

**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                )  
Revenues for Electric Service                            )     File No. ER-2014-0258

**CONCURRING OPINION OF COMMISSIONER DANIEL I. HALL IN THE ORDER  
APPROVING AMENDED STIPULATION AND AGREEMENT REGARDING CERTAIN  
REVENUE REQUIREMENT ISSUES**

On March 19, 2015, the Commission approved a nonunanimous stipulation and agreement, which the Commission treated as unanimous per Commission Rule 4 CSR 240-2.115(2). The approved stipulation resolved numerous previously contested issues, including the amount of rate case expense Ameren Missouri will recover in rates for pursuing and prosecuting its rate increase request. Specifically, it sets forth that “the revenue requirement in this case shall include the Company’s prudently-incurred rate case expenses for this case . . . .”<sup>1</sup> Accordingly, under this stipulation, Ameren Missouri ratepayers, through the rates they pay for electric service, will be required to pay 100 percent of Ameren Missouri’s prudently incurred rate case expenses. I believe the stipulation is a reasonable resolution of the vast majority of the issues addressed therein and, therefore, should be approved. However, I am not convinced it constitutes good public policy in general, or in this case in specific, to require customers to pay 100 percent of the utility’s rate case expense.<sup>2</sup> For that reason, I write separately to express my disagreement with that portion of the stipulation.

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<sup>1</sup> *Amended Nonunanimous Stipulation and Agreement Regarding Certain Revenue Requirement Issues*, p. 2, para. 3.

<sup>2</sup> Staff identified the final amount of rate case expense included in rates as \$2,391,209, which will be amortized over two years and recovered at \$1,366,975 per year. *Rate Case Expense*, EFIS No. 737, p. 1.

I acknowledge that, in one sense, rate case expense is like other common operational expenses, such as employee salaries, information technology upgrades and fuel costs. These are all expenses the utility must incur in order to provide utility service to customers. In order to prosecute a rate case, the utility must incur expenses for lawyers and consultants, and a rate case is the established process under Missouri law by which new just and reasonable rates are set. Accordingly, and because it is indisputable that customers benefit from having just and reasonable rates, it is appropriate for customers to bear some portion of the utility's cost of prosecuting a rate case.

However, rate case expense is also different from most other types of utility operational expenses. First, the rate case process is adversarial in nature, with the utility on one side and its customers on the other. During the hearing in this case, counsel for Ameren Missouri took issue with that observation, contending that Ameren Missouri does not view its customers as its adversaries. I appreciate that sentiment; I want that to be true. But that is not how it appears from where I sit. In the hearing room during the evidentiary hearing, the Office of Public Counsel and other customer organizations opposed Ameren Missouri on virtually every issue presented – the former taking positions that would lower rates, and the latter taking the positions that would result in increased rates. In addition, at local public hearings, customer after customer articulated the harmful effect of rising utility rates on their financial affairs, and pleaded with the Commission to take whatever action necessary to mitigate any future rate increase.

Second, unlike other operating expenses, rate case expense produces some direct benefits to the utility, more specifically, to its shareholders, that are not shared with customers. In a typical rate case, as in this one, the utility seeks a higher rate of return than customers are willing to support. While I agree it is absolutely necessary, both legally and from a public policy perspective, to ensure that the utility has the opportunity to recover a reasonable return on its investment, any amount sought over a reasonable rate of return is solely sought for the benefit of shareholders. This stands in contrast to typical operating expenses where there is a direct benefit to ratepayers – safe, adequate and reliable service.

Third, requiring 100 percent of rate case expense to be paid by ratepayers provides the utility with what appears to be an inequitable financial advantage over other participants in the rate case process. Staff and the Office of Public Counsel both operate within tight annual budgets, and the intervener consumer groups must pay their own legal expenses. In contrast, under the current system, the utility prosecutes its rate case with an unconstrained budget, receiving reimbursement from ratepayers for all of its expenses related thereto. This allows the utility, in some circumstances, to “out-gun” its opponents, investing resources other parties cannot match to engage numerous counsel and consultants, and conduct multiple rounds of depositions and written discovery.

Finally, full reimbursement of all rate case expense does nothing to encourage reasonable levels of cost containment. While Ameren Missouri insists it carefully scrutinizes and manages its costs, and that the prudence review these costs receive is designed to ensure that unnecessary and exorbitant rate case expenses are disallowed,

it is indisputable that the Commission has only rarely disallowed even a portion of a utility's rate case expense as imprudently incurred. This is because, in the context of rate case expense, a true prudence review would be cumbersome, time-consuming, resource intensive, and even impractical.<sup>3</sup> Simply put, it does not work as well as providing a direct financial incentive to the utility to minimize litigation costs.

Accordingly, I believe rate case expense should be shared by ratepayers and shareholders. Some parties have noted that there is no express authority in statute or rule to implement such a sharing mechanism, however, the Commission has the current legal authority to take such action. Under Missouri law, the Commission must set just and reasonable rates,<sup>4</sup> and rates that include 100 percent of the utility's rate case expense, for the reasons set forth above, may not be just or reasonable.<sup>5</sup> Moreover, this Commission has already found rate case expense sharing to be just and reasonable in at least one prior case. In a 1986 decision, *In the Matter of Arkansas Power and Light Company*,<sup>6</sup> the Commission "adopted Public Counsel's proposed

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<sup>3</sup> Any after-the-fact review of rate case expense necessarily depends on the utility's ability to make available detailed, transparent records about costs related to experts and attorneys, which are often considered confidential to some degree. Furthermore, even if records are made available, by the nature of the subject matter, any review of those records is inherently so deferential it can sometimes become a perfunctory exercise. In this very case, Public Counsel alleged the information Ameren Missouri provided for rate case expense would be insufficient for a meaningful prudence review. Despite these challenges reviewing rate case expense for prudence, the Commission has disallowed, on rare occasions, portions of rate case expense when certain costs were deemed excessive. See, *In the Matter of Missouri Gas Energy*, Report and Order Case No. GR-2004-0209, 12 Mo. P.S.C. 3d 581, 623 (2004) and *In the Matter of Missouri-American Water Company*, Report and Order, Case No. WR-93-212, 2 Mo. P.S.C. 3d 446, 449 (1993).

<sup>4</sup> ". . . All charges made or demanded by any . . . electrical corporation . . . shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge . . . is prohibited." Section 393.130.1, RSMo 2000 as currently supplemented.

<sup>5</sup> Of course, there are rate cases where the utility does not have the means to absorb a portion of rate case expense, and requiring it to do so would ultimately harm customers. In such circumstances, it would appear just and reasonable that rates include the entire amount of rate case expense.

<sup>6</sup> Report and Order, Case No. ER-85-265, 28 Mo. P.S.C. (N.S.) 435, 447 (1986).

disallowance of one-half of rate case expense.” It is also important to note that there are a number of other cases where the Commission acknowledged it had this authority.<sup>7</sup>

Some parties to this hearing suggested a workshop would be in order to examine and develop this concept. However, the Commission has already opened a working case precisely on this issue, File No. AW-2011-0330. This case was opened April 7, 2011, over four years ago, and is currently still open. In that case, Staff issued a comprehensive Staff Report, which concludes,

Staff recommends that the Commission consider employing structural incentive measures in rate cases to provide utilities with stronger incentives to reasonably limit their rate case expenses to appropriate and necessary levels. . . These measures may include . . . sharing of rate case expense.”<sup>8</sup>

As noted above, I believe the stipulation is reasonable and should be approved. I appreciate the parties’ efforts to reach this agreement that includes a number of other complex issues beyond the rate case expense issue. In those negotiations, the parties (in particular the Office of Public Counsel, which has long supported rate case expense sharing) were unaware that some Commissioners were open to this concept; and it is not my intent to thwart the work that went into reaching this agreement. Going forward, I am heartened by Public Council’s statements at the hearing that it would renew its pursuit of rate case expense sharing in future proceedings, and I am also encouraged

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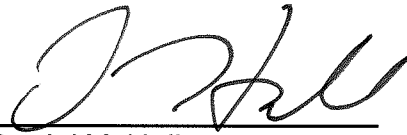
<sup>7</sup> See, *In the Matter of Kansas City Power & Light Company*, Report and Order, Case Nos. EO-85-185 and EO-85-224, 28 Mo. P.S.C. (N.S.) 229, 263 (1986), and *In the Matter of Missouri Gas Energy*, Report and Order, File No. GR-2009-0355, 19 Mo. P.S.C. 3d 245. 303, (2010).

<sup>8</sup> *Staff’s Investigative Report on Rate Case Expense*, Sept. 4, 2013, p. 15. Counsel for Ameren Missouri complained at the hearing that the company had not yet been given a chance to fully respond to the idea of a rate sharing mechanism. However, any party interested in this issue had an opportunity to provide comments in AO-2011-0330, as the Commission order establishing the file provided, “[u]sing this file, any person with an interest in this matter may . . . submit any pertinent responsive comments or documents.” *Order Directing Staff to Investigate and Opening a Repository File*, pp. 1-2. If Ameren Missouri was waiting for a more direct invitation to submit its input, this Concurrence constitutes such an invitation.

by the support some of my fellow Commissioners have expressed for considering a rate case expense sharing mechanism in future cases.

For the forgoing reasons, I concur.

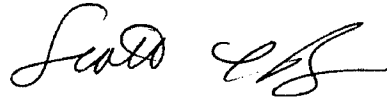
Respectfully submitted,



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Daniel Y. Hall  
Commissioner

Commissioner Rupp joins this concurring opinion in its entirety.



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Scott T. Rupp  
Commissioner

Dated this 11th day of June, 2015  
at Jefferson City, Missouri