the generating plants from the coal mines. Ameren Missouri takes title to the coal as it is loaded into Ameren Missouri's railcars at the mine. Once the coal is delivered to the generating plant, its cost is added to plant inventory, dumped in a pile, and included within the company's rate base.<sup>165</sup>

2. This issue concerns whether the coal-in-transit, in other words, the coal that is sitting in a railcar, or barge, between the mine and the generating plant, should also be included in rate base. Ameren Missouri contends the coal-in-transit should be included in rate base. Staff and MIEC oppose the inclusion of that coal in rate base.

3. It is important to remember that this is a rate base issue. In other words, the question is whether the company should be able to earn a return on the value of the coal- in-transit. The cost of the coal is not charged to ratepayers until it is actually burned at the power plant.<sup>166</sup>

4. At any given moment, Ameren Missouri has large quantities of coal in transit, moving toward its generating plants.<sup>167</sup> The quantities and value of the coal-in-transit are highly confidential so an exact number will not be included in this report and order. However, inclusion of coal in-transit in rate base would increase Ameren Missouri's revenue requirement in this case by less than \$1 million.<sup>168</sup>

5. Ameren Missouri takes title to the coal at the time it is put into its railcars at the mine. Thereafter, Ameren Missouri is the owner of the coal as it is being transported.<sup>169</sup> Generally, the coal is in transit for three or four days before it is added to inventory at the coal plant.<sup>170</sup>

6. The mine sends Ameren Missouri an invoice for the coal as it is delivered to the railcars. Ameren Missouri typically pays that invoice about two weeks later. As a result, the coal is usually not paid for until it is sitting in the coal pile at the generating plant.<sup>171</sup> However, payment is simply a timing matter, unconnected to where the coal is located. Ameren Missouri would still have to pay for the coal when invoiced even if for some reason delivery was delayed and the coal was still sitting in a railcar.<sup>172</sup>

<sup>165</sup> Neff Rebuttal, Ex. 18, Page 5, Lines 8-9.

<sup>166</sup> Transcript, Page 1411, Lines 5-13.

<sup>167</sup> Transcript, Page 1405, Lines 10-12.

<sup>168</sup> Transcript, Page 1419, Lines 2-6.

<sup>169</sup> Transcript, Page 1409, Lines 15-25.

<sup>170</sup> Transcript, Page 1408, Lines 20-24.

<sup>171</sup> Transcript, Page 1400-1401, Lines 12-25, 1-17. This testimony was offered in camera, but the facts are not highly confidential.

<sup>172</sup> Transcript, Page 1410, Lines 15-20.

7. The amount of coal held in inventory in the coal piles at the generating plants was not at issue at the hearing in this case. However, MIEC argued that inclusion of coal in-transit as part of inventory would increase that inventory to a level higher than necessary.<sup>173</sup>

8. There was a good deal of testimony offered about what would be an optimum amount of coal to hold in inventory at the plant, most of it highly confidential, but all such testimony misses the point. The coal-in-transit is not part of inventory and allowing it in rate base would not make it a part of inventory. Rather, it is a separate rate base item. As Ameren Missouri's witness explained, coal inventory is coal that is on site that the company knows it can burn. Coal that is in transit may never arrive because of some disruption. Therefore, it is not counted as part of the coal inventory reserve for purposes of determining whether there is enough coal on hand to avoid running out of coal and having to shut the plant down.<sup>174</sup>

9. As previously indicated, Ameren Missouri actually pays for the coal approximately two weeks after it takes title to the coal at the mouth of the mine. Staff and MIEC contend that payment delay should preclude Ameren Missouri from including the coal-in-transit in rate base.

10. In response to that argument, Ameren Missouri's witnesses pointed out that it has not yet paid for approximately one quarter of the coal sitting in the coal pile, but no one was arguing that coal in inventory should not be included in rate base.<sup>175</sup> Staff's witness at the hearing did not challenge that argument, but in its reply brief, Staff attempted to change its position impose a new adjustment to reduce "by 25 percent the value of the coal pile to reflect that Ameren Missouri has no investment in that coal."<sup>176</sup> However, such a position was not supported by any witness at the hearing.

11. The arguments about the two-week delay in paying for the coal are without merit. Ameren Missouri uses an accrual method of accounting. The coal goes on the company's books as an owned item when it takes ownership of the coal at the mine.<sup>177</sup> Using an accrual method of accounting, the timing of cash payments for inventory items is not a consideration in determining whether an inventory item should be included in rate base. Qualifying capital cost items are included in rate base whether they are paid for in advance, at the time of delivery, or after delivery. The test is whether those items are used and useful, not when payment is made.

<sup>173</sup> Meyer Surrebuttal, Ex. 511, Page 28, Lines 3-15.

<sup>174</sup> Transcript, Page 1413, Lines 1-16.

<sup>175</sup> Transcript, Page 1421, Lines 2-12.

<sup>176</sup> Staff's Reply Brief, Page 34. Ameren Missouri filed a motion to strike that portion of Staff's brief on November 26, 2012. Staff responded on December 3 and agreed that its proposal to make a new adjustment in its reply brief was inappropriate and withdrew that portion of its brief. Ameren Missouri's motion to strike is now moot and on that basis is denied.

<sup>177</sup> Transcript, Page 1420, Lines 15-22.

12. Ameren Missouri's lead-lag study recognizes a 17.14-day lead for the time between when the coal is loaded into the railcars and the time Ameren Missouri pays for it. There is also a \$53 million allowance for coal in the company's cash working capital allowance, which is also a rate base item. From this, Staff's witness argued for the first time at the hearing that allowing Ameren Missouri to include coal-in-transit in its rate base would allow the company to double recover for that cost.<sup>178</sup>

13. The double recovery argument is not persuasive. The 17.14-day lead associated with the coal-in-transit measures the amount of time Ameren Missouri has use of the coal before paying for it. In other words, recognizing the 17.14-day lead in the cash working capital allowance means that allowance is lower than it would be if the lead were not taken into account. Since the cash working capital allowance is already in rate base, recognizing the lead tends to reduce rate base. Thus, recognizing coal-in-transit in rate base does not amount to double recovery, rather it simply offsets a reduction to rate base that has already been taken through the adjustment of the cash working capital allowance through the lead-lag study.

14. Staff also argues in its brief that coal-in transit should not be included in rate base "because coal in transit has never been included in rate base in the 100 years of utility regulation in Missouri, that's why." Interestingly, Staff's witness, Lisa Hanneken, indicated at the hearing that she could not make such a broad statement.<sup>179</sup> In any event, whether coal-in-transit has ever before been included in rate base is irrelevant. The Commission will make its decision on the evidence presented to it in this case, not on what may or may have not happened in the past hundred years.

#### **Conclusions of Law:**

There are no additional conclusions of law for this issue.

#### **Decision:**

Ameren Missouri shall include the value of coal in transit in its rate base.

**10. Severance Costs and VS11: Should Ameren Missouri be authorized to amortize to rates over three years the approximately \$25.8 million in costs incurred in its VS11 voluntary employee separation program?**

#### **Findings of Fact:**

1. In 2011, Ameren Missouri reduced its workforce by offering a lump-sum severance package to some of its employees. Three hundred forty employees accepted the severance offer and left the employ of the company at the end of 2011.<sup>180</sup>

<sup>178</sup> Transcript, Pages 1423-1424, Lines 3-25, 1-9.

<sup>179</sup> Transcript, Pages 1434-1435, Lines 20-25, 1-2.

<sup>180</sup> Baxter Direct, Ex. 1, Page 15, Lines 3-5.

2. By reducing its workforce by 340 employees, Ameren Missouri has saved, and will continue to save, roughly \$25 million per year. The severance package cost Ameren Missouri a one-time amount of approximately \$25.8 million.<sup>181</sup> Ameren Missouri proposes to recover those one-time costs by amortizing the \$25.8 million over three years.<sup>182</sup> That amounts to an increase of \$8.6 million in annual revenue requirement.

3. Staff and MIEC oppose Ameren Missouri's proposed amortization of the cost of the severance package.

4. Ameren Missouri started to realize savings resulting from the reduction in its workforce as soon as it implemented the severance package. However, rates set in the last rate case assumed that the 340 employees would remain employed and the rates were set high enough to cover those costs. As a result, Ameren Missouri will be able to retain all those savings until new rates, using the new lower employment numbers, are set in this case. However, once the new rates go into effect, those savings will start flowing to ratepayers<sup>183</sup>

5. Staff's witness, Lisa Ferguson, calculated the savings retained by Ameren Missouri up until new rates will go into effect on January 2, 2013 at roughly \$26 million.<sup>184</sup> Ameren Missouri disagreed with some of the details of Ferguson's calculation, but conceded that the savings the company realized in 2012 roughly equal the severance costs.<sup>185</sup>

6. Despite having already recovered the costs of the severance package, Ameren Missouri asks the Commission to again recover those costs from ratepayers through a direct three-year amortization. Ameren Missouri contends such recovery is justified because ratepayers will ultimately benefit from the cost reductions resulting from the severance package in an amount much greater than the direct costs the company seeks to amortize.<sup>186</sup> Ameren Missouri also complains that from March 2009 through July 2012, the company actually under-recovered its payroll and benefit costs by \$51 million.<sup>187</sup>

Finally, Ameren Missouri argues that it should be allowed to recover the additional amortization so that it will have an incentive to pursue further cost-cutting measures.<sup>188</sup>

<sup>181</sup> Carver Surrebuttal, Ex. 515, Page 3, Lines 7-9.

<sup>182</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 101, Lines 12-13.

<sup>183</sup> Carver Direct, Ex. 514, Page 26, Lines 12-17.

<sup>184</sup> Ex. 242.

<sup>185</sup> Barnes Rebuttal, Ex. 12, Page 17, Lines 1-2.

<sup>186</sup> Barnes Rebuttal, Ex. 12, Page 16, Lines 14-17.

<sup>187</sup> Barnes Rebuttal, Ex. 12, Page 17, Lines 5-8, as corrected at Transcript, Page 1804.

<sup>188</sup> Barnes Rebuttal, Ex. 12, Page 17, Lines 12-14.

7. Ameren Missouri prudently took steps to reduce its payroll costs to improve the efficiency of its operations. Under the lag that results from the traditional regulatory model, the company is able to retain those cost savings until it chooses to come back for a rate adjustment and a new level of costs is used to reset rates. In this case, Ameren Missouri, for reasons unconnected to these particular costs, has asked the Commission to adjust its rates. The new rates will reflect the lower personnel costs and the company will cease to benefit directly from the reduced payroll after having barely recovered its costs. If Ameren Missouri had not chosen to request a rate increase at this time, it would have continued to benefit from its reduced payroll costs. That is how the system works.

8. Ameren Missouri is essentially asking the Commission to require ratepayers to give the company a \$25.8 million bonus to reward the company for being efficient in reducing its payroll and to give it an extra incentive to reduce costs in the future. The Commission finds that the company does not need and will not receive any extra incentive to operate efficiently.

#### **Conclusions of Law:**

There are no additional conclusions of law for this issue.

#### **Decision:**

Ameren Missouri proposed amortization of the costs of its severance package are disallowed.

**11. Return on Common Equity (ROE): In consideration of all relevant factors, what is the appropriate value for return on equity (ROE) that the Commission should use in setting Ameren Missouri's Rate of Return?**

#### **Findings of Fact:**

1. This issue concerns the rate of return Ameren Missouri will be authorized to earn on its rate base. Rate base includes things like generating plants, electric meters, wires and poles, and the trucks driven by Ameren Missouri's repair crews. In order to determine a rate of return, the Commission must determine Ameren Missouri's cost of obtaining the capital it needs.

2. The relative mixture of sources Ameren Missouri uses to obtain the capital it needs is its capital structure. Ameren Missouri's actual capital structure as of the true-up date, July 31, 2012 is:

Long-Term Debt	46.8%
Short-Term Debt	00.0%
Preferred Stock	01.1%
Common Equity	52.1% <sup>189</sup>

No party has raised an issue regarding capital structure so the Commission will not further address this matter.

<sup>189</sup> Martin Direct, Ex. 23, Page 7.

3. Similarly, no party has raised an issue regarding Ameren Missouri's calculation of the cost of its long-term debt and preferred stock.

4. Determining an appropriate return on equity is the most difficult part of determining a rate of return. The cost of long-term debt and the cost of preferred stock are relatively easy to determine because their rate of return is specified within the instruments that create them. In contrast, in determining a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in Ameren Missouri rather than in some other investment opportunity. As a result, the Commission cannot simply find a rate of return on equity that is unassailably scientifically, mathematically, or legally correct. Such a "correct" rate does not exist.

Instead, the Commission must use its judgment to establish a rate of return on equity attractive enough to investors to allow the utility to fairly compete for the investors' dollar in the capital market, without permitting an excessive rate of return on equity that would drive up rates for Ameren Missouri's ratepayers. In order to obtain guidance about the appropriate rate of return on equity, the Commission considers the testimony of expert witnesses.

5. Three financial analysts offered recommendations regarding an appropriate return on equity in this case. Robert B. Hevert testified on behalf of Ameren Missouri. Hevert is Managing Partner of Sussex Economic Advisors, LLC, and Executive Advisor to Concentric Energy Advisors, Inc. of Marlborough, Massachusetts. He holds a Bachelor of Science degree in Finance from the University of Delaware and a Master of Business Administration degree from the University of Massachusetts.<sup>190</sup> He recommends the Commission allow Ameren Missouri a return on equity of 10.50 percent, within a range of 10.25 percent to 11.00 percent.<sup>191</sup>

6. Michael Gorman testified on behalf of MIEC. Gorman is a consultant in the field of public utility regulation and is a managing principal of Brubaker & Associates.<sup>192</sup> He holds a Bachelor of Science degree in Electrical Engineering from Southern Illinois University and a Masters Degree in Business Administration with a concentration in Finance from the University of Illinois at Springfield.<sup>193</sup> Gorman recommends the Commission allow Ameren Missouri a return on equity of 9.30 percent, within a recommended range of 9.20 percent to 9.40 percent.<sup>194</sup>

<sup>190</sup> Hevert Direct, Ex. 20, Page 1.

<sup>191</sup> Hevert Rebuttal, Ex. 21, Page 2, Lines 4-12.

<sup>192</sup> Gorman Direct, Ex. 507, Page 1, Lines 4-6.

<sup>193</sup> Gorman Direct, Ex. 507, Appendix A, Page 1, Lines 9-12.

<sup>194</sup> Gorman Direct, Ex. 507, Page 2, Lines 6-8.

7. Finally, David Murray testified on behalf of Staff. Murray is the Utility Regulatory Manager of the Financial Analysis Unit for the Commission. He holds a Bachelor of Science degree in Business Administration from the University of Missouri – Columbia, and a Masters in Business Administration from Lincoln University. Murray has been employed by the Commission since 2000 and has offered testimony in many cases before the Commission.<sup>195</sup> Murray recommends a return on equity of 9.0 percent, within a range of 8.00 percent to 9.00 percent.<sup>196</sup>

8. A utility's cost of common equity is the return investors require on an investment in that company. Investors expect to achieve their return by receiving dividends and through stock price appreciation.<sup>197</sup> To comply with standards established by the United States Supreme Court, the Commission must authorize a return on equity sufficient to maintain financial integrity, attract capital under reasonable terms, and be commensurate with returns investors could earn by investing in other enterprises of comparable risk.<sup>198</sup>

9. Financial analysts use variations on three generally accepted methods to estimate a company's fair rate of return on equity. The Discounted Cash Flow (DCF) method assumes the current market price of a firm's stock is equal to the discounted value of all expected future cash flows.<sup>199</sup> The Risk Premium method assumes that the investor's required return on an equity investment is equal to the interest rate on a long-term bond plus an additional equity risk premium needed to compensate the investor for the additional risk of investing in equities compared to bonds.<sup>200</sup> The Capital Asset Pricing Method (CAPM) assumes the investor's required rate of return on equity is equal to a risk-free rate of interest plus the product of a company-specific risk factor, beta, and the expected risk premium on the market portfolio.<sup>201</sup> No one method is any more "correct" than any other method in all circumstances. Analysts balance their use of all three methods to reach a recommended return on equity.

10. Before examining the analyst's use of these various methods to arrive at a recommended return on equity, it is important to look at another number. For 2011, the average return on equity awarded to integrated electric utilities by state commissions in this country was 10.27 percent.<sup>202</sup> For the first six months of 2012, that average awarded return on equity dropped to 10.05 percent.<sup>203</sup> For

<sup>195</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Appendix 1, Page 49.

<sup>196</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 13, Lines 17-22.

<sup>197</sup> Gorman Direct, Ex. 507, Page 11, Lines 2-6.

<sup>198</sup> Gorman Direct, Ex. 507, Page 11, Lines 7-17.

<sup>199</sup> Gorman Direct, Ex. 507, Page 13, Lines 7-10.

<sup>200</sup> Hevert Direct, Ex. 20, Page 36, Lines 9-15.

<sup>201</sup> Hevert Direct, Ex. 20, Page 31, Lines 8-18.

<sup>202</sup> Hevert Direct, Ex. 20, Page 39, Lines 9-14.

<sup>203</sup> Transcript, Page 1555, Lines 2-5. That figure excludes an unusually high incentive rate awarded to an electric utility in Virginia

just the second quarter of 2012, the average awarded return on equity was 9.92 percent.<sup>204</sup> For the third quarter of 2012, the average awarded return on equity dropped to 9.9 percent.<sup>205</sup>

11. The Commission mentions the average allowed return on equity not because the Commission should, or would slavishly follow the national average in awarding a return on equity to Ameren Missouri. However, Ameren Missouri must compete with other utilities all over the country for the same capital. Therefore, the average allowed return on equity provides a reasonableness test for the recommendations offered by the return on equity experts.

12. Ameren Missouri's witness, Robert Hevert, recommended the Commission allow the company an ROE in a range from 10.25 to 11.00 percent, with a specific recommended ROE of 10.5 percent.<sup>206</sup> MIEC's witness, Michael Gorman, recommended an ROE in a range from 9.2 to 9.4 percent, with a specific recommended ROE of 9.3 percent.<sup>207</sup> Staff's witness, David Murray, recommended an ROE in a range from 8.0 to 9.0 percent, with a specific recommended ROE of 9.0 percent.<sup>208</sup> However, in its initial brief, Staff suggested that an ROE of 9.45 percent might be more appropriate.<sup>209</sup> AARP and Consumer's Council did not offer an ROE expert witness, but they recommend the Commission adopt an ROE of 8.0 percent, which is the low end of David Murray's range.

Public Counsel also did not offer an ROE expert witness, but advises the Commission to adopt an ROE at the low end of a reasonable range to best protect the interests of ratepayers.

13. The Commission will examine the analysis presented by each of the experts in more detail later in this order. But before doing so, the Commission notes that the cost of equity has trended downward since Ameren Missouri's ROE was established in its last rate case. Utility bond yields have declined by approximately 70 to 110 basis points since that last rate case. That decline in utility bond yields suggest that Ameren Missouri's cost of capital is lower now than it was then.<sup>210</sup> That decline is reflected in the trend noted above in declining allowed ROE in the last year. Even Ameren Missouri's expert, Mr. Hevert agrees that the cost of equity has gone down since the last case. As he puts it, "the question is by how much."<sup>211</sup>

<sup>204</sup> Transcript, Page 1555, Lines 15-16. See also, Ex. 530.

<sup>205</sup> Transcript, Pages 1558-1560. That number is calculated by averaging ROE awards to four vertically integrated electric utilities in the quarter.

<sup>206</sup> Hevert Rebuttal, Ex. 21, Page 2, Lines 6-9.

<sup>207</sup> Gorman Direct, Ex. 507, Page 2, Lines 6-9.

<sup>208</sup> Staff Report, Revenue Requirement Cost of Service, Ex. 202, Page 13, Lines 17-21.

<sup>209</sup> Staff's Initial Brief, Page 89.

<sup>210</sup> Gorman Direct, Ex. 507, Page 5, Lines 7-9.

<sup>211</sup> Transcript, Page 1548, Lines 3-4.

14. Looking at the recommendation of Staff's expert first, the Commission finds that David Murray's recommendation is unreasonably low. If the Commission were to award Ameren Missouri an ROE of 9.0 percent as Murray recommends, it would be the second lowest non-penalty ROE awarded to an energy utility in the United States in the last thirty years.<sup>212</sup> Furthermore, Murray testified at the hearing that he actually believes Ameren Missouri's cost of equity may be below 8.0 percent and he only raised his recommendation to 9.0 percent in recognition that the Commission would not award an ROE below 8.0 percent.<sup>213</sup>

15. Even Murray does not believe the Commission will actually award Ameren Missouri an ROE of 9.0 percent based on his recommendation. Instead, he is trying to convince the Commission to award an ROE below 10.0 percent.<sup>214</sup> That is probably why Staff essentially abandoned Murray's recommendation after the hearing. In its Initial Brief, Staff recommended that the Commission award Ameren Missouri an ROE of 9.45 percent, using Murray's 9.0 percent ROE recommendation as the low end of a possible range, bounded at the top by the national average ROE of 9.9 percent.<sup>215</sup>

16. Ameren Missouri's witness, Robert Hevert, primarily relied on two forms of the DCF model to make his recommendation that the Commission award the company an ROE of 10.5 percent.<sup>216</sup>

17. However, Hevert's estimation of an appropriate ROE is too high. MIEC's witness, Michael Gorman explains that Mr. Hevert relied on long-term sustainable growth rate estimates in his DCF models that are higher than the growth outlook of the economy as a whole. As he explained, it is not rational to expect that utilities can grow faster than the economies in which they provide service because utilities provide service to meet the demand of the economies they serve.<sup>217</sup> After correcting this, and other flaws in Hevert's multi-stage DCF model, Gorman showed that model as yielding a ROE of 9.46 percent instead of the 10.74 percent derived by Hevert.<sup>218</sup>

18. Although the Commission finds Michael Gorman to be the most credible and most understandable of the three ROE experts who testified in this case, his recommendation that the Commission award Ameren Missouri an ROE in a range from 9.2 to 9.4 percent also has weaknesses.

<sup>212</sup> Hevert Rebuttal, Ex. 21, Page 28, Footnote 57.

<sup>213</sup> Transcript, Page 1979-1980, Lines 23-25, 1-20.

<sup>214</sup> Transcript, Page 1980, Lines 17-24.

<sup>215</sup> Staff's Initial Brief, Page 89.

<sup>216</sup> Hevert Direct, Ex. 20, Page 18, Lines 15-16.

<sup>217</sup> Gorman Direct, Ex. 507, Page 44, Lines 10-12.

<sup>218</sup> Gorman Rebuttal, Ex. 507, Page 50, Table 8.

19. Ameren Missouri's extensive cross-examination of Gorman revealed that Gorman's evaluation is dependent on many assumptions. The same is true of any other expert and illustrates why ROE analysis is as much an art as a science. Specifically, that cross-examination showed that Gorman performed a risk premium analysis that relied on indicated risk premium data from 1986 through 2012. He then excluded the three highest and three lowest years from his analysis and arrived at an indicated ROE of 9.26 percent.<sup>219</sup> However, the three years that Gorman excluded from his analysis as too high were from three of the four most recent years, 2008, 2009, and 2011. The three years he excluded from his analysis as too low were from the early period of the study. As a result, the study wound up relying on risk premium data from 1986 and 1987 to calculate an ROE for today.<sup>220</sup>

20. Manipulating the data in a slightly different manner, using just a simple average of the last ten years of data, would result in an indicated ROE of 9.6 percent instead of 9.26 percent. Weighting that ten-year average would indicate an ROE of 9.76 percent.<sup>221</sup>

21. Similarly, the cross-examination revealed that if Gorman relied on the mean rather than the median for his proxy groups within his DCF analysis, his indicated ROE would have been 9.7 percent rather than 9.4 percent.<sup>222</sup>

22. That testimony does not show that Gorman was dishonest or unreliable. On the contrary, the Commission found his testimony to be reliable and persuasive. However, the cross-examination clearly revealed that any expert analysis is subject to the many decisions that go into choosing among the data to be included in the various formulas. As a result, the opinions offered by the ROE experts cannot be blindly accepted as scientifically or legally binding on the Commission.

23. After considering and balancing all the information before it, the Commission is concerned that Gorman's recommended ROE is too low. The national average awarded ROE in recent months is around 10.0 percent. Gorman's analysis indicates a return somewhere below 10.0 percent is appropriate. However, Gorman also testified that dropping a utility's allowed ROE too precipitously could be harmful to the company. He explained:

caution is necessary in awarding a return on equity for an electric utility company because dropping that authorized return on equity too fast can create financial trouble, even if the return on equity reflects fair compensation in the marketplace.<sup>223</sup>

<sup>219</sup> Transcript, Pages 1728-1732.

<sup>220</sup> Transcript, Page 1732, Lines 14-25.

<sup>221</sup> Transcript, Page 1737, Lines 12-24.

<sup>222</sup> Transcript, Pages 1745-1756.

<sup>223</sup> Transcript, Page 1774, Lines 18-22

He then went on to say:

my concern is that if the cost of capital drops and stays low, the utility needs time to modify its financial housekeeping in order to maintain its financial integrity while receiving a very low authorized return on equity, even if it is consistent with current market costs.<sup>224</sup>

24. In addition, Ameren Missouri must compete for capital with other utilities. Awarding Ameren Missouri an ROE that is 60 or 70 basis points below the national average could cause that available capital to flow away from Ameren Missouri to the detriment of both shareholders and ratepayers.

25. After considering all the competent and substantial evidence presented on this issue, the Commission finds that an ROE of 9.8 percent is appropriate.

### Conclusions of Law:

A. In assessing the Commission's ability to use different methodologies to determine just and reasonable rates, the Missouri Court of Appeals has said:

Because ratemaking is not an exact science, the utilization of different formulas is sometimes necessary. ... The Supreme Court of Arkansas, in dealing with this issue, stated that there is no 'judicial mandate requiring the Commission to take the same approach to every rate application or even to consecutive applications by the same utility, when the commission in its expertise, determines that its previous methods are unsound or inappropriate to the particular application' (quoting *Southwestern Bell Telephone Company v. Arkansas Public Service Commission*, 593 S.W. 2d 434 (Ark 1980)).<sup>225</sup>

Furthermore,

Not only can the Commission select its methodology in determining rates and make pragmatic adjustments called for by particular circumstances, but it also may adopt or reject any or all of any witnesses' testimony.<sup>226</sup>

<sup>224</sup> Transcript, Page 1775, Lines 8-13.

<sup>225</sup> *State ex rel. Assoc. Natural Gas Co. v. Public Service Commission*, 706 S.W. 2d 870, 880 (Mo. App. W.D. 1985).

<sup>226</sup> *State ex rel. Assoc. Natural Gas Co. v. Public Service Commission*, 706 S.W. 2d 870, 880 (Mo. App. W.D. 1985).

B. In another case, the Court of Appeals recognized that the establishment of an appropriate rate of return is not a “precise science”:

While rate of return is the result of a straight forward mathematic calculation, the inputs, particularly regarding the cost of common equity, are not a matter of ‘precise science,’ because inferences must be made about the cost of equity, which involves an estimation of investor expectations. In other words, some amount of speculation is inherent in any ratemaking decision to the extent that it is based on capital structure, because such decisions are forward-looking and rely, in part, on the accuracy of financial and market forecasts.<sup>227</sup>

**Decision:**

Based on the evidence in the record, on its analysis of the expert testimony offered by the parties, and on its balancing of the interests of the company’s ratepayers and shareholders, as fully explained in its findings of fact and conclusions of law, the Commission finds that 9.8 percent is a fair and reasonable return on equity for Ameren Missouri. The Commission finds that this rate of return will allow Ameren Missouri to compete in the capital market for the funds needed to maintain its financial health. Furthermore, this allowed return on equity is well within the zone of reasonableness that Missouri’s courts have applied when reviewing Commission decisions regarding return on equity.

**12. Fuel Adjustment Clause**

**(FAC):**

**Should Ameren Missouri’s fuel adjustment clause be continued?**

**Findings of Fact:**

1. Before addressing other issues regarding the implementation of Ameren Missouri’s fuel adjustment clause, the Commission must address the more fundamental issue of whether Ameren Missouri should be allowed to continue to use a fuel adjustment clause.

2. In a previous Ameren Missouri rate case, ER-2008-0318, the Commission allowed Ameren Missouri to implement a fuel adjustment clause.<sup>228</sup> The approved fuel adjustment clause includes an incentive mechanism that requires Ameren Missouri to pass through to its customers 95 percent of any deviation in fuel and purchased power costs from the base level. The other 5 percent of any deviation is retained or absorbed by Ameren Missouri.<sup>229</sup> The Commission has approved the continuation of that fuel adjustment clause in each subsequent Ameren Missouri rate case.

<sup>227</sup> *State ex rel. Missouri Gas Energy v. Public Service Commission*, 186 S.W.3d 376, 383 (Mo App. W.D. 2005).

<sup>228</sup> *In the Matter of Union Electric Company, d/b/a AmerenUE’s Tariffs to Increase its Annual Revenues for Electric Service*, Report and Order, Case No. ER-2008-0318, January 27, 2009, Pages 69-70.

<sup>229</sup> *In the Matter of Union Electric Company, d/b/a AmerenUE’s Tariffs to Increase its Annual Revenues for Electric Service*, Report and Order, Case No. ER-2008-0318, January 27, 2009, Page 76.

3. In this case, Ameren Missouri proposed that the Commission allow it to continue to use its existing fuel adjustment clause.<sup>230</sup> AARP and Consumers Council did not present any testimony on this issue, but they did cross examine witnesses presented by other parties and urge the Commission to discontinue Ameren Missouri's fuel adjustment clause. Staff did not oppose the continuation of the fuel adjustment clause, but advises the Commission to change the sharing mechanism to create an 85/15 split, with Ameren Missouri retaining or absorbing 15 percent of any deviation from the base level of fuel and purchased power costs. MIEC supports Staff's position. The Commission will address the proposed modification of the sharing mechanism in the next section of this report and order.

4. When it first allowed Ameren Missouri to implement a fuel adjustment clause in a previous rate case, ER-2008-0318, the Commission found that Ameren Missouri should be allowed to establish a fuel adjustment clause because its fuels costs were substantial, beyond the control of the company's management, and volatile in amount. The Commission also found that Ameren Missouri needed a fuel adjustment clause to have a sufficient opportunity to earn a fair return on equity and to be able to compete for capital with other utilities that have a fuel adjustment clause.<sup>231</sup> In the same rate case, the Commission found that a 95/5 sharing mechanism would give Ameren Missouri a sufficient opportunity to earn a fair return on equity, while protecting customers by preserving the company's incentive to be prudent.<sup>232</sup>

5. Nothing has changed in the years since the Commission established Ameren Missouri's fuel adjustment clause to cause the Commission to change that decision. The Commission again finds that Ameren Missouri's fuel and purchased power costs are substantial, \$941 million in the test year, comprising 47 percent of the company's total operations and maintenance expense.<sup>233</sup> Furthermore, the revenue the company receives from off-system sales, which is also tracked through the fuel adjustment clause, is also substantial, estimated to total approximately \$360 million per year.<sup>234</sup> Those fuel and purchased power costs continue to be dictated by national and international markets, and thus are outside the control of Ameren Missouri's management.<sup>235</sup> Finally, these costs and revenues continue to be volatile, particularly off-system sales. For example, annual average wholesale prices decreased approximately \$3 per megawatt-hour (MWh), or approximately 10 percent since February 2011, when Ameren Missouri rebased fuel costs in the last rate case. That reduction in wholesale electricity prices caused a \$30 million decrease in annual off-system sales revenues despite comparable sales volumes.<sup>236</sup> That volatility also means the fuel adjustment clause has benefited ratepayers in those periods when the company's net fuel costs have decreased.

<sup>230</sup> Barnes Direct, Ex. 11, Page 6, Lines 2-4.

<sup>231</sup> *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service*, Report and Order, Case No. ER-2008-0318, January 27, 2009, Pages 69-70.

<sup>232</sup> *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service*, Report and Order, Case No. ER-2008-0318, January 27, 2009, Page 76.

<sup>233</sup> Barnes Direct, Ex. 11, Page 8, Lines 14-17.

<sup>234</sup> Barnes Direct, Ex. 11, Page 8, Lines 17-20.

<sup>235</sup> Barnes Direct, Ex. 11, Page 8, Lines 20-23.

<sup>236</sup> Barnes Direct, Ex. 11, Pages 8-9, Lines 23-26, 1-3.

6. Furthermore, the Commission finds that Ameren Missouri still needs a fuel adjustment clause to help alleviate the effects of regulatory lag as net fuel costs continue to rise. In addition, Ameren Missouri still must compete in the capital markets with other utilities and the vast majority of those utilities have fuel adjustment clauses. The continued existence of a fuel adjustment clause is important to maintaining Ameren Missouri's credit worthiness.<sup>237</sup>

### **Conclusions of Law:**

A. Section 386.266.1, RSMo (Supp. 2011), allows the Commission to establish and continue a fuel adjustment clause for Ameren Missouri.

### **Decision:**

Ameren Missouri still needs to have a fuel adjustment clause in place if it is to have a reasonable opportunity to earn a fair return on its investments. The Commission concludes that Ameren Missouri should be allowed to continue to implement the previously approved fuel adjustment clause.

### **A. Should the sharing percentage in Ameren Missouri's fuel adjustment clause be changed to 85%-15%?**

### **Findings of Fact:**

1. While Staff did not oppose the continuation of Ameren Missouri's fuel adjustment clause, it advised the Commission to modify the sharing mechanism within the fuel adjustment clause to increase the percentage of costs and income absorbed or retained by Ameren Missouri from 5 percent to 15 percent. MIEC did not present any additional testimony on this question, but supports the modification proposed by Staff. AARP and Consumers Council also did not present any additional testimony on this question, but if the Commission does not totally eliminate the FAC, they advocate for a 50- 50 split between rate payers and shareholders.

2. Staff offered five reasons why the sharing percentage should be changed. First, Staff points out that under the current 95%-5% sharing percentage, Ameren Missouri had to absorb only \$15.3 million out of its net total fuel and purchased power cost of \$1.4 billion, or about 1.1 percent of its net energy costs. If that sharing percentage had been changed to 85%-15%, as Staff advocates, Ameren Missouri would have had to absorb \$45.9 million, or 3.3 percent of its net energy costs. If it did not have an FAC at all, Ameren Missouri would have had to absorb \$306 million, or 21.8 percent of its net energy costs.<sup>238</sup> In essence, Staff suggests Ameren Missouri should be thankful it has an FAC and not quibble about the sharing percentage.

<sup>237</sup> Barnes Direct, Ex. 11, Page 10, Lines 3-16.

<sup>238</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 164, Lines 5-15.

3. Second, Staff points out that Ameren Missouri's off-system sales margins are more volatile than its fuel costs. If the sharing percentage were changed to 85%-15% as Staff proposes, Ameren Missouri would be able to keep a greater percentage of the off- system sales margins.<sup>239</sup>

4. Third, Staff claims that increasing the sharing percentage to 85%-15% would give Ameren Missouri a greater incentive to increase its fuel cost savings or to make more off-system sales.<sup>240</sup>

5. Fourth, Staff claims that increasing the sharing percentage to 85%-15% would increase Ameren Missouri's incentive to accurately estimate the net base energy cost factors in its general rate cases.<sup>241</sup>

6. Fifth, Staff complains that Ameren Missouri used the FAC process to delay payment to ratepayers under the company's second prudence review case, EO-2012-0074.<sup>242</sup> The Commission will address each of Staff's concerns in turn.

7. It is easy for Staff to say that Ameren Missouri should not complain about a proposal to triple the amount of net energy costs it must absorb under the fuel adjustment clause from \$15 million to \$45 million. But that extra \$30 million represents prudently incurred net fuel costs that the company would never be able to recover. Even to a company as large as Ameren Missouri, \$30 million is not *de minimis*. Certainly, much time and energy has been expended in this case on issues that are worth substantially less than \$30 million.

8. Ameren Missouri's off-system sales margins are volatile because power prices are volatile<sup>243</sup> and Staff's proposal would allow the company to keep a greater percentage of off-system sales. However, that fact would not necessarily benefit the company. The company could just as easily be harmed if off-system sales decreased to below the level included in rates. The volatility of off-system sales is an argument for keeping the sharing mechanism at 95%-5%, not for changing it.

9. Staff contends that increasing the sharing percentage to 85%-15% would give Ameren Missouri a greater incentive to minimize its costs and maximize its off-system sales. However, a greater incentive would be meaningless if there is little the company can actually do to minimize costs or maximize off-system sales. In general, Ameren Missouri's fuel costs are dictated by national and international markets that are largely beyond the company's control.<sup>244</sup> Ameren Missouri already sells all of its available, in-the-money generation into the MISO market so there is little, if any, opportunity for Ameren Missouri to increase its off-system sales no matter how much incentive it is given.<sup>245</sup> Furthermore, Staff has not alleged that Ameren Missouri has acted imprudently in minimizing its fuel costs or maximizing its off-system sales.<sup>246</sup>

<sup>239</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 165, Lines 7-11.

<sup>240</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 165, Lines 12-17.

<sup>241</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 166, Lines 1-7.

<sup>242</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 166, Lines 8-16.

<sup>243</sup> Haro Rebuttal, Ex. 25, Pages 2-3, Lines 22,1.

<sup>244</sup> Barnes Direct, Ex. 11, Page 8, Lines 21-23.

<sup>245</sup> Haro Rebuttal, Pages 15-16, Lines 15-21, 1-4.

<sup>246</sup> Transcript, Page 1221, Lines 1-17.

10. Staff claims that increasing the sharing percentage to 85%-15% would increase Ameren Missouri's incentive to accurately estimate the net base energy cost factors in its general rate cases. Specifically, Staff's witness suggested that the increase would provide the company with a greater incentive to look for better predictors of future power costs.<sup>247</sup> However, Staff's witness did not know of any better predictors of future power costs,<sup>248</sup> and she was unwilling to utilize forward price projections even if they might be a better predictor.<sup>249</sup>

11. Finally, Staff complains about Ameren Missouri's decision to include AEP and Wabash revenues in the FAC and argues the company misused the FAC to delay repaying that revenue to ratepayers. The Commission directed Ameren Missouri to remove the AEP and Wabash revenues from its FAC in a report and order issued in 2011 in File Number EO-2010-0255. That decision has since been appealed to the Missouri Court of Appeals. The case Staff specifically references, EO-2012-0074, shares the same issues and is currently pending before the Commission. In the last rate case, the Commission rejected Staff's argument that Ameren Missouri's alleged imprudence regarding the AEP and Wabash revenues demonstrated a need for the company to have a greater incentive under the FAC.<sup>250</sup> Surely the Commission has no desire to try to punish Ameren Missouri for exercising its legal right to appeal the Commission's decision in EO-2010-0255. In short, Ameren Missouri has not misused the FAC process and Staff's argument is without merit.

12. Furthermore, changing the sharing percentage without a good reason to do so could erode investor confidence in the utility and cast a shadow on the state regulatory process.<sup>251</sup>

13. Most significantly, a change in the sharing mechanism to require Ameren Missouri to absorb 15 percent of net fuel cost changes instead of the current 5 percent would impose a significant financial burden on the company. If the proposed 85%-15% sharing mechanism had been in place since the fuel adjustment clause was put into effect instead of the actual 95%-5% sharing mechanism, Ameren Missouri would have been required to absorb an additional \$30 million in net fuel costs.<sup>252</sup> That would be a heavy burden on a company that is already having difficulty earning its allowed rate of return.

<sup>247</sup> Mantle Surrebuttal, Ex. 224, Page 8, Lines 8-12.

<sup>248</sup> Transcript, Page 1236, Lines 17-19.

<sup>249</sup> Transcript, Page 1237, Lines 6-12.

<sup>250</sup> In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase its Annual Revenues for Electric Service, File Number ER-2011-0028, Report and Order, Issued July 13, 2011, Pages 82-83.

<sup>251</sup> Barnes Direct, Ex. 11, Page 10, Lines 14.16.

<sup>252</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 164, Lines 5-15.

**Conclusions of Law:**

A. Section 386.266.1, RSMo (Supp. 2011), the statute that allows the Commission to establish a fuel adjustment clause provides as follows:

Subject to the requirements of this section, any electrical corporation may make an application to the commission to approve rate schedules authorizing an interim energy charge or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation. The commission may, in accordance with existing law, include in such rate schedules features designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities.

Subsection 4 of that statute sets out some of the provisions that must be included in a fuel adjustment clause as follows:

The commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section only after providing the opportunity for a full hearing in a general rate proceeding, including a general rate proceeding initiated by complaint. The commission may approve such rate schedule after considering all relevant factors which may affect the cost or overall rates and charges of the corporation, provided that it finds that the adjustment mechanism set forth in the schedules:

(1) *Is reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity;*

(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;

(3) In the case of an adjustment mechanism submitted under subsections 1 and 2 of this section, includes provisions requiring that the utility file a general rate case with the effective date of new rates to be no later than four years after the effective date of the commission order implementing the adjustment mechanism. ...

(4) In the case of an adjustment mechanism submitted under subsections 1 or 2 of this section, includes provisions for prudence reviews of the costs subject to the adjustment mechanism no less frequently than at eighteen- month intervals, and shall require refund of any imprudently incurred costs plus interest at the utility's short-term borrowing rate. (emphasis added)

Subsection 4(1) is emphasized because that is the key requirement of the statute. Any fuel adjustment clause the Commission allows Ameren Missouri to implement must be reasonably designed to allow the company a sufficient opportunity to earn a fair return on equity.

B. Subsection 7 of the fuel adjustment clause statute provides the Commission with further guidance, stating the Commission may:

take into account any change in business risk to the corporation resulting from implementation of the adjustment mechanism in setting the corporation's allowed return in any rate proceeding, in addition to any other changes in business risk experienced by the corporation.

Finally, subsection 9 of that statute requires the Commission to promulgate rules to "govern the structure, content and operation of such rate adjustments, and the procedure for the submission, frequency, examination, hearing and approval of such rate adjustments." In compliance with the requirements of the statute, the Commission promulgated Commission Rule 4 CSR 240-3.161, which establishes in detail the procedures for submission, approval, and implementation of a fuel adjustment clause.

C. Specifically, Commission Rule 4 CSR 240-3.161(3) establishes minimum filing requirements for an electric utility that wishes to continue its fuel adjustment clause in a rate case subsequent to the rate case in which the fuel adjustment clause was established. Ameren Missouri has met those filing requirements.

### **Decision:**

Staff's stated reasons for experimenting with adjusting the sharing mechanism of Ameren Missouri's fuel adjustment clause to implement an 85%-15% split do not withstand scrutiny. Imposing a significant financial burden on the company simply to experiment with an alternative sharing percentage would be unfair to the company. The Commission finds that there is no reason to change the sharing percentages in the fuel adjustment clause under which Ameren Missouri has operated for the past several years. The Commission will retain the current 95%-5% sharing mechanism included in Ameren Missouri's fuel adjustment clause.

### **B. MISO Costs in the FAC:**

#### **Findings of Fact:**

1. Through its membership in the Midwest Independent Transmission System Operator, Inc. (MISO), Ameren Missouri has access to a transparent energy market where it can acquire power to serve its load and sell power off-system. As part of its membership in MISO, Ameren Missouri incurs certain transmission charges for the load it serves through the MISO market.<sup>253</sup> Ameren Missouri incurs a variety of charges from MISO for the use of its service. Ameren Missouri cannot pick and choose which of these charges it will pay, all are required charges.<sup>254</sup>

<sup>253</sup> Haro Sur-Surrebuttal, Ex. 26, Page 6, Lines 6-9.

<sup>254</sup> Haro Rebuttal, Ex. 25, Page 22, Lines 12-16.

Furthermore, no party is disputing the amount of the MISO charges or the fact that Ameren Missouri must pay them. Ameren Missouri is currently flowing MISO transmission charges through the fuel adjustment clause.

2. Since January 2012, Ameren Missouri has begun to incur charges under MISO tariff schedule 26A. As with the other MISO transmission charges, including charges incurred under schedule 26,<sup>255</sup> Ameren Missouri has flowed those charges through the fuel adjustment clause.<sup>256</sup>

3. When Staff realized that what it terms the cost of building transmission lines would be included under MISO tariff schedules 26 and 26A, it proposed that those charges be excluded from recovery under the fuel adjustment clause.<sup>257</sup> MIEC arrived at essentially the same position and would exclude all charges for long-term transmission service from the fuel adjustment clause.<sup>258</sup>

4. The Ameren Missouri tariff provision in question concerns Factor CPP, which determines what costs may be flowed through the FAC. That tariff provision states as follows:

Costs of purchased power reflected in FERC Account Numbers 555, **565**, and 575, excluding MISO administrative fees arising under MISO Schedules 10, 16, 17, and 24, **and excluding capacity charges for contracts with terms in excess of one (1) year**, incurred to support sales to all Missouri retail customers and Off-System Sales allocated to Missouri retail electric operations. ...<sup>259</sup>  
(emphasis added).

5. Under the Federal Energy Regulatory Commission's Uniform System of Accounts, transmission charges for the transmission of the utility's electricity over transmission facilities owned by others are to be recorded in account 565.<sup>260</sup> Since the tariff specifically provides that costs of purchased power reflected in account 565 are to be flowed through the fuel adjustment clause, Ameren Missouri acted appropriately in doing so. Indeed, Staff agreed that account 565 costs were to be passed through the fuel adjustment clause within the current language of the tariff<sup>261</sup> and no party has alleged that Ameren Missouri should be required to make any adjustment for transmission charges that have already been passed through the fuel adjustment clause.

<sup>255</sup> Transcript, Page 1195, Lines 14-17.

<sup>256</sup> Transcript, Page 1173, Lines 19-23.

<sup>257</sup> Mantle Surrebuttal, Ex. 224, Page 3, Lines 24-28.

<sup>258</sup> Dauphinais Surrebuttal, Ex. 518, Pages 9-16.

<sup>259</sup> Mantle Surrebuttal, Ex. 224, Page 3, Lines 10-17.

<sup>260</sup> Exhibit 80.

<sup>261</sup> Transcript, Page 1243, Lines 10-13.

6. However, MIEC argues that the highlighted exclusion in the tariff provision of “capacity charges for contract with terms in excess of one (1) year” would exclude most schedule 26 and 26A charges from the fuel adjustment clause because those charges are for contracts with terms in excess of one year.<sup>262</sup> However, the tariff’s exclusion of capacity charges for contract with terms in excess of one year refers to generation capacity, not transmission capacity. That interpretation of the tariff is supported by Ameren Missouri’s witness, Jaime Haro, when he testifies “[c]apacity is commonly understood – in the markets and in Missouri regulation – as generation capacity.”<sup>263</sup> Staff’s witness, Lena Mantle, confirms that the intent of the tariff’s exclusion was to apply to generation capacity.<sup>264</sup> The Commission finds that the tariff’s exclusion applies only to generation capacity and not transmission capacity.

7. Actually, whether the tariff’s current exclusion applies to generation capacity or transmission capacity is not the important question before the Commission. Even if the current tariff were interpreted to exclude transmission capacity, the Commission could, in this case, direct Ameren Missouri to modify its tariff to explicitly include transmission capacity. The more important question before the Commission is whether that tariff should exclude the capacity charges challenged by Staff and MIEC.

8. MIEC’s witness, James Dauphinais, explains that MISO schedule 26 charges are for long-term transmission service the utility takes under MISO tariff schedule 9 to serve its network load and short-term transmission services it takes under MISO tariff schedule 7 and MISO tariff schedule 8 to make off system sales on behalf of its retail customer to entities not located within MISO or PJM. Currently, schedule 26 is used by MISO to recover the cost of Baseline Reliability Projects of 345 kV or higher voltage that are included in the MISO Transmission Expansion Plan.<sup>265</sup>

9. Dauphinais also explains that MISO schedule 26A charges are incurred by Ameren Missouri for long-term transmission service it takes under MISO tariff schedule 9 to serve its network load and short-term transmission services it takes under MISO tariff schedule 7 and MISO tariff schedule 8 to make off-system sales, on behalf of its retail customers, to entities not located within MISO or PJM. MISO schedule 26A is used to recover the cost of Multi-Value Transmission Projects (MVPs).<sup>266</sup>

10. The MVPs are of particular concern because the MISO Board of Directors has approved \$5.6 billion of new MVP construction through 2021. MISO will collect the cost of these MVPs from all MISO transmission customers for the benefit of the transmission owners who are, or who will, construct the MVPs.<sup>267</sup>

<sup>262</sup> Dauphinais Surrebuttal, Ex. 518, Pages 13-14, Lines 8-24, 1-8.

<sup>263</sup> Haro Sur-Surrebuttal, Ex. 26, Page 11, Lines 6-7.

<sup>264</sup> Transcript, Page 1244, Lines 5-16.

<sup>265</sup> Dauphinais Surrebuttal, Ex. 518, Page 11, Lines 3-15.

<sup>266</sup> Dauphinais Surrebuttal, Ex. 518, Page 12, Lines 6-16.

<sup>267</sup> Dauphinais Surrebuttal, Ex. 518, Page 12, Lines 16-20.

11. About eight percent of the MVP's will be built within Missouri.<sup>268</sup> Furthermore, only about \$250 million of the \$5.6 billion approved by MISO for MVPs will be used for construction in Missouri.<sup>269</sup> Ameren Missouri does not plan to build any MVPs within its service territory,<sup>270</sup> but Ameren Transmission Company (ATX), an affiliate of Ameren Corporation may build one or more MVPs in Ameren Missouri's service territory.<sup>271</sup>

12. The MISO transmission revenues associated with MVPs will ultimately flow to the owners of that transmission. That means that if ATX or another Ameren Corporation affiliate builds the MVP, those revenues, which are paid by Ameren Missouri's ratepayers, will go to the Ameren Corporation affiliate instead of being used to offset the charges paid by Ameren Missouri's ratepayers.<sup>272</sup>

13. Staff is concerned that ATX or another affiliate will build the MVP's instead of Ameren Missouri and thereby siphon off the transmission revenue that would otherwise go back to Ameren Missouri. However, Ameren Missouri has no particular right of first refusal to build such projects, cannot dictate to Ameren Corporation how other affiliated companies invest money, and may not have sufficient capital to build such projects while also maintaining reliable service within its own service territory.<sup>273</sup>

14. Since the construction of MVPs is just getting underway, associated transmission charges are expected to rise in the future. Right now, through the true-up period for this case, the twelve months ending July 31, 2012, those transmission costs are \$25.8 million. By 2016, they are projected to rise to nearly \$53 million.<sup>274</sup> Ameren Missouri anticipates those costs will rise by 24 percent per year.<sup>275</sup>

15. Right now, MISO transmission costs paid by Ameren Missouri are nearly offset by MISO revenues received by Ameren Missouri as a transmission owner.<sup>276</sup> But as MVPs are built, transmission costs will rise faster than revenues simply because most of the MVPs are being built outside Missouri.<sup>277</sup>

16. Ameren Corporation is a member of MISO, but it has little control over MISO transmission charges.<sup>278</sup>

17. MISO transmission charges are volatile because no one knows for sure how much those MVP projects will cost once construction is complete.<sup>279</sup>

<sup>268</sup> Transcript, Page 1200, Lines 1-5.

<sup>269</sup> Transcript, Pages 1361-1362, Lines 18-25, 1-4.

<sup>270</sup> Transcript, Page 1175, Lines 20-25.

<sup>271</sup> Oligschlaeger Responsive Testimony, Ex. 240, Page 8, Lines 7-17.

<sup>272</sup> Oligschlaeger Responsive Testimony, Ex. 240, Page 8, Lines 17-19.

<sup>273</sup> Transcript, Pages 1308-1309.

<sup>274</sup> Haro Surrebuttal, Ex. 26, Page 8, Line 2.

<sup>275</sup> Transcript, Page 1362, Lines 18-24.

<sup>276</sup> Oligschlaeger, Responsive Testimony, Page 7, Lines 11-15. The exact numbers are highly confidential.

<sup>277</sup> Transcript, Page 1296, Lines 12-23.

<sup>278</sup> Transcript, Page 1290, Lines 13-19. Also Page 1246, Lines 6-14.

<sup>279</sup> Transcript, Page 1290, Lines 1-19.

18. All parties agree that Ameren Missouri must be able to recover the MISO transmission charges in some manner. If the charges are not flowed through the FAC, the Commission will need to allow the company to recover those charges in base rates. The only issue is whether Ameren Missouri should be allowed to flow those charges through the fuel adjustment clause.

19. Since Ameren Missouri must be allowed to recover the MISO transmission charges in some manner, the continuation of the current practice of passing those costs through the fuel adjustment clause is the most logical manner of doing so. Those costs meet the Commission's past standards for inclusion in the fuel adjustment clause in that they are significant in amount, volatile in that they are not only rapidly rising, but are also uncertain in amount, and they are largely beyond the control of Ameren Missouri. The Commission finds that MISO transmission costs should continue to be flowed through Ameren Missouri's fuel adjustment clause.

### **Conclusions of Law:**

A. Commission Rule 4 CSR 240-20.030 requires electric utilities to keep all accounts in accordance with the Uniform System of Accounts.

B. Under the Filed Rate doctrine, the Commission must allow Ameren Missouri to recover in some manner the transmission charges imposed under the FERC approved MISO tariff.<sup>280</sup>

C. Staff presents a legal argument against inclusion of the MISO transmission charges in the fuel adjustment charge based on two Missouri statutes. The first statute Staff references is the statute that authorizes the establishment of a fuel adjustment clause. Section 386.266.1, RSMo (Supp. 2011) allows an electric utility to apply to the Commission for a mechanism to permit the utility to make periodic rate adjustments to "reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation."

D. Staff argues that transmission of electricity over electric lines is not the transportation of electricity within the meaning of the statute and therefore, transmission costs cannot properly be flowed through the fuel adjustment clause. Staff would limit the meaning of "transportation" within the statute to the transportation of fuel, such as coal. However, the phrase "including transportation" within the statute modifies both "fuel" and "purchased-power" costs. Since there is no way to transport electricity, in the form of purchased-power, except by transmission over electric lines, the statute that allows electric utilities to include transportation costs as part of purchased power costs must have been intended to allow transmission costs to be included within a fuel adjustment clause.

<sup>280</sup> *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 106 S.Ct. 2349 (1986).

E. The second statute cited by Staff is Missouri's anti-CWIP statute, Section 393.135, RSMo 2000. That statute states:

Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.

Staff contends that statutory provision would prohibit the inclusion of the Article 26 and 26A MISO charges within the fuel adjustment charge because MISO is using those charges to allow transmission owners to recover the costs of building new transmission projects.

F. Of course, if the anti-CWIP statute really applied to prohibit recovery of these transmission charges through the fuel adjustment charges, it would also prohibit their recovery by any method until the new transmission facilities were put in service. Any attempt by the Commission to deny Ameren Missouri the ability to recover duly imposed, FERC-approved charges would violate the filed-rate doctrine.

G. Even if the inclusion of the capital construction costs associated with the construction of MVP and other transmission projects in the fuel adjustment clause does not violate the anti-CWIP statute, Staff contends the recovery of such construction costs through the fuel adjustment clause would be bad public policy because the fuel adjustment clause should not be used to recover construction costs.<sup>281</sup>

H. However, both Staff's reliance on the anti-CWIP statute and its public policy argument rely on a mischaracterization of the nature of the transmission charges that Ameren Missouri seeks to flow through the fuel adjustment clause. MISO may use those charges to allow the transmission owner to recover the cost of constructing the transmission. But from Ameren Missouri's perspective, it is paying a FERC approved transmission charge, nothing more and nothing less. To Ameren Missouri it makes no difference how the transmission owner uses the revenue it receives through FERC.

I. When Ameren Missouri pays the transmission charges it is in the same position as an Ameren Missouri customer who pays their electric bill. The customer pays an established rate for the amount of electricity used. It is meaningless to try to parse out how much of that payment is for the cost of a new transformer in the neighborhood, or how much is paid toward the CEO's salary. The customer is paying a legally established charge that covers all the costs associated with the electricity used and Ameren Missouri is paying a legally established charge that covers all the costs associated with the transmission services it is using.

<sup>281</sup> Mantle Surrebuttal, Ex. 224, Page 4, Lines 14-22.

J. The Commission concludes there is no legal or public policy impediment to allowing Ameren Missouri to recover MISO transmission charges through the fuel adjustment clause.

**Decision:**

The Commission finds that Ameren Missouri may pass MISO transmission charges through its fuel adjustment clause.

**The Sixth Non-Unanimous Stipulation and Agreement:**

Having decided that Ameren Missouri's fuel adjustment clause will be continued, the Commission must now take up the sixth nonunanimous stipulation and agreement that was signed by Ameren Missouri, Staff, and MIEC and filed on November 2. As explained earlier in this report and order, AARP and Consumers Council objected to that stipulation and agreement because it assumed the Commission would renew Ameren Missouri's fuel adjustment clause in some form, a result that was contrary to AARP and Consumers Council's position.

That stipulation and agreement dealt with technical details regarding 1) class kilowatt-hours, revenues and billing determinants; 2) fuel costs, purchased power costs, off- system sales revenues and base factors; and 3) fuel adjustment clause tariff sheets. In particular, the stipulation and agreement set out alternative model tariff sheets that would be used depending upon how the Commission decided the sharing percentage and MISO transmission cost issues. Those technical details were not the subject of testimony or other evidence at the hearing.

Because of the objection, the Commission cannot approve the stipulation and agreement. However, that stipulation and agreement is now the joint position statement of the signatory parties and no party has presented any evidence to counter that joint position. Therefore, the Commission finds that the joint position of the parties described in the sixth nonunanimous stipulation and agreement is appropriate and shall be incorporated in the compliance tariffs that Ameren Missouri will be directed to file as a result of this report and order.

**B. Should Ameren Missouri be allowed to track transmission charges for recovery in a future rate case?**

**C. If a tracker is allowed, should it be subject to the conditions proposed by Staff?**

**Decision:**

If the Commission had refused to allow Ameren Missouri to continue to recover MISO transmission charges through the fuel adjustment charge, Ameren Missouri proposed that it be allowed to track and defer those costs for possible recovery in a future rate case. Since the Commission has allowed those charges to be recovered through the fuel adjustment clause, these issues are now moot.

**13. Storm Costs Tracker: Should the Commission establish a two-way storm restoration cost tracker whereby storm-related non-labor operations and maintenance (O&M) expenses for major storms would be tracked against the base amount with expenditures below the base creating a regulatory liability and expenditures above the base creating a regulatory asset, in each case along with interest at the Company's AFUDC rate?**

**Findings of Fact:**

1. Ameren Missouri has proposed to implement a two-way storm restoration tracker to deal with storm-related non-labor operations and maintenance (O&M) expenditure for major storms.<sup>282</sup> Under that proposal, the Commission would establish a base level of expected major storm restoration O&M costs in the company's revenue requirement. Actual expenditures would then be tracked above or below that base level to create a regulatory asset or liability that the Commission would consider for amortization and recovery in the company's next rate case.<sup>283</sup>

2. Staff, MIEC, and Public Counsel oppose the creation of a storm restoration tracker.

3. Under regulation as it is currently practiced, major storm costs are recovered through base rates by inclusion of an expected level of costs determined by averaging historical storm related costs over several years. Occasionally, however, the utility's service territory will be hit by an extraordinary storm with many customers out of service, requiring massive repair and restoration efforts. For most extraordinary storm events that occur outside a rate case test year, the Commission has allowed the affected utility to defer those costs through an accounting authority order (AAO) for possible recovery in a future rate case.<sup>284</sup>

4. The Commission has frequently approved such AAOs and has allowed Ameren Missouri to recover its extraordinary storm recovery costs through an AAO and subsequent five-year amortizations. In fact, the company's current revenue requirement contains four separate amortizations related to extraordinary storm restoration costs.<sup>285</sup>

5. The current system has allowed Ameren Missouri to recover all of its major storm recovery costs in recent years. For the period from March 1, 2009, when rates from Case No. ER-2008-0318 went into effect, until the July 31, 2012 true-up cut-off date for this case, Ameren Missouri has, or will, collect in rates approximately \$8.2 million more than the actual costs it incurred to restore service.<sup>286</sup>

6. If major storm restoration costs do not rise to the level included in base rates, Ameren Missouri gets to keep the extra earnings. That has also happened in recent years, as in 2010, when \$6,400,000 was allowed for such expenses in base rates and the company had actual expenses of only \$38.<sup>287</sup>

7. The two-way storm restoration costs tracker would not allow Ameren Missouri to recover its costs any sooner. But it would rationalize the process, and it would allow over collected costs to be returned to ratepayers if the company is fortunate enough to avoid any major storms.<sup>288</sup>

<sup>282</sup> The capital costs incurred for storm restoration are included in rate base and recovered in that manner.

<sup>283</sup> Barnes Direct, Ex. 11, Page 14, Lines 1-14.

<sup>284</sup> Boateng Rebuttal, Ex. 207, Page 4, Lines 1-14.

<sup>285</sup> Wakeman Surrebuttal, Ex. 32, Page 3, Lines 1-3.

<sup>286</sup> Meyer Surrebuttal, Ex. 511, Page 12, Lines 8-21 and Schedule GRM-SUR-1.

<sup>287</sup> Transcript, Pages 1926-1927, Lines 9-25, 1-6.

<sup>288</sup> Wakeman Surrebuttal, Ex. 32, Page 3, Lines 3-8.

8. The current system using occasional AAOs to allow Ameren Missouri to recover its extraordinary storm restoration costs requires Ameren Missouri to file an application for an AAO and to demonstrate that the storm event is extraordinary before related costs will be deferred through the AAO.<sup>289</sup> Staff is concerned that the burden of determining whether particular storm costs would be treated as normal or major would be shifted to Staff.<sup>290</sup>

9. However, Ameren Missouri's proposal would use the IEEE1366 method to determine whether a particular storm event would be classified as a major storm. That method looks at customer interruption minutes per customer to determine whether an outage event is outside the normal range of such events. Ameren Missouri would also treat as extraordinary costs and include in the two-way tracker the costs of preparation for an anticipated major storm that does not materialize if the non-internal labor O&M incurred for the preparation exceeds \$1.5 million.<sup>291</sup>

10. The storm restoration costs tracker would not allow Ameren Missouri to automatically recover the tracked costs. Those costs would still be subject to a prudence review by Staff just as those costs are currently reviewed for prudence.<sup>292</sup>

11. In general, the Commission remains skeptical of proposed tracking mechanisms. There is a legitimate concern that a tracker can reduce a company's incentive to aggressively control costs. However, that concern is reduced for major storm restoration costs. When faced with a massive power outage, the company's first priority must be to quickly restore electric service to its customers.

12. As explained by Ameren Missouri's witness, David Wakeman, who is the person in charge of its power restoration efforts, the ordinary means by which the company can control costs frequently are not available in major storm restoration situations. For example, the company cannot take the time to obtain competitive bids for services, it cannot limit the amount of overtime worked by its employees, nor can it decide not to hire outside restoration crews.<sup>293</sup> In any event, there is no evidence in the record to suggest that Ameren Missouri has spent money imprudently in past major storm restoration efforts.

<sup>289</sup> Boateng Rebuttal, Ex. 207, Page 4, Lines 10-11.

<sup>290</sup> Boateng Surrebuttal, Ex. 231, Page 13, Lines 4-7.

<sup>291</sup> Wakeman Direct, Ex. 30, Pages 13-14, Lines 5-23, 1-4.

<sup>292</sup> Transcript, Pages 1923-1924, Lines 22-25, 1-9.

<sup>293</sup> Wakeman Surrebuttal, Ex. 32, Page 4, Lines 15-22.

13. Major storm restoration costs are particularly well suited for inclusion in a two-way tracker. Ameren Missouri has no control over whether major storms occur and has very little ability to control its restoration cost when such storms do hit its service territory. Such major storm costs can have a significant impact on the company's overall costs and ability to earn a reasonable return on its investment. Furthermore, for whatever reason, major storm events seem to have increased in frequency and intensity in recent years.

14. In the past, the Commission has allowed Ameren Missouri to recover all its major storm costs through a series of AAOs. The creation of a two-way tracker will simply rationalize that method of recovery without reducing Ameren Missouri's incentive to control costs. It will not increase the burden of prudence review imposed on Staff and other parties. However, because it tracks major storm restoration costs both above and below the amount set in base rates, the tracker will return such costs to ratepayers if Ameren Missouri's service territory is not hit by a major storm. The Commission finds that a two-way tracker is appropriate in these circumstances and will approve the tracker proposed by Ameren Missouri.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

The Commission approves the two-way tracker for major storm restoration costs as proposed by Ameren Missouri

**14. Storm Costs:**

**A. If the Commission does not establish a two-way storm restoration costs tracker, then what is the appropriate amount to include in revenue requirement for major storm restoration costs?**

**B. If the Commission does establish a two-way storm restoration costs tracker, then what is the appropriate base level of major storm restoration Operations and Maintenance (O&M) costs to include in Ameren Missouri's revenue requirement?**

**Findings of Fact:**

1. Having approved the major storm restoration cost tracker proposed by Ameren Missouri, the Commission must now decide what level of costs should be established as the base for that tracker.

2. All parties agree the base level should be established using a normalized storm restoration cost calculated by averaging storm costs incurred over a period of time. Staff proposed to set that base amount at \$6.8 million using a 60-month period ending on the true-up date of July 31, 2012.<sup>294</sup> Ameren Missouri accepted Staff's proposal.<sup>295</sup> MIEC initially argued the base level should be set at \$6.5 million, using a 62-month period running from April 2007 to May 2012.<sup>296</sup> After the hearing, MIEC proposed the base level be set at \$6.3 million by extending the averaged period to include June and July 2012, to reach the end of the true-up period.<sup>297</sup>

3. The difference between the parties is that MIEC claims the Commission should use a normalization period of as long as possible by including all available data, which in this case goes back to April 2007.<sup>298</sup>

4. The purpose of using a normalization to determine the proper amount of expense to include is rates is to find a representative period of time that will most accurately reflect what cost levels are likely to be incurred during the time rates will be in effect.<sup>299</sup>

5. In Ameren Missouri's last rate case, Ameren Missouri and Staff proposed to use 47 months of expense information as the normalization period, going back to April 2007 as the first month for which information was available. In that case, MIEC proposed to use expense information for only 23 months beginning with the start of the test-year and running through the end of the true-up period.<sup>300</sup> In rejecting MIEC's use of a 23-month normalization period, the Commission indicated a longer period of normalization was likely to be more reliable than a shorter period of normalization.<sup>301</sup>

6. In this case, all parties recommend the use of an appropriately long period for the normalization. MIEC has apparently taken the Commission's statement in the last case to mean that normalization should be measured over as long a period as possible. In this case 64 months of available expense information is nearly the same period as the 60 months used by Staff and Ameren Missouri, although it has a \$500,000 impact on the company's cost of service. However, in Ameren Missouri's next rate case, assuming the next case is filed in 15 months, there might be 79 months of available cost information. The case after that might have 94 months of available data. At some point, a principle of using all available data for the normalization period would become too long to be reliable.

<sup>294</sup> Transcript, Page 1916, Lines 16-21.

<sup>295</sup> Transcript, Pages 1902-1903, Lines 22-25, 1-4.

<sup>296</sup> Meyer Direct, Ex. 510, Page 10, lines 9-13.

<sup>297</sup> Transcript, Page 1903, Lines 12-25.

<sup>298</sup> Meyer Direct, Ex. 511, Page 8, Lines 9-14.

<sup>299</sup> Barnes Rebuttal, Ex. 12, Page 26, Lines 17-20.

<sup>300</sup> *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase its Annual Revenues for Electric Service*, File No. ER-2011-0028, Report and Order issued July 13, 2011, Page 21.

<sup>301</sup> *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase its Annual Revenues for Electric Service*, File No. ER-2011-0028, Report and Order issued July 13, 2011, Page 22.

7. The 60-month normalization period proposed by Staff and accepted by Ameren Missouri is a reasonable normalization period and the Commission will accept that normalization period to calculate Ameren Missouri's average major storm costs.

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

The storm cost base shall be set using a 60-month average of \$6.8 million.

**15. Storm Assistance Revenues:**

**A. If the Commission authorizes a two-way storm restoration cost tracker for Ameren Missouri, should storm assistance revenues received from other utilities be included in the tracker or annualized and normalized and included as an offset in revenue requirement?**

**B. What amount of storm assistance revenue should be included in the cost of service?**

**Findings of Fact:**

1. Storm assistance revenue is the amount of money Ameren Missouri receives to reimburse it for the labor costs associated with use of its crews for storm restoration work performed for other utilities around the country.<sup>302</sup> While this is not a regular source of income, Ameren Missouri reported receiving such revenue on eleven occasions since July 2005.<sup>303</sup>

2. Staff and MIEC propose that an annualized and normalized storm assistance revenue should be included as an offset to the base amount of storm restoration cost set in the tracker. Ameren Missouri would not use those revenues as an offset to the base amount set in the tracker, but would account for such revenue through the tracker as an offset to the restoration costs incurred by the company from storms in its own territory.<sup>304</sup>

3. The amount of storm assistance revenue Ameren Missouri receives can vary a great deal from year to year. In 2007, 2009, and 2010, the company received no such income, whereas in 2011, it received \$2.6 million.<sup>305</sup>

4. Ameren Missouri has no control over such revenue as it depends entirely upon whether mutual assistance requests are received from some other utility.<sup>306</sup>

<sup>302</sup> Wakeman Rebuttal, Ex. 31, Page 5, Lines 18-23.

<sup>303</sup> Meyer Direct, Ex. 510, Page 12, Lines 19-22.

<sup>304</sup> Wakeman Rebuttal, Ex. 31, Page 6, Lines 15-20.

<sup>305</sup> Transcript, Pages 1931-1932 and Ex. 76.

<sup>306</sup> Wakeman Direct, Ex. 30, Page 9, Lines 13-22.

5. MIEC calculated that the company received \$1.6 million in such revenue during the test year. It proposed to normalize that amount over two years to arrive at its \$800,000 offset to revenue requirement for this case.<sup>307</sup>

6. Staff took a different approach to normalizing the amount of storm restoration revenue earned by Ameren Missouri. Staff noted that 2011, which happens to be the test year, contained an unusually high amount of storm restoration revenue. Staff proposed to normalize that level of income by averaging the amount of such income the company received over the five-year period ending July 31, 2012. That normalization resulted in Staff's recommendation to include \$581,189 as an offset to the company's revenue requirement.<sup>308</sup>

7. Because this source of revenue is highly variable, Staff's five-year normalization provides a more reasonable estimate of likely future revenues than does the test-year normalization proposed by MIEC, which includes the unusually high revenues experienced in 2011 without acknowledging the earlier years when no such revenue was received.

8. The importance of this issue was diminished when the Commission decided to implement a two-way tracker for storm costs. Ameren Missouri will require the company to include these revenues within the tracker. The only question remaining is whether the \$581,189 normalization of that revenue described by Staff should be used to reduce the base level of storm costs included in the tracker.

9. Ameren Missouri proposes that the revenue not be used to reduce the base level of storm costs, and would instead simply credit such revenues against expenses within the tracker. The Commission finds that to be a reasonable solution that will credit ratepayers for that revenue without imposing an economic penalty on the company if those revenues are not received.

#### **Conclusions of Law:**

There are no additional conclusions of law for this issue.

#### **Decision:**

Ameren Missouri shall credit storm assistance revenue as an offset to major storm expenses within the two-way storm cost tracker established in the report and order. Such revenue shall not be used to reduce the base level of storm costs established within that tracker.

<sup>307</sup> Meyer Direct, Ex. 510, Page 13, Lines 9-15.

<sup>308</sup> Transcript, Page 1928, Lines 20-25.

- 16. Vegetation Management and Infrastructure Inspection Tracker:**
- A. Should the unamortized balance for the regulatory asset associated with the Vegetation Management and Infrastructure Inspection Tracker be adjusted for all amortization through December 31, 2012, and amortized over two years?**
- B. Should the Vegetation Management and Infrastructure Inspection Tracker be continued?**

**Findings of Fact:**

1. Ameren Missouri's vegetation management and infrastructure inspection expense is closely associated with two Commission rules. Following extensive storm related service outages in 2006, the Commission promulgated new rules designed to compel Missouri's electric utilities to do a better job of maintaining their electric distribution systems. Those rules, entitled Electrical Corporation Infrastructure Standards<sup>309</sup> and Electrical Corporation Vegetation Management Standards and Reporting Requirements,<sup>310</sup> became effective on June 30, 2008.

2. The rules establish specific standards requiring electric utilities to inspect and replace old and damaged infrastructure, such as poles and transformers. In addition, electric utilities are required to more aggressively trim tree branches and other vegetation that encroaches on transmission lines. In promulgating the stricter standards, the Commission anticipated utilities would have to spend more money to comply. Therefore, both rules include provisions that allow a utility the means to recover the extra costs it incurs to comply with the requirements of the rule.

3. In an earlier rate case, ER-2008-0318, the Commission allowed Ameren Missouri to recover a set amount in its base rates for vegetation management and infrastructure inspection costs. However, since the rules were new, the Commission found that Ameren Missouri had too little experience to know how much it would need to spend to comply with the vegetation management and infrastructure inspection rules. Because of that uncertainty, the Commission established a two-way tracking mechanism to allow Ameren Missouri to track its vegetation management and infrastructure costs.

4. The order required Ameren Missouri to track actual expenditures around the base level. In any year in which Ameren Missouri spent below that base level, a regulatory liability would be created. In any year in which Ameren Missouri's spending exceeded the base level, a regulatory asset would be created. The

<sup>309</sup> Commission Rule 4 CSR 240-23.020.

<sup>310</sup> Commission Rule 4 CSR 240-23.030.

regulatory assets and liabilities would be netted against each other and would be considered in a future rate case. The tracking mechanism contained a 10 percent cap so if Ameren Missouri's expenditures exceeded the base level by more than 10 percent it could not defer those costs under the tracking mechanism, but would need to apply for an additional accounting authority order. The Commission's order indicated that the tracking mechanism would operate until new rates were established in Ameren Missouri's next rate case.<sup>311</sup>

5. The Commission renewed the tracking mechanism in Ameren Missouri's next two rate cases, ER-2010-0036 and ER-2011-0028, finding that Ameren Missouri's costs to comply with the vegetation management and infrastructure inspection rules were still uncertain, as the company had not yet completed a full four/six year vegetation management cycle on its entire system.<sup>312</sup>

6. Ameren Missouri asks that the tracker be continued. Staff does not oppose the continuation of the tracker, but MIEC contends the tracker is no longer necessary and urges the Commission to end it.

7. The other half of this issue concerns what should be done with the regulatory asset that has accumulated under the existing tracker. Ameren Missouri proposes that it be amortized and recovered over two years.<sup>313</sup> Staff argues for a three-year amortization.

8. Ameren Missouri has now been operating under the Commission's vegetation management and infrastructure inspection rules for nearly five years. Ameren Missouri has completed its first four-year cycle for vegetation management work on urban circuits under the requirements of the new rules, however, it will not complete the first six-year cycle of work on rural circuits until December 31, 2013.<sup>314</sup>

9. Ameren Missouri's actual expenditures for vegetation management and infrastructure inspection have not been extremely volatile over the last three rate cases, but they have varied from base amounts. For example, the base amount allowed in rates in the last rate case was \$52.2 million for vegetation management and \$7.8 million for infrastructure inspections. The true-up expenditure amount for this case was \$54.1 million on vegetation management and \$6.2 million on infrastructure inspections.<sup>315</sup>

10. The tracking mechanism works in two directions. That means ratepayers can also benefit when, as was the case for infrastructure inspections in the last year, the company spent less than the established base amount.<sup>316</sup>

<sup>311</sup> *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service*, Report and Order, Case No. ER-2008-0318, January 27, 2009, Pages 48-49.

<sup>312</sup> *In the Matter of Union Electric Company, d/b/a Ameren UE's Tariffs to Increase its Annual Revenues for Electric Service*, Report and Order, File No. ER-2010-0036, May 28, 2010, and *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, File No. ER-2011-0028, July 13, 2011.

<sup>313</sup> Weiss Rebuttal, Ex.6, Pages 26-27.

<sup>314</sup> Wakeman Rebuttal, Ex. 31, Page 2, Lines 10-13.

<sup>315</sup> Meyer Surrebuttal, Ex. 511, Charts at Pages 23-24.

<sup>316</sup> Barnes Rebuttal, Ex. 12, Page 38, Lines 12-13.

11. For the period of March 1, 2011, when rates went into effect in the last rate case, through July 31, 2012, the end of the true-up in this case, Ameren Missouri under- collected a net amount of \$2,465,063. That represents a \$2,896,420 under-collection for vegetation management, offset by an over-collection of \$431,357 for infrastructure inspections.<sup>317</sup> In past Ameren Missouri rate cases the Commission has amortized that net amount over three years for collection from ratepayers and has rolled any unamortized balance from the previous tracker into the new amount so that only one tracker remains. Staff recommends the Commission do so again in this case.<sup>318</sup> Staff's proposed three-year amortization will increase Ameren Missouri's annual revenue requirement by \$821,688.<sup>319</sup>

12. The Commission finds Staff's proposed treatment of the existing regulatory asset to be reasonable and consistent with past Commission practice.

### **Conclusions of Law:**

A. Commission Rule 4 CSR 240-23.020 establishes standards requiring electrical corporations, including Ameren Missouri, to inspect its transmission and distribution facilities as necessary to provide safe and adequate service to its customers. Specifically, 4 CSR 240-23.020(3)(A) establishes a four-year cycle for inspection of urban infrastructure and a six-year cycle for inspection of rural infrastructure.

B. Commission Rule 4 CSR 240-23.020(4) establishes a procedure by which an electric utility may recover expenses it incurs because of the rule. Specifically, that section states as follows:

In the event an electrical corporation incurs expenses as a result of this rule in excess of the costs included in current rates, the corporation may submit a request to the commission for accounting authorization to defer recognition and possible recovery of these excess expenses until the effective date of rates resulting from its next general rate case, filed after the effective date of this rule, using a tracking mechanism to record the difference between the actually incurred expenses as a result of this rule and the amount included in the corporation's rates ... .

C. Commission Rule 4 CSR 240-23.030 establishes standards requiring electrical corporations, including Ameren Missouri, to trim trees and otherwise manage the growth of vegetation around its transmission and distribution facilities as necessary to provide safe and adequate service to its customers. Specifically, 4 CSR 240-23.030(9) establishes a four-year cycle for vegetation management of urban infrastructure and a six- year cycle for vegetation management of rural infrastructure. The vegetation management rule also includes a provision that allows Ameren Missouri to ask the Commission for authority to accumulate and recover its cost of compliance in its next rate case.<sup>320</sup>

<sup>317</sup> Grissum Surrebuttal, Ex. 223, Page 7, Lines 12-17.

<sup>318</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Pages 114-115.

<sup>319</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 115, Lines 26-28.

<sup>320</sup> Commission Rule 4 CSR 240-23.030(10).

**Decision:**

Although Ameren Missouri now has more experience in complying with the rules, it still has not completed a single cycle on inspections for its rural circuits. The Commission finds that because of that remaining uncertainty the tracker is still needed. However, as the Commission has indicated in previous rate cases, it does not intend for this tracker to become permanent. For this case, the Commission will renew the existing vegetation management and infrastructure inspection tracker.

Ameren Missouri shall establish a tracking mechanism to track future vegetation management and infrastructure costs. That tracking mechanism shall include a base level of \$60.3 million (\$54.1 million vegetation management + \$6.2 million infrastructure = \$60.3 million). Actual expenditures shall be tracked around that base level with the creation of a regulatory liability in any year where Ameren Missouri spends less than the base amount and a regulatory asset in any year where Ameren Missouri spends more than the base amount. The assets and liabilities shall be netted against each other and shall be considered in Ameren Missouri's next rate case. The tracking mechanism shall contain a ten percent cap so expenditures exceeding the base level by more than ten percent shall not be deferred under the tracking mechanism. If Ameren Missouri's vegetation management and infrastructure inspection costs exceed the ten percent cap, it may request additional accounting authority from the Commission in a separate proceeding. The tracking mechanism shall operate until the Commission establishes new rates in Ameren Missouri's next rate case.

The net under-collection of \$2,465,063 under the tracker established in Case No. ER-2011-0028 shall be combined with any unamortized amount related to the tracker established in Case No. ER-2010-0036 and then amortized over a three-year period so that only one tracker remains.

**17. Rate Design:**

- A. What should the residential class customer charge be?**
- B. What should the small general service class customer charge be (single-phase and three-phase)?**

**Findings of Fact:**

1. After the Commission determines the amount of rate increase that is necessary, it must decide how that rate increase will be spread among Ameren Missouri's customer classes. The basic principle guiding that decision is that the customer class that causes a cost should pay that cost.

2. The Commission has approved a stipulation and agreement that resolves most of the rate design issues. One issue that remains unresolved is amount of Ameren Missouri's customer charge for its residential and small general services customer classes.

3. The customer charge is the set amount on every customer's bill that must be paid even if the customer uses no electricity.

4. Customer-related costs are the minimum costs necessary to make electric service available to the customer, regardless of how much electricity the customer uses.<sup>321</sup> Customer-related costs are generally recovered through the customer charge while other costs are recovered through volumetric rates that vary with the amount of electricity used.

5. It is important to remember that determining an appropriate customer charge is a question of rate design, not a question of the company's revenue requirement. That means any increase in the company's customer charge would be accompanied by a decrease in volumetric rates so that, in theory, the company recovers the same amount of revenue.

6. In actual practice, because the amount collected from volumetric rates varies with the amount of electricity used, the company will collect less money from volumetric rates when customers use less electricity. Thus, for example, in a cool summer, when customers are using less air conditioning, the company runs the risk of collecting less revenue. For that reason, electric utilities prefer to lessen risk by collecting more of its charges through the fixed customer charge.

7. Ameren Missouri's current customer charge for residential customers is set at \$8.00 per month. For the small general service rate, the current customer charge is \$9.74 per month for single-phase service and \$19.49 for three-phase service. Ameren Missouri proposes to increase those customer charges to \$12.00 per month for residential customers. It would increase the customer charge to \$14.61 for single-phase customers and \$29.24 for three-phase customers in the small general service class.<sup>322</sup>

8. Staff would slightly increase the residential customer charges to \$9.00<sup>323</sup> but NRDC, Public Counsel, and AARP/Consumers Council oppose any increase in the customer charges.

9. Ameren Missouri, Staff, and Public Counsel all submitted cost of service studies that support their positions regarding the customer charges. Ameren Missouri's study indicates a customer charge of \$20.00 would be appropriate for the residential class, although the company limited its request to \$12.00.<sup>324</sup> Staff's study indicated the correct amount for the residential customer charge would be \$8.97, which Staff rounded to \$9.00.<sup>325</sup> Public Counsel's study indicated the correct customer charge would be under \$6.00 for the residential class and about \$10.65 for the small general services class. Public Counsel recommends the current customer charges be unchanged.<sup>326</sup>

<sup>321</sup> Cooper Direct, Ex. 36, Page 9, Lines 20-23.

<sup>322</sup> Cooper Direct, Ex. 36, Pages 21-22, Lines 16-25, 1-5. The small general services class includes small commercial businesses.

<sup>323</sup> Staff's Rate Design and Class Cost of Service Report, Ex. 205, Page 22, Lines 17-18.

<sup>324</sup> Cooper Direct, Ex. 36, Page 21, Lines 16-21.

<sup>325</sup> Transcript, Page 2148, Lines 20-24.

<sup>326</sup> Meisenheimer Direct, Ex. 403, Page 17, Lines 11-16.

10. The chief difference between the various cost of service studies is the amount of distribution plant that each expert assigned to customer-related usage. Ameren Missouri's study tends to overstate the amount of the distribution system that would appropriately be allocated to customer-related usage.<sup>327</sup> On that basis, for this purpose, the Commission finds the cost of service studies submitted by Staff and Public Counsel to be more reliable.

11. Regardless of their details, the Commission is not bound to set the customer charges based solely on the details of the cost of service studies. The Commission must also consider the public policy implications of changing the existing customer charges. There are strong public policy considerations in favor of not increasing the customer charges.

12. Recently, in File Number EO-2012-0142, the Commission approved Ameren Missouri's first energy efficiency plan under the Missouri Energy Efficiency Investment Act. (MEEIA). Shifting customer costs from variable volumetric rates, which a customer can reduce through energy efficiency efforts, to fixed customer charges, that cannot be reduced through energy efficiency efforts, will tend to reduce a customer's incentive to save electricity.<sup>328</sup>

13. Admittedly, the effect on payback periods associated with energy efficiency efforts would be small,<sup>329</sup> but increasing customer charges at this time would send exactly to wrong message to customers that both the company and the Commission are encouraging to increase efforts to conserve electricity.

14. The Commission finds that the existing customer charges for the residential and small general services classes should not be increased.

#### **Conclusions of Law:**

A. The Missouri Energy Efficiency Investment Act is codified at Section 393.1075, RSMo (Supp. 2011).

#### **Decision:**

Ameren Missouri's customer charges for residential and small general services customers shall remain unchanged.

**B. Should the Commission address declining block rate design either by opening a separate docket on rate design or by ordering Ameren to address the rate design in its next general rate case?**

<sup>327</sup> Transcript, Page 2067-2071 and Ex. 410.

<sup>328</sup> Morgan Rebuttal, Ex. 650, Page 7, Lines 11-15.

<sup>329</sup> Davis Surrebuttal, Ex. 40, Page 3, Lines 12-19.

**Findings of Fact:**

1. Ameren Missouri's current residential rate design includes a declining block element for the winter billing season only. That means that during the winter the rate paid for electricity goes down as more electricity is used. That declining block design benefits customer who use a lot of electricity in the winter, chiefly customers who use electricity for space heating in their home. That design also benefits the electric utility in that it makes electricity more competitive with other fuel sources for space heating and allows the company to sell more electricity during off-peak times. The downside of a declining block rate design is that it may not send a proper price signal and tends to encourage the excessive consumption of electricity.<sup>330</sup>

2. In Ameren Missouri's last rate case, the Commission decided not to eliminate Ameren Missouri's declining block rates because not enough evidence was presented in that case to justify such a modification. At that time, the Commission invited the parties to present more evidence in the next rate case.<sup>331</sup>

3. The NRDC raised the issue of declining block rates again in this case through the testimony of Pamela Morgan. Ms. Morgan's testimony acknowledged the complexity of the issue and indicated much of the information needed to properly evaluate the continued use of declining block rates is controlled by the utility. She recommends the Commission open a new, separate investigative case to address this issue.<sup>332</sup>

4. Ameren Missouri agreed that if the Commission wished to investigate declining block rates it should do so in the context of a broader investigative case that could involve all Missouri's regulated electric utilities and all interested stakeholders, not just those who have intervened in this case.<sup>333</sup>

**Conclusions of Law:**

There are no additional conclusions of law for this issue.

**Decision:**

The Commission finds that the issue of whether declining block rates should be eliminated or modified should be addressed in an investigative case outside the confines of this rate case. The Commission will open such a case by separate order.

<sup>330</sup> Morgan Rebuttal, Ex. 650, Page 17, Lines 5-7.

<sup>331</sup> *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase its Annual Revenues for Electric Service*, File No. ER-2011-0028, Report and Order, issued July 13, 2011, Page 124.

<sup>332</sup> Morgan Rebuttal, Ex. 650, Page 18, Lines 10-13.

<sup>333</sup> Cooper Surrebuttal, Ex. 38, Pages 14-15, Lines 14-23, 1-5.

**18. Should the Commission make the Findings Required by the Energy Independence and Security Act of 2007 (EISA). Findings of Fact:**

1. In 2007, the United States Congress passed the Energy Independence and Security Act of 2007 (EISA). EISA amended the Public Utility Regulatory Policies Act of 1978 (PURPA) to establish four additional PURPA standards with which each electric utility must comply. Those four new standards relate to 1) Integrated Resource Planning (IRP), 2) Rate Design Modifications to Promote Energy Efficiency Investments, 3) Consideration of Smart Grid Investments, and 4) Smart Grid Information. EISA requires the Commission to consider in a general rate case for each individual electric utility whether it is appropriate to implement those standards to encourage conservation of electric energy, efficiency in the use of facilities and resources by electric utilities, and equitable rates to consumers of electricity.<sup>334</sup>

2. In its direct testimony, Staff examined Ameren Missouri's compliance with each of the EISA standards and concluded that the Commission should make a specific finding that the Commission and the Company do not need to do anything further to comply with each of those standards. No party responded to Staff's testimony, either in testimony or by argument.

3. PURPA section 111(d)(16)<sup>335</sup> requires state commissions to consider integration of energy resources into utility, state and regional plans and to adopt policies to establish cost-effective energy efficiency as a priority resource.<sup>336</sup>

4. The Commission has complied with that standard by revising its integrated resource planning rule to require the screening and integration of cost-effective energy efficiency resources as part of the resource planning process.

5. PURPA section 111(d)(17)<sup>337</sup> requires state commissions to consider various means to encourage energy efficiency.<sup>338</sup>

6. The Commission has complied with that standard by implementing the requirements of the Missouri Energy Efficiency Investment Act (MEEIA) in this case and through a stipulation and agreement resolving Ameren Missouri's MEEIA implementation filing in File No. EO-2012-0142.<sup>339</sup>

7. PURPA section 111(d)(18)<sup>340</sup> requires state commissions to consider requiring electric utilities to consider investments in smart grid technology before investing in non-advanced grid technologies. PURPA section 111(d)(19)<sup>341</sup> requires state commissions to make available information about smart grid technology.

<sup>334</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 176, Lines 9-26.

<sup>335</sup> This section is codified at 16 U.S.C.A. Section 2621(d)(16).

<sup>336</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Page 178, Lines 20-26.

<sup>337</sup> This section is codified at 16 U.S.C.A. Section 2621(d)(17).

<sup>338</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Pages 179-180, Lines 25-28, 1-5.

<sup>339</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Pages 180-181.

<sup>340</sup> This section is codified at 16 U.S.C.A. Section 2621(d)(18).

<sup>341</sup> This section is codified at 16 U.S.C.A. Section 2621(d)(19).

8. The Commission has taken steps to encourage electric utilities to become familiar with and to use smart grid technology.<sup>342</sup>

**Conclusions of Law:**

- A. The purpose of PURPA is to encourage
- (1) conservation of energy supplied by electric utilities;
  - (2) the optimization of the efficiency of use of facilities and resources by electric utilities; and
  - (3) equitable rates to electric consumers.<sup>343</sup>
- B. The four new PURPA standards created by the Energy Independence and Security Act of 2007 (EISA) are:
- (16) Integrated resource planning  
Each electric utility shall—
    - (A) integrate energy efficiency resources into utility, State, and regional plans; and
    - (B) adopt policies establishing cost-effective energy efficiency as a priority resource.
  - (17) Rate design modifications to promote energy efficiency investments
    - (A) In general  
The rates allowed to be charged by any electric utility shall—
      - (i) align utility incentives with the delivery of cost-effective energy efficiency; and
      - (ii) promote energy efficiency investments.
    - (B) Policy options  
In complying with subparagraph (A) each State regulatory authority and each nonregulated utility shall consider—
      - (i) removing the throughput incentive and other regulatory and management disincentives to energy efficiency;
      - (ii) providing utility incentives for the successful management of energy efficiency programs;
      - (iii) including the impact on adoption of energy efficiency as 1 of the goals of retail rate design, recognizing that energy efficiency must be balanced with other objectives;
      - (iv) adopting rate designs that encourage energy efficiency for each customer class;
      - (v) allowing timely recovery of energy efficiency-related costs; and
      - (vi) offering home energy audits, offering demand response programs, publicizing the financial and environmental benefits associated with making home energy efficiency improvements,

<sup>342</sup> Staff Report Revenue Requirement Cost of Service, Ex. 202, Pages 181-182.

<sup>343</sup> 16 U.S.C.A. Section 2611. and educating homeowners about all existing Federal and State incentives, including the availability of low-cost loans, that make energy efficiency improvements more affordable.

## (18) Consideration of smart grid investments

## (A) In General

Each State shall consider requiring that, prior to undertaking investments in nonadvanced grid technologies, an electric utility of the State demonstrate to the State that the electric utility considered an investment in a qualified smart grid system based on appropriate factors, including—

- (i) total costs;
- (ii) cost-effectiveness;
- (iii) improved reliability;
- (iv) security;
- (v) system performance; and
- (vi) societal benefit.

## (B) Rate recovery

Each State shall consider authorizing each electric utility of the State to recover from ratepayers any capital, operating expenditure, or other costs of the electric utility relating to the deployment of a qualified smart grid system, including a reasonable rate of return on capital expenditures of the electric utility for the deployment of the qualified smart grid system.

## (C) Obsolete equipment

Each State shall consider authorizing any electric utility or other party of the State to deploy a qualified smart grid system to recover in a timely manner the remaining book-value costs of any equipment rendered the remaining depreciable life of the obsolete equipment.

## (19) Smart Grid information

## (A) Standard

All electricity purchasers shall be provided direct access, in written or electronic machine-readable form as appropriate, to information from their electricity provider as provided in subparagraph (B)

## (B) Information

Information provided under this section, to the extent practicable, shall include:

## (i) Prices

Purchasers and other interested persons shall be provided with information on—

- (I) time-based electricity prices in the wholesale electricity market; and
- (II) time-based electricity retail prices or rates that are available to the purchasers.

## (ii) Usage

Purchasers shall be provided with the number of electricity units, expressed in kwh, purchased by them

## (iii) Intervals and projections

Updates of information on prices and usage shall be offered on not less than a daily basis, shall include hourly price and use information, where available, and shall include a day-ahead projection of such price information to the extent available.

## (iv) Sources

Purchasers and other interested persons shall be provided annually with written information on the sources of the power provided by the utility, to the extent it can be determined, by type of generation, including greenhouse gas emissions associated with each type of generation, for intervals during which such information is available on a cost-effective basis.

## (C) Access

Purchasers shall be able to access their own information at any time through the Internet and on other means of communication elected by that utility for Smart Grid applications. Other interested persons shall be able to access information not specific to any purchaser through the Internet. Information specific to any purchaser shall be provided solely to that purchaser.<sup>344</sup>

**Decision:**

While not specifically making a determination to implement PURPA section 111(d)(16), the Commission has promulgated rules to address the principles of that section. Therefore, nothing remains for the Commission to determine in response to PURPA section 111(d)(16).

No further determination by the Commission is needed in response to PURPA section 111(d)(17).

The Commission has established the appropriate avenues for monitoring smart grid activities and no greater ongoing activity is needed in response to PURPA sections 111(d)(18) and 111(d)(19).

<sup>344</sup> 16 U.S.C.A. 2621(d)(16)-(19).

**Application for Waiver or Variance of 4 CSR 240-20.100(6)(A)16 for Maryland Heights Landfill Gas Facility:**

On December 7, 2012, Ameren Missouri filed an application asking the Commission for a waiver or variance from Commission Rule 4 CSR 240-20.100(6)(A)16 concerning the treatment of landfill gas purchased from the landfill owner for operation of the company's Maryland Heights landfill gas facility. That regulation provides that RES compliance costs may only be recovered through a RESRAM or as part of a general rate proceeding. Such costs may not be recovered through a fuel adjustment clause.

In recent days, a question has arisen as to whether some or all of the cost of landfill gas purchased from the owner of the landfill and used to operate the company's Maryland Heights landfill gas facility is a RES compliance cost. The parties to this case assumed that the cost of such gas would be recovered through the fuel adjustment clause. The treatment of these landfill gas costs would have a very small impact on this case, but recalculating many of the agreed upon particulars of the fuel adjustment clause at this late date would be difficult.

Because of those difficulties, Ameren Missouri asks the Commission to grant it a waiver from the rule provision to allow it to continue to flow the cost of the landfill gas through its fuel adjustment clause. Ameren Missouri agrees that in the future it will work with Staff and other interested parties to resolve the issues surrounding the landfill gas. The application represents that Staff supports the company's request for waiver of the rule provision. It also represents that Ameren Missouri has contacted all other parties to this case and that none of them object to the application.

On December 7, the Commission issued an order establishing December 11 as the deadline for any interested party to respond to Ameren Missouri's application. Staff responded on December 11, indicating its support for the requested waiver for purposes of this case only. No other response has been filed.

The Commission finds Ameren Missouri's application to be reasonable and will waive application of the rule provision as requested.

**THE COMMISSION ORDERS THAT:**

1. The tariff sheets filed by Union Electric Company, d/b/a Ameren Missouri on February 3, 2012, and assigned tariff number YE-2012-0370, are rejected.

2. Union Electric Company, d/b/a Ameren Missouri is authorized to file a tariff sufficient to recover revenues as determined by the Commission in this order. Ameren Missouri shall file its compliance tariff no later than December 18, 2012.

3. Union Electric Company, d/b/a Ameren Missouri shall file the information required by Section 393.275.1, RSMo 2000, and Commission Rule 4 CSR 240-10.060 no later than January 14, 2013.

4. For purpose of the rates established in this case, Ameren Missouri is granted a waiver of Commission Rule 4 CSR 240-20.100(6)(A)16 as regards the purchase of landfill gas for the operation of the Maryland Heights Landfill Gas Facility.

5. This report and order shall become effective on December 22, 2012.

Gunn, Chm., concurs with concurring opinion attached;  
Jarrett, C., concurs with concurring opinion to follow;  
Stoll, C., concurs; and Kenney, C., dissents, with dissenting opinion to follow; and  
certify compliance with the provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,  
on this 12<sup>th</sup> day of December, 2012.

**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 *Union Electric Co. v. Pub. Serv. Comm.*, 422 S.W.3d 358 (Mo. App. W.D. 2013).

In the matter of Union Electric Company,	)	
d/b/a AmerenUE’s Tariffs to Increase Its	)	Case No. ER-2012-0166
Annual Revenues for Electric Service	)	

**CONCURRING OPINION OF COMMISSIONER TERRY M. JARRETT IN THE COMMISSION’S REPORT AND ORDER**

I concur in the *Report and Order* because, taken as a whole, I believe it provides just and reasonable rates consistent with *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) and *Hope Natural Gas Company v. Federal Power Commission*, 320 U.S. 591 (1943), and supports bold steps by the utility in promoting and implementing energy efficiency programs that give ratepayers an opportunity to impact their costs for electrical service. However, I write separately to address; (1) Plant in Service Accounting (“PISA”) and (2) Ameren Missouri’s Property Tax Appeal and subsequent Refund.

(1) Plant in Service Accounting (“PISA”)

These times are challenging for regulated utilities and consumers. Increasingly, regulators are being asked to rethink the traditional rate making paradigm and to consider alternatives to traditional regulatory practice. Not every idea is a good one, but every well conceived idea merits consideration by this Commission. Energy efficiency is an example of new thinking that is being embraced by utility regulators, utilities and ratepayers.

Today’s electricity world looks vastly different from the traditional vertically integrated utility of years past. It is the past that shaped state regulations which guided us through the 19<sup>th</sup> and into the 20<sup>th</sup> century. The current regulatory framework is rooted in more than 100 years of regulatory history in Missouri, solidly developed and applied. “Rate of return” regulation is a valuable approach to utility regulation; but, economic, political and regulatory changes cannot be overlooked in regulating investor owned utilities today.

Now, utility systems are no longer incentivized to encourage unlimited demand for electricity and load growth. Instead, energy efficiency, conservation and demand response are in the spot light. Construction of new base load power plants has all but been supplanted by costly installation of environmental controls on existing generation plants. Public policy pushes interest in “green” energy sources, leading to construction of renewable power generation and transmission projects to move the renewable power to the load. More stringent reliability limits and development of the “smart grid” requires investment. Aging infrastructure must be replaced. This short list of new regulatory considerations shows that today’s regulator is not faced with the same challenges that were faced by the first five Commissioners of the Missouri Public Service Commission when it was created by the Missouri General Assembly in 1913.

We now live in regulatory times that incent a counterintuitive business model whereby a regulated utility spends its investor monies to stop sales of its product.

Explaining this complex model is difficult if not logically impossible, but experts and scholars have opined that this new thinking is the “right thinking” for today’s regulatory marketplace. This is the new normal.

While there are those that call for dismantling traditional regulation and retooling the future from the ground up, there are sound reasons for leaving the existing paradigm intact, chief among them the legal certainty that exists in laws that have been tested by time. As has been demonstrated in Missouri, each new legislative effort to implement a “tweek” or “fix” to the traditional regulatory framework has left parties in a state of uncertainty, not only at the hands of the regulator, but ultimately the courts. Absent legislative mandates, a regulator must understand and use the tools that already are in the regulator’s toolbox.

Regulators must work to address today’s unique challenges in the face of one longstanding issue; regulatory lag. The “file and suspend” system for rate setting honors the Constitutional bargain of ensuring that private property is not taken without just compensation, while creating a regulatory balancing of interests between ratepayers and utility investors. The suspension period affords due process protections, without unduly delaying implementation of new just and reasonable rates. The “lag” that raises concern is not just embedded in the “suspension” of a rate (as many as eleven months in Missouri), but also in the type of test period (“historical”) the regulator uses to measure a new rate. This scheme of time and measurement made perfect sense in a 1913 world where new base load generation was being built, along with distribution and transmission systems for a utility. These capital intensive projects lent themselves well to the rate of return regulatory model, and the regulatory review which accompanied the process. The granting of monopoly status to a utility in exchange for rate regulation a century ago has allowed for the expansive development of safe and reliable utility services for Missouri’s ratepayers, fueled economic development throughout the state, and provided an opportunity for the utilities investor’s to earn a fair return on their investment. This balance should not be disturbed. Nor should there be any temptation to put a thumb on the scale and tilt that balance discriminatorily in favor of one interest over another.

There will always be financial market concerns, and economic drivers that are well beyond a Missouri regulator’s control. However, understanding there are regulatory choices that neither require a change of law, or creation of new regulation, allows today’s regulator to act lawfully and proactively in the face of changing times. Commissioners must ensure that the best tool in ratemaking is selected if addressing the “lag” issue, and making sure that tinkering with the tried and true regulatory model isn’t inadvertently tipped off balance.

Ameren Missouri’s PISA proposal is an example of a regulatory tool that could allow Missouri regulators to reach into the tool box and attempt to realign an out of balance framework for cost recovery in construction projects. Missouri’s prohibition on collection of “construction work in progress” – like statutory lag in rate making – tilts the balance of interests. That is why exploration of new approaches such as PISA should not be set aside simply because it is new or novel.

Beyond PISA, this Commission can look to existing laws to diminish regulatory lag – leaving only mandatory statutory lag behind. Statutory lag (eleven month suspension) is not mandatory in Missouri; to the contrary, the law directs this Commission to act as “speedily” as possible in determining a rate increase change. More expedient processing of rate increase filings is a tool available today. Time is one tool, but function is another, and the mechanisms embodied in PISA recognize that capital projects may not neatly fit into a test year. Further, certain types of capital projects may not be capable of expedient completion, not because of the utilities’ delay, but for example due to review and approvals necessary from state and federal agencies. Even where these factors are built into the construction timeline, such outside countervailing forces have a tremendous impact on the Missouri regulated utilities’ operations.

What the Infrastructure System Replacement Surcharge (“ISRS”) has accomplished through statute illustrates a change to regulatory and statutory lag. According to Ameren, the intended goal of PISA was to reduce the regulatory lag that kept the company from earning its allowed return on equity. While ultimately I did not believe that the record supported implementing PISA as proposed in this case, I do believe that the general concept of reducing lag should be further explored.

The Commission opens workshop dockets to invite comment and participation from interested persons on issues which are new to the Commission. The Commission recently opened a workshop docket, AW-2013-0110, to explore rate stabilization, a regulatory “tool” currently not utilized by this Commission. In my opinion, PISA or similar concepts to reduce lag should be explored and considered in the context of a workshop, and adding it to the existing rate stabilization workshop is appropriate.

(2) Ameren Missouri’s Property Tax Appeal and Subsequent Refund

As I noted above, I supported the *Report and Order* in its totality. In light of Ameren’s *Application for Rehearing and Request for Reconsideration*, my view is unchanged as to my support of the Order in its totality. Nevertheless, Ameren raises serious legal arguments on the property tax refund issue. As a matter of law, Ameren may be entitled to keep the refund. It looks like this issue may be addressed by the courts, thereby providing legal certainty on this matter.

Absent that, I am concerned that we return the entire tax refund without offsetting Ameren’s expenses to prosecute the case. I realize that the record in this case is not adequate to determine how much Ameren spent to obtain the refund. This is a fact question – limited to an inquiry of the balancing of the ledger sheet – what did it cost to recover the refund? Returning nearly \$2.9 million dollars to the ratepayers from Ameren, without any explanation as to why Ameren Missouri’s investors should bear the financial burden to litigate solely for the benefit of the ratepayers, is striking. In rate making, expenses are considered part of the process. But on this particular issue, there seems to be no offset whatsoever; nor any explanation. To the extent that these facts would be legally relevant, development of the record on this point would have been

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valuable in my opinion. My point begs the question, why would the utility seek redress at all, if the shareholders bear the cost of the litigation, and must hand over all of the spoils to the ratepayers? Win, lose or draw the ratepayers as well as the utility must have skin in the game.

Respectfully submitted,

A handwritten signature in black ink, reading "Terry M. Janett", is written over a horizontal line.

This 9<sup>th</sup> day of January, 2013 at  
Jefferson City, Missouri.

**BEFORE THE PUBLIC SERVICE COMMISSION OF THE  
STATE OF MISSOURI**

In the Matter of Union Electric Company, d/b/a )  
 Ameren Missouri's Tariff to Increase Its Annual ) **Case No. ER-2012-0166**  
 Revenues for Electric Service. )

**CONCURRING OPINION OF CHAIRMAN KEVIN D. GUNN**

The Commission's order in ER-2012-0166 is a fair order and reflects just and reasonable rates based upon substantial and competent evidence. However, in order to expand on certain issues included in the Report and Order, I am attaching this very short concurrence.

The Report and Order correctly applies a Return of Equity of 9.8%. In the absence of contravening issues, I would have advocated for a slightly lower Return. However, in an Order of this magnitude, a balance in the public's best interest must be struck, and I recognize that a significantly lower ROE would have most likely resulted in an almost immediate filing of a new rate case. Additionally, such a low ROE would have had an unnecessarily negative impact on Ameren's cost of capital. Neither of these would, in the long term, benefit the ratepayer.

It is important to remember that ROE is essentially a theoretical number that defines a utility's "opportunity" to earn on its investment. It is not a guarantee of profit, nor is a utility guaranteed to earn that percentage. There does exist in the utility world an "echo chamber" where an ROE is driven not necessarily by evidence, but by concern about perceptions of investors. While it is important to recognize that this echo chamber tends to inflate ROE's beyond the actual cost of capital, one cannot ignore the very real world implications of earning below the mainstream of the industry. Investors will put their money where they believe they will earn a sufficient return. Utilities must compete for those dollars and the harder it is to attract investors, the more the cost of capital rises.

I think the markets and investors would have been comfortable with an ROE of below 9.8% and I would have supported that number. However, the evidence and testimony does support the higher ROE. Ameren should be on notice that if the cost of capital remains where it is today, lower ROE's may be awarded.

I would have also voted to end Ameren's vegetation management tracker. Trackers tend to remain past their usefulness and there is a danger that mechanisms meant to assist with acute issues become chronically renewed

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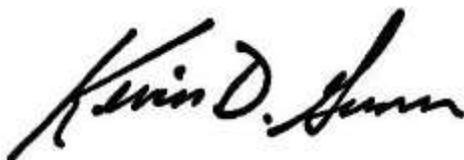
without much scrutiny. Through one full urban cutting cycle and 2/3 through a rural cutting cycle, costs have remained remarkably stable and could be accounted for in base rates. If the costs do fluctuate wildly over the next cycle, those may be demonstrated in the next rate case and adjustments may be made. Also, any extraordinary costs associated with vegetation management due to increase storm activity could be accounted for in the authorized storm tracker.

Although the Commission has authorized rate case expense in this case, it has also opened docket AW-2011-0330 open to explore the potential of sharing these costs between ratepayers and shareholders. A utility is required to go through a rate case filing in order to increase revenues, however, that requirement is because they enjoy a monopoly in their service territory. Clearly when revenues are increased and a utility gets to recover its cost plus a return, shareholders benefit. It is impossible to claim that shareholders do not benefit from the rate case proceedings and to do so is disingenuous. I believe it is appropriate to allow some sharing of rate case expense. If not for the open docket, I would have allocated some of the rate case expense costs to the utility. There are many questions as to what the correct allocation formula should be as how to calculate benefits that should be resolved using the docket/workshop process. The Commission should proceed with all deliberate speed in concluding the workshop and moving towards a rule that would allow for a fair allocation of rate case expense to utility shareholders.

This is an important report and order because it authorizes and incorporates a historic agreement on energy efficiency measures. Measures that I hope will allow individual customers to offset the increased rates in this report and order if efficiency programs are fully implemented and utilized. Ameren and the parties should continue to work together to allow customers to make their homes and their usage more efficient.

Despite these slight disagreements with the Report and Order, I believe that the conclusions are supported but substantial and competent evidence and concur in the result.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin D. Gunn". The signature is fluid and cursive, with a large initial "K" and "G".

Kevin D. Gunn  
Chairman

Dated at Jefferson City, Missouri  
On this 12<sup>th</sup> day of December, 2012.

**In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service**

**File No. ER-2012-0166**

**§20 Rates.** The Commission corrected some illustrative numbers in the report and order.

**ORDER CORRECTING REPORT AND ORDER NUNC PRO TUNC**

Issue Date: December 14, 2012

Effective Date: December 14, 2012

The summary section of the report and order the Commission issued order on December 12, 2012, includes numbers relating to the company's increased net fuel costs and the cost of increasing Ameren Missouri's energy efficiency efforts under MEEIA. Specifically, the section represents that over \$100 million of the increase was related to increased net fuel costs and that \$89 million of the increase was for the cost of energy efficiency efforts. Those numbers were not at issue in the case and the Commission included them in the summary section of the order only to illustrate the nature of the rate increase that would result from the report and order. The numbers cited in the summary section do not in any way control or modify the decisions described later in the report and order, as was explained in a footnote to that section.

On December 13, Ameren Missouri filed a motion asking the Commission to modify its report and order to correct those numbers. Ameren Missouri explains that the numbers should be corrected to avoid any confusion that could result when Ameren Missouri reports the correct numbers in its filing with the Securities and Exchange Commission. Ameren Missouri represents that Staff concurs with the numbers it provides in its motion.

The Commission will correct the summary section of its report and order *nunc pro tunc*. The second and third sentences of that summary are corrected to read as follows:

Approximately \$84 million of that increase is related to Ameren Missouri's increased net fuel costs and would otherwise be recovered by the company through its fuel adjustment clause. Another \$79.6 million of that increase is for the cost of increasing Ameren Missouri's energy efficiency efforts under Missouri's Energy Efficiency Investment Act, MEEIA.

**THE COMMISSION ORDERS THAT:**

1. The report and order is corrected as indicated in the body of this order.
2. This order shall become effective upon issuance.

Morris L. Woodruff, Chief Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 14<sup>th</sup> day of December, 2012.

**In the Matter of Union Electric Company d/b/a Ameren Missouri's Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA**

**File No. EO-2012-0142**

**Electric. §13.1 Energy efficiency** The Commission approved a stipulation and agreement that slightly modified a previously approved stipulation and agreement.

**ORDER APPROVING  
AMENDMENT TO STIPULATION AND AGREEMENT**

Issue Date: December 19, 2012

Effective Date: December 29, 2012

On December 11, 2012, the Commission's Staff, Union Electric Company d/b/a Ameren Missouri, and the Office of the Public Counsel, filed an amendment to the previously approved stipulation and agreement regarding Ameren Missouri's MEEIA filing. The stipulation and agreement, which the Commission approved on August 1, 2012, specifies the language Ameren Missouri is to use in identifying MEEIA costs on customer bills when that charge goes into effect on January 2, 2013 as part of Ameren Missouri's recently revised rates. Ameren Missouri has now discovered that the specified phrase is too long to fit on some of its bills.

The stipulation and agreement requires Ameren Missouri to include a separate line item on customer bills that says "Energy Efficiency Investment Chg." The proposed amendment would shorten the required line to "Energy Efficiency Invest. Chg." The amendment does not make any other change to the approved stipulation and agreement.

Not all parties to the case signed the proposed amendment so the Commission established December 18, 2012 as the deadline for any interested party to file a response to the proposed amendment. No such response has been filed.

After reviewing the proposed amendment to the stipulation and agreement, the Commission independently finds and concludes that the amendment is reasonable and should be approved.

**THE COMMISSION ORDERS THAT:**

1. The Amendment to the July 5, 2012 Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing is approved. The signatory parties are ordered to comply with the terms of the amended stipulation and agreement. A copy of the stipulation and agreement amendment is attached to this order.

2. This order shall become effective on December 29, 2012.

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

Woodruff, 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.

**DIGEST OF REPORTS**  
**OF THE**  
**PUBLIC SERVICE COMMISSION**  
**OF THE**  
**STATE OF MISSOURI**

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## ACCOUNTING

### II. DUTY TO KEEP PROPER ACCOUNTS

**§8. Duty to keep proper accounts generally.** The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that KCP&L Greater Missouri Operations Company (GMO) violated the Uniform System of Accounts. The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that GMO violated its Fuel Adjustment Clause Tariff. **22 MPSC 3d 237**

### III. PARTICULAR ITEMS

**§9. Methods of accounting generally.** Ameren Missouri sought authority for a one-time trade or exchange of the company's excess 2012 SO<sub>2</sub> allowances for some 2012 annual NO<sub>x</sub> allowances. Additionally, Ameren Missouri sought authority to defer to Account 254, Other Regulatory Liabilities, all revenues associated with the SO<sub>2</sub> allowances portion of the exchange and to amortize the amounts deferred to that account concurrently with the company's utilization of the acquired NO<sub>x</sub> allowances. The Commission determined that Ameren Missouri's proposed exchange was not detrimental to the public interest and approved it subject to certain conditions. **22 MPSC 3d 3**

#### **§42 Accounting Authority Orders.**

**Gas. §34 Accounting Authority orders.** The tornado that struck Joplin in May 2011 was extraordinary and justified the issuance of an AAO to defer recording of capital and O & M expenses associated with the damages caused by the tornado. **22 MPSC 3d 10**

**Gas. §34 Accounting Authority orders.** Deferral of an expense through an AAO does not require a showing that the expense will probably be recovered in the company's next rate case. Questions of recovery will be decided in that rate case. **22 MPSC 3d 10**

**Gas. §34 Accounting Authority orders.** Revenue not generated because of damage resulting from the tornado may not be deferred through an AAO. **22 MPSC 3d 10**

**§42. Accounting Authority Orders.** The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that KCP&L Greater Missouri Operations Company engaged in improper accounting practices in violation of the Accounting Authority Order from File Number ER-2005-0436. . **22 MPSC 3d 237**

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## **CERTIFICATES**

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- §25. Ability and prospects of success**

- §26. Public safety
- §27. Charters and franchises
- §28. Contracts
- §29. Unauthorized operation or construction
- §30. Municipal or county action
- §31. Rate proposals
- §32. Competition or injury to competitor
- §33. Immediate need for the service
- §34. Public convenience and necessity or public benefit
- §35. Existing service and facilities

#### **V. PREFERENCE BETWEEN RIVAL APPLICANTS – FACTORS**

- §36. Preference between rival applicants generally
- §37. Ability and responsibility
- §38. Existing or past service
- §39. Priority of applications
- §40. Priority in occupying territory
- §41. Rate proposals

#### **VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES**

- §42. Electric and power
- §43. Gas
- §44. Heating
- §45. Water
- §46. Telecommunications
- §46.1. Certificate of local exchange service authority
- §46.2. Certificate of interexchange service authority
- §46.3. Certificate of basic local exchange service authority
- §47. Sewers

#### **VII. OPERATION UNDER TERMS OF THE CERTIFICATE**

- §48. Operations under terms of the certificate generally
- §49. Beginning operation
- §50. Duration of certificate right
- §51. Modification and amendment of certificate generally

#### **VIII. TRANSFER, MORTGAGE OR LEASE**

- §52. Transfer, mortgage or lease generally
- §53. Consolidation or merger
- §54. Dissolution
- §55. Transferability of rights
- §55.1. Change of supplier
- §55.2. Territorial agreement
- §56. Partial transfer
- §57. Transfer of abandoned or forfeited rights
- §58. Mortgage of certificate rights
- §59. Sale of certificate rights

## **IX. REVOCATION, CANCELLATION AND FORFEITURE**

- §60. Revocation, cancellation and forfeiture generally**
- §61. Acts or omissions justifying revocation or forfeiture**
- §62. Necessity of action by the Commission**
- §63. Penalties**

## **CERTIFICATES**

### **I. IN GENERAL**

**§1. Generally.** Having found that the factors for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Valley Woods Utility, LLC, to provide the water and sewer service to the customers currently being served by Valley Woods Water Company, Inc., the Commission finds that the public interest standards for approving a transfer of assets and granting a certificate of convenience and necessity have also been satisfied. Thus, the Commission approved the transfer of assets and granted the certificate with certain conditions. **22 MPSC 3d 132**

**§1. Generally.** Having found that the factors for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Lincoln County Sewer & Water, LLC, to provide the water and sewer service to the customers currently being served by the unregulated systems at the developments of Rockport and Bennington, the Commission found that the public interest standards for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied. Thus, the Commission approved the transfer of assets and granted the certificate. **22 MPSC 3d 169**

**Certificates. §1. Generally.** Having found that the factors for granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Missouri-American Water Company, to provide the water and sewer service to the customers in the incorporated Village of Saddlebrooke located in Christian and Taney Counties, Missouri. **22 MPSC 3d 172**

## **DEPRECIATION**

### **I. IN GENERAL**

- §1. Generally**
- §2. Right to allowance for depreciation**
- §3. Reports, records and statements**

§4. Obligation of the utility

## II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commission
- §8. Jurisdiction and powers of local authorities

## III. BASIS FOR CALCULATION

- §9. Generally
- §10. Cost or value
- §11. Property subject to depreciation
- §12. Methods of calculation
- §13. Depreciation rates to be allowed
- §14. Rates or charges for service

## IV. FACTORS AFFECTING ANNUAL ALLOWANCE

- §15. Factors affecting annual allowance generally
- §16. Life of enterprise
- §17. Life of property
- §18. Past depreciation
- §19. Charges to maintenance and other accounts
- §20. Particular methods and theories
- §21. Experience
- §22. Life of property and salvage
- §23. Sinking fund and straight line
- §24. Combination of methods

## V. RESERVES

- §25. Necessity
- §26. Separation between plant units
- §27. Amount
- §28. Ownership of fund
- §29. Investment and use
- §30. Earnings on reserve

## VI. DEPRECIATION OF PARTICULAR UTILITIES

- §31. Electric and power
- §32. Gas
- §33. Heating
- §34. Telecommunications
- §35. Water

# DEPRECIATION

No headnotes in this volume involved the question of depreciation.

## **DISCRIMINATION**

### **I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Recovery of damages for discrimination
- §4. Recovery of discriminatory undercharge
- §5. Reports, records and statements

### **II. JURISDICTION AND POWERS**

- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of the local authorities

### **III. RATES**

- §9. Competitor's right to equal treatment
- §10. Free service
- §11. Inequality of rates
- §12. Methods of eliminating discrimination
- §13. Optional rates
- §14. Rebates
- §15. Service charge, meter rental or minimum charge
- §16. Special rates
- §17. Rates between localities
- §18. Concessions

### **IV. RATES BETWEEN CLASSES**

- §19. Bases for classification and differences
- §20. Right of the utility to classify
- §21. Reasonableness of classification

### **V. RATES AND CHARGES OF PARTICULAR UTILITIES**

- §22. Electric and power
- §23. Gas
- §24. Heating
- §25. Telecommunications
- §26. Sewer
- §27. Water

### **VI. SERVICE IN GENERAL**

- §28. Service generally
- §29. Abandonment and discontinuance
- §30. Discrimination against competitor
- §31. Equipment, meters and instruments
- §32. Extensions
- §33. Preference during shortage of supply
- §34. Preferences to particular classes or persons

## **VII. SERVICE BY PARTICULAR UTILITIES**

- §35. Electric and power**
- §36. Gas**
- §37. Heating**
- §38. Sewer**
- §39. Telecommunications**
- §40. Water**

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## **DISCRIMINATION**

No headnotes in this volume involved the question of discrimination.

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## **ELECTRIC**

### **I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Transfer, lease and sale**
- §4.1. Change of suppliers**
- §5. Charters and franchise**
- §6. Territorial agreements**

### **II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers generally**
- §8. Jurisdiction and powers of Federal Commissions**
- §9. Jurisdiction and powers of the State Commission**
- §10. Jurisdiction and powers of the local authorities**
- §11. Territorial agreements**
- §12. Unregulated service agreements**

### **III. OPERATIONS**

- §13. Operations generally**
- §13.1 Energy Efficiency**
- §14. Rules and regulations**
- §15. Cooperatives**
- §16. Public corporations**
- §17. Abandonment and discontinuance**
- §18. Depreciation**
- §19. Discrimination**
- §20. Rates**
- §21. Refunds**
- §22. Revenue**
- §23. Return**

- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

#### **IV. RELATIONS BETWEEN CONNECTING COMPANIES**

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §48.1 Qualifying facilities
- §49. Records and statements

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## **ELECTRIC**

### **I. IN GENERAL**

**§3 Certificate of convenience and necessity.** An unopposed certificate of convenience and necessity was granted to the applicant. **22 MPSC 3d 177**

**§4 Transfer, lease and sale.** The Commission cannot impose conditions designed to make the transfer more beneficial for the public, but it can impose conditions designed to alleviate specific detriments that would otherwise result from the transfer, even if the transfer overall would not be detrimental to the public. **22 MPSC 3d 101**

The Commission granted the company's unopposed motion to clarify certain conditions established in an earlier report and order. **22 MPSC 3d 140**

**§4. Accounting authority orders.** The Commission approved an unopposed stipulation and agreement granting authority for two electric utilities to undertake certain accounting procedures in connection with their electrical operations in relation to the costs of compliance with Missouri's Renewable Energy Standard Law. **22 MPSC 3d 118**

**§4.1 Change of supplier.** Application to change supplier from cooperative to investor-owned electric utility to take advantage of a solar installation rebate was denied as being contrary to the public interest. **22 MPSC 3d 339**

## **II. JURISDICTION AND POWERS**

**§7. Jurisdiction and powers generally.** The Commission does have the authority to determine what approved rate should be applied to a customer, but does not have the authority to provide equitable relief, determine damages, or award pecuniary relief, including granting the customer's request for re-billing, refund and interest. **22 MPSC 3d 50**

## **III. OPERATIONS**

**§11. Territorial agreements.** The Commission approved a territorial agreement between an electrical corporation and an electric cooperative that designates the boundaries of exclusive service areas within Christian and Taney counties in Missouri. **22 MPSC 3d 34**

**§13.1 Energy efficiency.** The Commission approved a stipulation and agreement implementing the utility's energy efficiency program under the Missouri Energy Efficiency Investment Act (MEEIA). **22 MPSC 3d 191**

The Commission approved a stipulation and agreement establishing the utility's demand-side program plan. **22 MPSC 3d 335**

The Commission approved a stipulation and agreement that slightly modified a previously approved stipulation and agreement. **22 MPSC 3d 431**

**§20 Rates.** By ordering a phase-in of rates, the Commission has effectively denied the utility the right to earn a full return on investment during the phase-in period unless appropriate carrying costs are allowed during the phase-in. **22 MPSC 3d 63**

The Commission has express statutory authority to order that rates be phased in. **22 MPSC 3d 63**

The test year and true-up period is important because it allows the Commission to set rates while considering the relationship between revenues, expenses and rate base within a specified period. **22 MPSC 3d 345**

By going outside the specified test year and true-up period to make an isolated adjustment, the Commission would necessarily be ignoring other expenses and income items that might also change the company's revenue requirement. **22 MPSC 3d 345**

**§22 Revenue.** Retained earnings belong to the company and its shareholders, not to ratepayers. **22 MPSC 3d 345**

When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions. **22 MPSC 3d 345**

**§27. Accounting.** The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that KCP&L Greater Missouri Operations Company (GMO) violated the Uniform System of Accounts. The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that GMO violated its Fuel Adjustment Clause Tariff. **22 MPSC 3d 237**

Construction accounting is frequently used to help a utility recover the cost of single large construction projects. **22 MPSC 3d 345**

**§29 Rate of return. Rates. §41 Return.** In determining a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in the utility rather than in some other investment opportunity. **22 MPSC 3d 345**

To comply with standards established by the United States Supreme Court, the Commission must authorize a return on equity sufficient to maintain financial integrity, attract capital under reasonable terms, and be commensurate with returns investors could earn by investing in other enterprises of comparable risk. **22 MPSC 3d 345**

The opinions offered by return on equity experts cannot be blindly accepted as scientifically or legally binding on the Commission. **22 MPSC 3d 345**

**§38. Financing practices.** The Commission approved an unopposed request by the utility to issue up to \$300 million of debt securities, subject to certain conditions imposed by the Commission's staff, and to enter into interest rate hedging instruments. **22 MPSC 3d 31**

**§40. Reports, records and statements.** The requests of the Staff of the Missouri Public Service Commission, the Missouri Department of Natural Resources, and Dogwood Energy, L.L.C., are appropriate given the continuous nature of The Empire District Electric Company's integrated resource plan (IRP) filings, and the varying conditions surrounding some of the concerns. The Commission directed The Empire District Electric Company to comprehensively address the alleged deficiencies and concerns identified by the participants to this file in its next triennial IRP. **22 MPSC 3d 188**

**§42 Planning and Management.** The purpose of the IRP review process is to determine whether the company has sufficiently explained why it chose the preferred resource plan that it chose. The process does not determine whether that resource plan is correct. **22 MPSC 3d 77**

While the Commission does not pre-approve the utility's plan, it is important that the utility undertake an appropriate planning process and that the planning process be transparent to the Commission and the public. **22 MPSC 3d 77**

A change in circumstances during the study process does not mean that the study is deficient. **22 MPSC 3d 77**

The Commission's regulation requires an electric utility to undertake a planning process. It does not require the utility to reach a particular result, or even a result of which the Commission would approve. **22 MPSC 3d 77**

Despite deficiencies in the utility's IRP filing, it would be a waste of resources to require the utility to look backward to use old data to revise that filing. Instead, the utility was ordered to take steps to improve its next IRP filing. **22 MPSC 3d 77**

The Commission amended its previous report and order to address an overlooked alleged deficiency identified by Public Counsel. **22 MPSC 3d 147**

The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing. **22 MPSC 3d 314**

The Commission determined that The Empire District Electric Company shall analyze and document the certain special contemporary issues in its 2013 triennial Integrated Resource Plan. **22 MPSC 3d 318**

The Commission directed an electric utility to address certain contemporary planning issues in its next annual update report to the integrated resource plan. **22 MPSC 3d 323**

The Commission directed an electric utility to address certain contemporary planning issues in its next annual update report to the integrated resource plan. **22 MPSC 3d 329**

**§43. Accounting Authority Orders.** The Commission's Staff failed to meet its burden of proving by a preponderance of the evidence that KCP&L Greater Missouri Operations Company (GMO) engaged in improper accounting practices in violation of the Accounting Authority Order from File Number ER-2005-0436. **22 MPSC 3d 237**

#### **IV. RELATIONS BETWEEN CONNECTING COMPANIES**

**§46 Relations between connecting companies generally.** The Commission granted the company's unopposed motion to apportion interests related to the Iatan Generating Station among the utilities that own Iatan. **22 MPSC 3d 159**

The Commission granted the company's unopposed motion to apportion interests related to the Iatan Generating Station among the utilities that own that station. **22 MPSC 3d 162**

### **EVIDENCE, PRACTICE AND PROCEDURE**

#### **I. IN GENERAL**

- §1. Generally**
- §2. Jurisdiction and powers**
- §3. Judicial notice; matters outside the record**
- §4. Presumption and burden of proof**
- §5. Admissibility**

- §6. Weight, effect and sufficiency
- §7. Competency
- §8. Stipulation

## II. PARTICULAR KINDS OF EVIDENCE

- §9. Particular kinds of evidence generally
- §10. Admissions
- §11. Best and secondary evidence
- §12. Depositions
- §13. Documentary evidence
- §14. Evidence by Commission witnesses
- §15. Opinions and conclusions; evidence by experts
- §16. Petitions, questionnaires and resolutions
- §17. Photographs
- §18. Record and evidence in other proceedings
- §19. Records and books of utilities
- §20. Reports by utilities
- §21. Views

## III. PRACTICE AND PROCEDURE

- §22. Parties
- §23. Notice and hearing
- §24. Procedures, evidence and proof
- §25. Pleadings and exhibits
- §26. Burden of proof
- §27. Finality and conclusiveness
- §28. Arbitration
- §29. Discovery
- §30. Settlement procedures
- §31. Mediator
- §32. Confidential evidence
- §33. Defaults

# EVIDENCE, PRACTICE AND PROCEDURE

## I. IN GENERAL

**§1 Generally.** *Stare decisis* does not bind the Commission to past Commission decisions. **22 MPSC 3d 10**

**§6 Weight, effect and sufficiency.** Reliance on an old report as received wisdom with no analysis to demonstrate its continued accuracy is not competent and substantial evidence. **22 MPSC 3d 345**

A witnesses vague and unsupported statements about “little or no” or “most, if not all” do not constitute competent and substantial evidence to support his position. **22 MPSC 3d 345**

## **II. PARTICULAR KINDS OF EVIDENCE**

**§12 Depositions.** When one party reads a portion of a deposition the opposition may read some or all of the remainder to clarify the situation, rebut the inferences to be drawn, or explain its side of the controversy. **22 MPSC 3d 101**

## **III. PRACTICE AND PROCEDURE**

**§26. Burden of proof.** Halo Wireless, Inc., failed to meet its burden to prove its allegations by a preponderance of the evidence. Southwestern Bell Telephone Company, d/b/a AT&T Missouri, on the other hand, has met its burden to prove the allegations within its counterclaim by the preponderance of the evidence. **22 MPSC 3d 194**

Staff’s allegations and the relief sought were denied because Staff failed to: provide substantial controverting evidence to rebut the presumption of the prudence of KCP&L Greater Missouri Operations Company’s (GMO) hedging practices; meet its burden of proving that GMO engaged in improper accounting practices in violation of the accounting authority order; meet its burden of proving that GMO violated the Uniform System of Accounts; or meet its burden of proving that GMO violated its Fuel Adjustment Clause tariff. **22 MPSC 3d 237**

**§27 Finality and conclusiveness.** The Commission approved a stipulation and agreement that resolved Staff’s complaint against a utility, but refused to offer an advisory opinion about the proper interpretation of a Commission rule. **22 MPSC 3d 95**

**§33 Defaults.** Dismissal of complaint without prejudice was appropriate where the complainant failed to respond to multiple orders from the Commission. **22 MPSC 3d 165**

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## **EXPENSE**

### **I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the utility**
- §3. Financing practices**
- §4. Apportionment**
- §5. Valuation**

§6. Accounting

## II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

## III. EXPENSES OF PARTICULAR UTILITIES

- §10. Electric and power
- §11. Gas
- §12. Heating
- §13. Telecommunications
- §14. Water
- §15. Sewer

## IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally
- §17. Extraordinary and unusual expenses
- §18. Comparisons in absence of evidence
- §19. Future expenses
- §20. Methods of estimating
- §21. Intercorporate costs or dealings

## V. REASONABLENESS OF EXPENSE

- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

## VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments

- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings
- §47. Extensions
- §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
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies
- §57. Purchases under contract
- §58. Office expense
- §59. Officers' expenses
- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages
- §65. Savings in operation
- §66. Securities redemption or amortization
- §67. Taxes
- §68. Uncollectible accounts
- §69. Administrative expense
- §70. Engineering and superintendence expense
- §71. Interest expense
- §72. Preliminary and organization expense
- §73. Expenses incurred in acquisition of property
- §74. Demand charges
- §75. Expenses incidental to refunds for overcharges
- §76. Matching revenue/expense/rate base
- §77. Adjustments to test year levels
- §78. Isolated adjustments

## **EXPENSE**

No headnotes in this volume involved the question of expense.

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## **GAS**

### **I. IN GENERAL**

- §1. Generally

- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Abandonment or discontinuance
- §5. Liability for damages
- §6. Transfer, lease and sale

## II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

## III. CONSTRUCTION AND EQUIPMENT

- §10. Construction and equipment generally
- §11. Leakage, shrinkage and waste
- §12. Location
- §13. Additions and betterments
- §14. Extensions
- §15. Maintenance
- §16. Safety

## IV. OPERATION

- §17. Operation generally
- §17.1. Purchased Gas Adjustment (PGA)
- §17.2. Purchased Gas-incentive mechanism
- §18. Rates
- §19. Revenue
- §20. Return
- §21. Service
- §22. Weatherization
- §23. Valuation
- §24. Accounting
- §25. Apportionment
- §26. Restriction of service
- §27. Depreciation
- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
- §32. Financing practices
- §33. Billing practices
- §34. Accounting Authority orders
- §35. Safety

## V. JOINT OPERATIONS

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts

- §40. Transportation
- §41. Pipelines

#### VI. PARTICULAR KIND OF EXPENSES

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses
- §50. Capital amortization
- §51. Collection fees
- §52. Construction
- §53. Consolidation expense
- §54. Depreciation
- §55. Deficits under rate schedules
- §56. Donations
- §57. Dues
- §58. Employee's pension and welfare
- §59. Expenses relating to property not owned
- §60. Expenses and losses of subsidiaries or other departments
- §61. Expenses of non-utility business
- §62. Expenses relating to unused property
- §63. Expenses of rate proceedings
- §64. Extensions
- §65. Financing costs and interest
- §66. Franchise and license expense
- §67. Insurance and surety premiums
- §68. Legal expense
- §69. Loss from unprofitable business
- §70. Losses in distribution
- §71. Maintenance and depreciation; repairs and replacements
- §72. Management, administration and financing fees
- §73. Materials and supplies
- §74. Purchases under contract
- §75. Office expense
- §76. Officers' expenses
- §77. Political and lobbying expenditures
- §78. Payments to affiliated interests
- §79. Rentals
- §80. Research
- §81. Salaries and wages
- §82. Savings in operation
- §83. Securities redemption or amortization
- §84. Taxes
- §85. Uncollectible accounts

- §86. Administrative expense
- §87. Engineering and superintendence expense
- §88. Interest expense
- §89. Preliminary and organization expense
- §90. Expenses incurred in acquisition of property
- §91. Demand charges
- §92. Expenses incidental to refunds for overcharges

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## GAS

### III. PARTICULAR ITEMS

**§3 Certificate of convenience and necessity.** The Commission granted the utility a certificate of convenience and necessity to expand its service area based on the unanimous stipulation and agreement of the parties. **22 MPSC 3d 1**

The Commission granted a certificate of convenience and necessity to provide natural gas service to the Lake of the Ozarks area. **22 MPSC 3d 185**

**§6 Transfer, lease and sale.** The Commission approved a stipulation and agreement regarding a transaction by which Southern Union Company became a subsidiary of Energy Transfer Equity, L.P. **22 MPSC 3d 28**

The Commission approved the proposed transfer of a gas company's assets as being not detrimental to the public interest. **22 MPSC 3d 74**

**§17.1 Purchased Gas Adjustment (PGA).** The Commission established ending balances for the 2009-2009 ACA period. **22 MPSC 3d 8**

### IV. OPERATION

**§27 Depreciation.** The Commission found that a utility's capital expenditures for a new computer operating system created a new type of asset for which a new depreciation rate could be established outside of a full depreciation study without constituting forbidden single-issue ratemaking **22 MPSC 3d 296**

**§34 Accounting Authority orders.** The tornado that struck Joplin in May 2011 was extraordinary and justified the issuance of an AAO to defer recording of capital and O & M expenses associated with the damages caused by the tornado. **22 MPSC 3d 10**

Deferral of an expense through an AAO does not require a showing that the expense will probably be recovered in the company's next rate case. Questions of recovery will be decided in that rate case. **22 MPSC 3d 10**

Revenue not generated because of damage resulting from the tornado may not be deferred through an AAO. **22 MPSC 3d 10**

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## **MANUFACTURED HOUSING**

### **I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**
- §4. Jurisdiction and powers of the State Commission**
- §5. Reports, records and statements**

### **II. WHEN A PERMIT IS REQUIRED**

- §6. When a permit is required generally**
- §7. Operations and construction**

### **III. GRANT OR REFUSAL OF A PERMIT**

- §8. Grant or refusal generally**
- §9. Restrictions or conditions**
- §10. Who may possess**
- §11. Public safety**

### **IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION**

- §12. Operations under the permit generally**
- §13. Duration of the permit**
- §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**

No headnotes in this volume involved the question of manufactured housing.

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## **PUBLIC UTILITIES**

### **I. IN GENERAL**

- §1. Generally**
- §2. Nature of**
- §3. Functions and powers**
- §4. Termination of status**
- §5. Obligation of the utility**

### **II. JURISDICTION AND POWERS**

- §6. Jurisdiction and powers generally**
- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

### **III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER**

- §10. Tests in general**
- §11. Franchises**
- §12. Charters**
- §13. Acquisition of public utility property**
- §14. Compensation or profit**
- §15. Eminent domain**
- §16. Property sold or leased to a public utility**
- §17. Restrictions on service, extent of use**
- §18. Size of business**
- §19. Solicitation of business**
- §20. Submission to regulation**
- §21. Sale of surplus**
- §22. Use of streets or public places**

### **IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER**

- §23. Particular organizations generally**
- §24. Municipal plants**
- §25. Municipal districts**
- §26. Mutual companies; cooperatives**
- §27. Corporations**
- §28. Foreign corporations or companies**
- §29. Unincorporated companies**
- §30. State or federally owned or operated utility**
- §31. Trustees**

## **PUBLIC UTILITIES**

### **I. IN GENERAL**

- §1. Generally.** The Commission established the assessment amount for fiscal year 2013. **22 MPSC 3d 167**

## **II. JURISDICTION AND POWERS**

§7. Jurisdiction and powers of the State Commission. Because Ameren Missouri's application involved a transfer of assets, it is within the Commission's jurisdiction to decide pursuant to Section 393.190, RSMo 2000. **22 MPSC 3d 3**

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## **RATES**

### **I. JURISDICTION AND POWERS**

- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions
- §3. Jurisdiction and powers of the State Commission
- §4. Jurisdiction and powers of the courts
- §5. Jurisdiction and powers of local authorities
- §6. Limitations on jurisdiction and power
- §7. Obligation of the utility

### **II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS**

- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
- §10. Ability to pay
- §11. Breach of contract
- §12. Capitalization and security prices
- §13. Character of the service
- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercorporate relations
- §28. Large consumption
- §29. Liability of utility
- §30. Location
- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service

- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

### **III. CONTRACTS AND FRANCHISES**

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

### **IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO**

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules

§79. Test or trial rates

#### **V. KINDS AND FORMS OF RATES AND CHARGES**

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

#### **VI. RATES AND CHARGES OF PARTICULAR UTILITIES**

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service
- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

#### **VII. EMERGENCY AND TEMPORARY RATES**

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

## 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

### I. JURISDICTION AND POWERS

**§3 Jurisdiction and powers of the State Commission.** The Commission retained jurisdiction to determine questions regarding phase in of a rate increase even while the order that established the rates to be phased in was under judicial review. **22 MPSC 3d 63**

### II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

**§8 Reasonableness generally.** Shareholders benefit when rates go up to a just and reasonable level, but so do ratepayers. Shareholders may receive higher dividends and benefit from higher stock prices, but ratepayers receive the benefit of safe, adequate, and reliable service. No one benefits when a utility is deprived of the ability to charge its customers a just and reasonable rate. **22 MPSC 3d 345**

**§20 Rates.** The Commission corrected some illustrative numbers in the report and order. **22 MPSC 3d 430**

**§41 Return.** In determining a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in the utility rather than in some other investment opportunity. **22 MPSC 3d 346**

To comply with standards established by the United States Supreme Court, the Commission must authorize a return on equity sufficient to maintain financial integrity, attract capital under reasonable terms, and be commensurate with returns investors could earn by investing in other enterprises of comparable risk. **22 MPSC 3d 346**

The opinions offered by return on equity experts cannot be blindly accepted as scientifically or legally binding on the Commission. **22 MPSC 3d 346**

## **VI. RATES AND CHARGES OF PARTICULAR UTILITIES**

**§104. Electric and power.** The electric utility improperly refused to provide service to a company under the all-electric rate schedule when the name on the account had been previously changed because the company acquired the status of a customer under the utility's tariffs from its undisclosed agent. **22 MPSC 3d 50**

**§111. Water.** The Commission approved a Non-Unanimous Stipulation and Agreement that increased Missouri-American Water Company's annual water revenue by \$23,255,000 and established eight water districts. **22 MPSC 3d 37**

**§112. Sewer.** The Commission approved a Non-Unanimous Stipulation and Agreement that increased Missouri-American Water Company's annual sewer revenue by \$725,000 and established eight sewer districts. **22 MPSC 3d 37**

## **VII. EMERGENCY AND TEMPORARY RATES**

**§114. Emergency and temporary rates generally.** The Commission has the implied authority to grant interim rates increases in emergency or near emergency situations where the utility is facing extraordinary circumstances and there is a compelling reason for the rate increase. **22 MPSC 3d 304**

**§115. What constitutes an emergency.** An electric utility failed to present sufficient evidence to justify an interim rate increase where its revenues had increased compared to the previous year, its retained earnings balance had increased, the shareholder dividend was reinstated, it retained an investment grade credit rating, and it was able to access the capital markets. **22 MPSC 3d 304**

## **VIII. RATE DESIGN, CLASS COST OF SERVICE**

**§119 Rate design, class cost of service for electric utilities.** An appropriate customer charge is a question of rate design, not a question of the company's revenue requirement. **22 MPSC 3d 345**

Shifting customer costs from variable volumetric rates, which a customer can reduce through energy efficiency efforts, to fixed customer charges, that cannot be reduced through energy efficiency efforts, will tend to reduce a customer's incentive to save electricity. **22 MPSC 3d 345**

## **SECURITY ISSUES**

### **I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the utility**
- §3. Authorization by a corporation**
- §4. Conversion, redemption and purchase by a corporation**
- §5. Decrease of capitalization**
- §6. Sinking funds**
- §7. Dividends**
- §8. Revocation and suspension of Commission authorization**
- §9. Fees and expenses**
- §10. Purchase by utility**
- §11. Accounting practices**

### **II. JURISDICTION AND POWERS**

- §12. Jurisdiction and powers in general**
- §13. Jurisdiction and powers of Federal Commissions**
- §14. Jurisdiction and powers of the State Commission**
- §15. Jurisdiction and powers of local authorities**

### **III. NECESSITY OF AUTHORIZATION BY THE COMMISSION**

- §16. Necessity of authorization by the Commission generally**
- §17. Installment contracts**
- §18. Refunding or exchange of securities**
- §19. Securities covering utility and nonutility property**
- §20. Securities covering properties outside the State**

### **IV. FACTORS AFFECTING AUTHORIZATION**

- §21. Factors affecting authorization generally**
- §21.1. Effect on bond rating**
- §22. Equity capital**
- §23. Charters**
- §24. Competition**
- §25. Compliance with the terms of a mortgage or lease**
- §26. Definite plans and purposes**
- §27. Financial conditions and prospects**
- §28. Use of proceeds**
- §29. Dividends and dividend restrictions**
- §30. Improper practices and irregularities**
- §31. Intercompany relations**
- §32. Necessity of issuance**
- §33. Revenue**
- §34. Rates and rate base**
- §35. Size of the company**
- §36. Title of property**
- §37. Amount**

- §38. Kind of security
- §39. Restrictions imposed by the security

#### **V. PURPOSES AND SUBJECTS OF CAPITALIZATION**

- §40. Purposes and subjects of capitalization generally
- §41. Additions and betterments
- §42. Appreciation or full plant value
- §43. Compensation for services and stockholders' contributions
- §44. Deficits and losses
- §45. Depreciation funds and requirements
- §46. Financing costs
- §47. Intangible property
- §48. Going value and good will
- §49. Stock dividends
- §50. Loans to affiliated interests
- §51. Overhead
- §52. Profits
- §53. Refunding, exchange and conversion
- §54. Reimbursement of treasury
- §55. Renewals, replacements and reconstruction
- §56. Working capital

#### **VI. KINDS AND PROPORTIONS**

- §57. Bonds or stock
- §58. Common or preferred stock
- §59. Stock without par value
- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

#### **VII. SALE PRICE AND INTEREST RATES**

- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
- §67. Preferred stock
- §68. No par value stock

#### **VIII. FINANCING METHODS AND PRACTICES**

- §69. Financing methods and practices generally
- §70. Leases
- §71. Financing expense
- §72. Payment for securities
- §73. Prospectuses and advertising
- §74. Subscriptions and allotments
- §75. Stipulation as to rate base

## **IX. PARTICULAR UTILITIES**

- §76. Telecommunications**
- §77. Electric and power**
- §78. Gas**
- §79. Sewer**
- §80. Water**
- §81. Miscellaneous**

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## **SECURITY ISSUES**

No headnotes in this volume involved the question of security issues.

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## **SERVICE**

### **I. IN GENERAL**

- §1. Generally**
- §2. What constitutes adequate service**
- §3. Obligation of the utility**
- §4. Abandonment, discontinuance and refusal of service**
- §5. Contract, charter, franchise and ordinance provisions**
- §6. Restoration or continuation of service**
- §7. Substitution of service**
- §7.1. Change of supplier**
- §8. Discrimination**

### **II. JURISDICTION AND POWERS**

- §9. Jurisdiction and powers generally**
- §10. Jurisdiction and powers of the Federal Commissions**
- §11. Jurisdiction and powers of the State Commission**
- §12. Jurisdiction and powers over service outside of the state**
- §13. Jurisdiction and powers of the courts**
- §14. Jurisdiction and powers of local authorities**
- §15. Limitations on jurisdiction**
- §16. Enforcement of duty to serve**

### **III. DUTY TO SERVE**

- §17. Duty to serve in general**
- §18. Duty to render adequate service**
- §19. Extent of profession of service**
- §20. Duty to serve as affected by contract**
- §21. Duty to serve as affected by charter, franchise or ordinance**
- §22. Duty to serve persons who are not patrons**
- §23. Reasons for failure or refusal to serve**
- §24. Duty to serve as affected by inadequate revenue**

#### **IV. OPERATIONS**

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
- §28. Consent of local authorities
- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property
- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

#### **V. SERVICE BY PARTICULAR UTILITIES**

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

#### **VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT**

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

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### **SERVICE**

No headnotes in this volume involved the question of service.

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### **SEWER**

#### **I. IN GENERAL**

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale

## II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the Federal Commissions
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of local authorities
- §9. Territorial agreements

## III. OPERATIONS

- §10. Operation generally
- §11. Construction and equipment
- §12. Maintenance
- §13. Additions and betterments
- §14. Rates and revenues
- §15. Return
- §16. Costs and expenses
- §17. Service
- §18. Depreciation
- §19. Discrimination
- §20. Apportionment
- §21. Accounting
- §22. Valuation
- §23. Extensions
- §24. Abandonment or discontinuance
- §25. Reports, records and statements
- §26. Financing practices
- §27. Security issues
- §28. Rules and regulations
- §29. Billing practices
- §30. Eminent domain
- §31. Accounting Authority orders

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## SEWER

### I. IN GENERAL

**§2 Certificate of convenience and necessity.** The Commission granted a certificate of convenience and necessity conditioned upon the Commission's Staff securing appointment of a receiver to manage or sell the sewer system. **22 MPSC 3d 121**

The Commission granted a sewer corporation a certificate of convenience and necessity authorizing it to construct and operate a sewer system and sewer line to obtain access to an alternate wastewater treatment plant. **22 MPSC 3d 179**

The Commission granted a sewer corporation a certificate of convenience and necessity authorizing it to construct and operate a sewer system and sewer line to obtain access to an alternate wastewater treatment plant. . **22 MPSC 3d 183**

**Sewer. §4. Transfer, lease and sale.** Having found that the factors for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Lincoln County Sewer & Water, LLC, to provide the water and sewer service to the customers currently being served by the unregulated systems at the developments of Rockport and Bennington, the Commission found that the public interest standards for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied. Thus, the Commission approved the transfer of assets and granted the certificate. **22 MPSC 3d 169**

### **III. OPERATIONS**

**§14. Rates and revenues.** The Commission approved a Non-Unanimous Stipulation and Agreement that increased Missouri-American Water Company's annual sewer revenue by \$725,000 and established eight sewer districts. **22 MPSC 3d 37**

## **STEAM**

### **I. IN GENERAL**

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Transfer, lease and sale**
- §4.1. Change of suppliers**
- §5. Charters and franchise**
- §6. Territorial agreements**

### **II. JURISDICTION AND POWERS**

- §7. Jurisdiction and powers generally**
- §8. Jurisdiction and powers of Federal Commissions**
- §9. Jurisdiction and powers of the State Commission**
- §10. Jurisdiction and powers of the local authorities**
- §11. Territorial agreements**
- §12. Unregulated service agreements**

### **III. OPERATIONS**

- §13. Operations generally**
- §14. Rules and regulations**
- §15. Cooperatives**

- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

#### **IV. RELATIONS BETWEEN CONNECTING COMPANIES**

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §49. Records and statements

### **STEAM**

No headnotes in this volume involved the question of steam.

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### **TELECOMMUNICATIONS**

#### **I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility

- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

## **II. JURISDICTION AND POWERS**

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

## **III. OPERATIONS**

- §8. Operations generally
- §9. Public corporations
- §10. Abandonment or discontinuance
- §11. Depreciation
- §12. Discrimination
- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §14.1 Universal Service Fund
- §15. Establishment of a rate base
- §16. Revenue
- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return
- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service
- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

## **IV. RELATIONS BETWEEN CONNECTING COMPANIES**

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

## V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally , or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated
- §47. Price Cap

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## TELECOMMUNICATIONS

### I. IN GENERAL

**§3. Certificate of convenience and necessity.** Halo Wireless, Inc., and Transcom Enhanced Services, Inc., were legally required to be certificated in Missouri prior to the transport of landline telephone calls. Consequently, the Commission directed the Staff of the Missouri Public Service Commission to complete an investigation into any unlawful actions by Halo and Transcom and to file a complaint seeking penalties if the results of Staff's investigation support such action. **22 MPSC 3d 194**

### III. OPERATIONS

**§14 Rates.** The Commission denied Public Counsel's motion to suspend a telephone company's tariff revision needed to comply with FCC requirements. The tariff was approved. **22 MPSC 3d 124**

The Commission denied Public Counsel's motion to suspend a telephone company's tariff revision needed to comply with FCC requirements. The tariff was approved. **22 MPSC 3d 128**

**§14.1 Universal Service Fund.** The Commission reduced the Universal Service Fund assessment rate as recommended by the Missouri Universal Service Board. **22 MPSC 3d 26**

The circumstances created by the *FCC's Third Order on Clarification* constituted good cause to approve the Companies' tariffs and direct that they become effective on an expedited basis similar to the circumstances in File Nos. TR-2012-0298 and TR-2012-0299. **22 MPSC 3d 151**

## **V. ALTERNATIVE REGULATION AND COMPETITION**

**§46. Interconnection Agreements.** The substantial and competent evidence in the record as a whole supports the conclusion that Halo Wireless, Inc., violated the Missouri Enhanced Records Exchange Rule and materially breached its interconnection agreement with Southwestern Bell Telephone Company, d/b/a AT&T Missouri. **22 MPSC 3d 194**

## **VALUATION**

### **I. IN GENERAL**

- §1. Generally**
- §2. Constitutional limitations**
- §3. Necessity for**
- §4. Obligation of the utility**

### **II. JURISDICTION AND POWERS**

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of the Federal Commissions**
- §8. Jurisdiction and powers of local authorities**

### **III. METHODS OR THEORIES OF VALUATION**

- §9. Methods or theories generally**
- §10. Purpose of valuation as a factor**
- §11. Rule, formula or judgment as a guide**
- §12. Permanent and tentative valuation**

### **IV. ASCERTAINMENT OF VALUE**

- §13. Ascertainment of value generally**
- §14. For rate making purposes**
- §15. Purchase or sale price**
- §16. For issuing securities**

### **V. FACTORS AFFECTING VALUE OR COST**

- §17. Factors affecting value or cost generally**
- §18. Contributions from customers**
- §19. Appreciation**
- §20. Apportionment of investment or costs**
- §21. Experimental or testing cost**
- §22. Financing costs**
- §23. Intercorporate relationships**
- §24. Organization and promotion costs**
- §25. Discounts on securities**
- §26. Property not used or useful**
- §27. Overheads in general**
- §28. Direct labor**

- §29. Material overheads
- §30. Accidents and damages
- §31. Engineering and superintendence
- §32. Preliminary and design
- §33. Interest during construction
- §34. Insurance during construction
- §35. Taxes during construction
- §36. Contingencies and omissions
- §37. Contractor's profit and loss
- §38. Administrative expense
- §39. Legal expense
- §40. Promotion expense
- §41. Miscellaneous

#### **VI. VALUATION OF TANGIBLE PROPERTY**

- §42. Buildings and structures
- §43. Equipment and facilities
- §44. Land
- §45. Materials and supplies
- §46. Second-hand property
- §47. Property not used and useful

#### **VII. VALUATION OF INTANGIBLE PROPERTY**

- §48. Good will
- §49. Going value
- §50. Contracts
- §51. Equity of redemption
- §52. Franchises
- §53. Leases and leaseholds
- §54. Certificates and permits
- §55. Rights of way and easements
- §56. Water rights

#### **VIII. WORKING CAPITAL**

- §57. Working capital generally
- §58. Necessity of allowance
- §59. Factors affecting allowance
- §60. Billing and payment for service
- §61. Cash on hand
- §62. Customers' deposit
- §63. Expenses or revenues
- §64. Prepaid expenses
- §65. Materials and supplies
- §66. Amount to be allowed
- §67. Property not used or useful

## **IX. DEPRECIATION**

- §68. Deprecation generally**
- §69. Necessity of deduction for depreciation**
- §70. Factors affecting propriety thereof**
- §71. Methods of establishing rates or amounts**
- §72. Property subject to depreciation**
- §73. Deduction or addition of funds or reserve**

## **X. VALUATION OF PARTICULAR UTILITIES**

- §74. Electric and power**
- §75. Gas**
- §76. Heating**
- §77. Telecommunications**
- §78. Water**
- §79. Sewer**

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## **VALUATION**

No headnotes in this volume involved the question of valuation.

## **WATER**

### **I. IN GENERAL**

- §1. Generally**
- §2. Certificate of convenience and necessity**
- §3. Obligation of the utility**
- §4. Transfer, lease and sale**
- §5. Joint Municipal Utility Commissions**

### **II. JURISDICTION AND POWERS**

- §6. Jurisdiction and powers generally**
- §7. Jurisdiction and powers of the Federal Commissions**
- §8. Jurisdiction and powers of the State Commission**
- §9. Jurisdiction and powers of local authorities**
- §10. Receivership**
- §11. Territorial Agreements**

### **III. OPERATIONS**

- §12. Operation generally**
- §13. Construction and equipment**
- §14. Maintenance**
- §15. Additions and betterments**
- §16. Rates and revenues**
- §17. Return**
- §18. Costs and expenses**
- §19. Service**

- §20. Depreciation
- §21. Discrimination
- §22. Apportionment
- §23. Accounting
- §24. Valuation
- §25. Extensions
- §26. Abandonment or discontinuance
- §27. Reports, records and statements
- §28. Financing practices
- §29. Security issues
- §30. Rules and regulations
- §31. Billing practices
- §32. Accounting Authority orders

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## WATER

### I. IN GENERAL

**Water. §2. Certificate of convenience and necessity.** Having found that the factors for granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Missouri-American Water Company, to provide the water and sewer service to the customers in the incorporated Village of Saddlebrooke located in Christian and Taney Counties, Missouri. **22 MPSC 3d 172**

**§4. Transfer, lease and sale.** The Commission approved the sale and transfer of assets of a water system to the City of Waynesville, Missouri, subject to certain conditions, after the Commission found that the sale would benefit the customers of the water system and is not detrimental to the public interest. **22 MPSC 3d 98**

Having found that the factors for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Valley Woods Utility, LLC, to provide the water and sewer service to the customers currently being served by Valley Woods Water Company, Inc., the Commission finds that the public interest standards for approving a transfer of assets and granting a certificate of convenience and necessity have also been satisfied. Thus, the Commission approved the transfer of assets and granted the certificate with certain conditions. **22 MPSC 3d 132**

**Water. §4. Transfer, lease and sale.** Having found that the factors for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied, and having found that it is in the public interest for Lincoln County Sewer & Water, LLC, to provide the water and sewer service to the customers currently being served by the

unregulated systems at the developments of Rockport and Bennington, the Commission found that the public interest standards for approving a transfer of assets and granting a certificate of convenience and necessity were satisfied. Thus, the Commission approved the transfer of assets and granted the certificate. **22 MPSC 3d 169**

### **III. OPERATIONS**

**§14 Maintenance.** The utility's tariff obligated it to maintain its mains. Generally, anything on the customer's side of the meter must be maintained by the customer. **22 MPSC 3d 278**

**§16. Rates and revenues.** The Commission approved a Non-Unanimous Stipulation and Agreement that increased Missouri-American Water Company's annual water revenue by \$23,255,000 and established eight water districts. **22 MPSC 3d 37**

**§28 Financing practices.** The controlling statutes do not authorize the Commission to consider an application from a third party to seize the assets of a utility for payment of a debt of the utility. **22 MPSC 302**