BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company	)	
d/b/a Ameren Missouri's Tariffs to	)	File No. ER-2019-0355
Decrease Its Revenues for Electric Service.	)	

INITIAL POST-HEARING BRIEF OF UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI

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The sole remaining issue in this case is whether the sharing percentage for Ameren Missouri's fuel adjustment clause ("FAC") should be changed. For the reasons discussed in detail below, the answer to that question is a resounding "no." Regardless, in deciding that issue the Commission should be mindful of both the facts of record that pertain to the issue – including the complete lack of record evidence to support a change – and of the context surrounding how this issue came up in this case in the first place.

A. FACTS

Ameren Missouri's FAC took effect on March 1, 2009 after it was approved in File No. ER-2008-0318.[1] As outlined below, the Commission made a deliberate and conscious decision to reject alternative sharing percentage recommendations from others (including from the Office of the Public Counsel ("OPC")) and affirmatively determined that a 95%/5% sharing percentage was appropriate. Indeed, the Commission specifically determined that the 95%/5% mechanism "provides AmerenUE[2] sufficient incentive to operate at optimal efficiency because the Company already has several incentives in place that encourage it to minimize net fuel costs."[3] Since it first determined, based on record evidence, that the 95%/5% sharing percentage was appropriate and provided a sufficient incentive for the Company to operate at optimal efficiency, the

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[1] The Commission took official notice of and admitted into the record in this case the Commission's order establishing Ameren Missouri's FAC and its other orders continuing it.
[2] The Company's d/b/a has since been changed to Ameren Missouri.
[3] *Id.* (Note that what were at that time labelled "net fuel costs" in the FAC tariff are now called "net energy costs").

Commission has been asked on six separate occasions – including in this case – to impose greater sharing on the Company, only one of which was resolved by settlement (File No. ER-2016-0179).[4] The Commission has, repeatedly, through conscious, deliberate, and affirmative decision making, determined that the 95%/5% sharing percentage is appropriate for Ameren Missouri. Those decisions were based on the record evidence adduced in each of those cases. OPC has been a chief advocate for changing the sharing percentage in every one of these cases, with Ms. Mantle acting as OPC's chief advocate in the past three cases.[5]

Since Ameren Missouri's FAC was first established, not a single finding of imprudence respecting Ameren Missouri's operation of its FAC has been made. Moreover, no party is claiming in this case that there has been any imprudence that would justify a change in the sharing percentage now.[6]

B. CONTEXT

So, what is the context that led to an evidentiary hearing on whether the sharing percentage should be changed despite a total lack of evidence to support the need for such a change? This appears to be part of a larger effort on OPC's part as it relates to the FAC in general and is not just about imposing more sharing on Ameren Missouri. Instead, OPC's action in this case and insistence on taking the FAC sharing issue to hearing in this case is obviously a

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[4] OPC settled its FAC issues shortly before the hearing in File No. ER-2014-0258, but Consumers Council of Missouri objected and advocated for a cancellation of the FAC entirely or, alternatively, a 50%/50% sharing percentage. Report and Order, File No. ER-2014-0258.

[5] Ex. 6 (Meyer Rebuttal), Sch. AMM-R1; Reports and Orders, File Nos. ER-2014-0258 and ER-2014-0179, and in this case.

[6] There was a disagreement early on in the FAC's operation about the classification of two wholesale power contracts that impacted two different prudence review periods (the first and second). See the Commission's Reports and Orders from those prudence reviews, File Nos. EO-2010-0255 and EO-2012-0274, of which the Commission has taken official notice. Ms. Mantle previously tried to argue that those cases supported a change in the sharing percentage. The Commission specifically rejected her argument, stating that its finding that Ameren Missouri had misclassified the contracts (and should have flowed their impacts through the FAC) "does not support the argument that Ameren Missouri needs a larger financial incentive within the fuel adjustment clause." Report and Order, File No. ER-2011-0028, p. 83. It has similarly rejected all of her other arguments, some of which are simply repeated in this case. Her only new argument relates to the "PISA" statute, which will be addressed below.

part of OPC's ongoing effort to in effect convince the Commission to adopt a policy of greater sharing for other utilities, including for The Empire District Electric Company.[7]

The Commission need not take the Company's word for it on these points. In Ms. Mantle's own words, OPC has "been very negative about fuel adjustment clauses from the beginning."[8] And that hostility has not changed: "[p]ersonally, I don't think customers should bear any of the costs," which by definition means there should be no FAC at all in her view.[9] Of course, OPC itself will likely assign that statement only to its witness, Ms. Mantle, and claim that all it is doing is seeking a change in the sharing percentage, but as earlier noted, it is obvious that if OPC had its way, the debate here would not just be about sharing percentages; it would be about not having an FAC at all despite (a) the General Assembly's clear recognition that FACs are an appropriate regulatory mechanism for Missouri, subject to the Commission's decisions regarding their use and structure, and (b) the Commission's own longstanding and consistent recognition of the important role FACs play for the electric utilities under its jurisdiction.

Before more specifically addressing the record in this case, the Company respectfully suggests the Commission keep one more important aspect of sharing in an FAC in mind: *any sharing at all* leads to one of two results: it either deprives the utility of a greater share of increases in *prudently-incurred* net energy costs or it deprives customers of a greater share of decreases in *prudently-incurred* net energy costs.

C. ARGUMENT

1. The Commission has consciously and affirmatively approved the 95%/5% sharing mechanism, based on record evidence; nothing has changed in this case that

[7] Tr. p. 325, ll. 2-3, 9-18; p. 330, ll. 9-15 (OPC Counsel making clear that OPC is engaged in a concerted effort to try to take advantage of the adoption of PISA (Section 393.1400, RSMo) to justify a uniform 85%/15% sharing percentage in the FAC for all Missouri utilities); Tr. p. 397, ll. 1-4 (Ms. Mantle asserting that there must be sharing (and presumably, 85%/15% sharing) on all Missouri utilities via their FACs).
[8] Ex. 7 (Meyer Rebuttal), p. 14, ll. 13-17, n. 10 (quoting Ms. Mantle's deposition in File No. ER-2014-0258).
[9] Tr. p. 392, ll. 8-12.

would justify a departure from the Commission's consistent rulings on this very issue.

There were suggestions during the evidentiary hearing that the Commission's consistent rejection of a sharing percentage of other than 95%/5% was somehow "arbitrary" and that Commission's sharing percentage decisions post its original 2007 decision approving the first Section 396.266 FAC for Aquila, Inc. had been made arbitrarily and without thought or justification.[10] Those suggestions, opportunistically fed by OPC every chance it got, are false, as convincingly shown by the Commission's orders on this very issue in each Ameren Missouri rate case where attempts have been made to impose greater sharing on the Company have been made.

a. File No. ER-2008-0318

When the Commission first approved Ameren Missouri's FAC, parties advocated for sharing percentages ranging from 50%/50% (OPC) to 85%/15% (the Attorney General).[11] The Commission evaluated those specific proposals and rejected them based on the record in that case.[12] In doing so, the Commission noted that "a fuel adjustment clause for AmerenUE already [in addition to sharing] includes features designed to give the company an incentive to maximize its income from off-system sales and minimize costs," citing both the fact that the Company must re-ask for an FAC at least every four years (where the request could be denied) and must undergo periodic prudence reviews.[13] Addressing whether a 95%/5% sharing percentage should be adopted for Ameren Missouri instead of the other proposals in the case, the Commission, with specificity, rejected OPC's 50%/50% proposal,[14] and rejected the alternative proposals, finding, specifically, that they would "impose more costs on AmerenUE than is necessary to provide an

[10] Tr., p. 401, ll. 9-12.
[11] Meyer Rebuttal, Sch. AMM-R1.
[12] Report and Order, File No. ER-2008-0318, pp. 70-76.
[13] *Id.*, p. 70.
[14] *Id.*, p. 72.

appropriate incentive."[15] This was not an arbitrary copy of its decision in the first case for Aquila but was deliberate decision making *based on evidence of record in that case*. Not only did the Commission affirmatively determine that an 85%/15% sharing percentage was unnecessary but it also affirmatively determined that a 95%/5% sharing percentage appropriate because it "provides AmerenUE sufficient incentive to operate at optimal efficiency because the Company already has several incentives in place that encourage it to minimize net fuel costs."[16] In addition to its affirmative finding that a 95%/5% mechanism was appropriate because of the incentives the Company has apart from a sharing percentage, the Commission affirmatively found – again based upon record evidence from witnesses with knowledge and experience in such matters – that implementing a different sharing percentage than it had approved for other electric utilities at that time "would signal to investors that AmerenUE was less well regarded by this regulatory agency."[17] There was also a third independent reason the Commission affirmatively adopted Ameren Missouri's 95%/5% sharing percentage proposal in that case: "Most fuel adjustment clauses . . . provide for a 100% pass through of costs. To allow substantially less than a 100 percent pass through would push AmerenUE's fuel adjustment clause out of the mainstream and hurt the company's efforts for needed capital."[18]

b. File No. ER-2010-0036

This was the first case where Ameren Missouri asked to continue its FAC essentially as-is, including with the sharing percentage the Commission had determined the year before to be appropriate. Initially, no party suggested a change should be made but on its own motion, the

[15] *Id.*, p. 72-73.
[16] *Id.*, p. 73 (Note that what were at that time labelled "net fuel costs" in the FAC tariff are now called "net energy costs").
[17] *Id.*, p. 74.
[18] *Id.* p. 75.

Commission indicated it wanted to hear evidence on the appropriate sharing percentage and at that point, certain parties, including OPC, advocated for a change from 95%/5% to 80%/20%.[19]

OPC's justifications at that time were in substance the same as one of Ms. Mantle's justifications given in this case: more sharing is "necessary to ensure that AmerenUE continues to make its best efforts . . ..."[20] Staff recommended leaving the sharing percentage at 95%/5% "since little time has passed" (about 18 months) since the Commission first approved Ameren Missouri's FAC.[21]

During the hearings in this case, OPC clearly attempted to paint the picture that the Commission hearing the ER-2010-0036 case essentially threw up its hands and made a robotic and unreasoned decision to continue the 95%/5% sharing simply because one party – the Staff – indicated that in its opinion more time should pass before considering a change, but that picture is a false one. In fact, the Commission, as it did in File No. ER-2008-0318, made several findings re-affirming the appropriateness of the 95%/5% mechanism for Ameren Missouri, including:

- That nothing had changed that justified altering its prior (and as noted above, specific and affirmative) reasons for adopting 95%/5%;[22]
- That "the testimony [in favor of a change] was based on little more than the opinions of [the witnesses who wanted to change it] . . . [n]o party presented any evidence that would indicate how the 95/5 sharing is working . . . [and] [c]ertainly, no evidence was produced to show that AmerenUE had acted imprudently ….";[23]

[19] Report and Order, File No. ER-2010-0036, pp. 73-74.
[20] *Id.*, p. 74.
[21] *Id.*
[22] *Id.*, pp. 75-76.
[23] *Id.*, pp. 76-77.

- That "[s]ubstantially changing the existing fuel adjustment clause without a meaningful analysis could have severe adverse consequences for AmerenUE and ultimately for ratepayers."[24]

c. File No. ER-2012-0166

In this case, Staff, through its witness Ms. Mantle, argued for an 85%/15% sharing percentage. At the time the Commission made its decision in the ER-2012-0166 case, Ameren Missouri had operated with its FAC for nearly four full years, and again, based on record evidence and specific findings, the Commission affirmatively found that the 95%/5% mechanism was appropriate and provided a sufficient incentive, including specifically rejecting five arguments Ms. Mantle made in an effort to impose an 85%/15% sharing percentage, including one argument that is essentially identical to Ms. Mantle's claims in this case: that Ameren Missouri may not have sufficient incentive to accurately set net base energy costs ("NBEC").[25]

Among other things, the Commission rejected the notion that $30 million (the additional prudently-incurred net energy costs the Company would have had to absorb had the 85%/15% sharing been in place) is something the Company should not "complain" about, finding that $30 million is not di minimis.[26]

Far from unthinkingly just continuing the status quo, the Commission affirmatively decided based upon an evaluation and rejection of specific justifications advanced by Ms. Mantle – and specific evidence in opposition to them – that an 85%/15% sharing mechanism should not be adopted:

> Staff's [Ms. Mantle'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

[24] *Id.*, p. 77.
[25] Report and Order, File No. ER-2012-0166, pp. 77-78. With respect to Ms. Mantle's lack of incentive to properly set NBEC, see p. 78, ¶ 5; pp. 79-80, ¶ 10.
[26] *Id.,* ¶ 7.

> 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.[27]

d. File No. ER-2014-0258

While OPC (Ms. Mantle) initially proposed a 90%/10% sharing mechanism, OPC dropped its FAC-related claims via a settlement leaving only Mr. Coffman and his client, Consumers Council of Missouri ("CCM"), which objected to the settlement, to argue both against Ameren Missouri having an FAC at all and to argue that if Ameren Missouri was to have an FAC the sharing should be 50%/50%.

Again, the Commission affirmatively rejected the notion that the 95%/5% sharing percentage should be changed, noting that the $38 million of prudently-incurred net energy cost changes absorbed by the Company under the 5% sharing is a "significant incentive" even to a large company like Ameren Missouri and again specifically finding that most utilities with FACs have no sharing at all.[28]

The foregoing *evidence of record* debunks Ms. Mantle's attempt to rewrite the Commission orders of the past 12 years[29] by suggesting that this Commission has not been directly and repeatedly called upon to make an affirmative decision – based on evidence in each case – as to whether the 95%/5% sharing percentage is appropriate and has instead simply followed the status quo without having any reason to do so. Respectfully, any such suggestion is not only wrong, but it is misleading. This Commission did its duty in every single one of those

[27] *Id.*, p. 83.
[28] Report and Order, File No. ER-2014-0258, pp. 108-09 (and noting that a change "without a good reason to do so could erode investor confidence in the utility and the state regulatory process").
[29] See Tr. p. 400, l. 10 to p. 402, l. 12.

cases when it afforded the parties Due Process in presenting the evidence and argument they desired to present on the issue of FAC sharing, when it considered that evidence, and when it made its findings of fact and conclusions of law and rendered its conscious and affirmative decisions that a 95%/5% sharing percentage was appropriate and that the alternatives argued for by others were not.

2. Not a single one of OPC's (paper thin) justifications for adopting a sharing percentage of 85%/15% withstand scrutiny.

a. OPC's "gamesmanship" theory.

While OPC's counsel recoiled at characterization of Ms. Mantle's "gamesmanship"[30] argument as a claim by Ms. Mantle that the Company somehow "manipulated" its NBEC recommendation in this case,[31] the fact remains that any objective person reading Ms. Mantle's direct testimony could not escape the conclusion that she was accusing the Company of just that. Indeed, Ms. Mantle herself made no effort in her surrebuttal testimony, when she had the chance to do so, to rebut or otherwise disagree with the Company's characterization of the point she was trying to make as one of implied or actual manipulation.[32] In any event, either Ms. Mantle stands by her claims or she doesn't, but if OPC is going to try to justify imposing three times as much sharing on Ameren Missouri because of a claimed need to provide a greater incentive against "gamesmanship," then OPC should be prepared to be required to prove its claims. It hasn't and it can't. The Company will not repeat the completely unrebutted and unchallenged testimony it provided on this very point – see Mr. Meyer's rebuttal testimony, starting at p. 2,

[30] Ex. 200 (Mantle Direct), p. 5, l. 24 to p. 6, l. 2.
[31] Tr., p. 311, l. 17 to p. 312, l. 3. "Gamesmanship" is defined as "the art or practice of winning games by *questionable expedients* . . ." [or] the use of "*ethically dubious* methods to gain an objective" (emphasis added). Merriam-Webster online dictionary, accessed March 18, 2010.
[32] Indeed, her prefiled testimony indicated that the issue she was raising was the prospect that NBEC could be manipulated. Ex. 200, pp. 2-3.

l. 21 and continuing to p. 9, l. 20. To summarize, Mr. Meyer's rebuttal testimony makes absolutely clear that it would make absolutely no sense at all for the Company to recommend an artificially low NBEC level and then face *repeated* instances of negative press when the FAC adjustments that follow will all reflect increases in the FAC rate; that the Company has followed well-accepted approaches in determining a recommended normalized NBEC level in each of its rate cases – just as has the Staff; and that given that Staff *independently* makes its own NBEC recommendation (which is *lower* than the Company's in this case), the Company couldn't manipulate the NBEC even if it wanted to – it doesn't.

As just noted, OPC didn't challenge any of this testimony at all but it may reference Ms. Mantle's rebuttal testimony where she pointed out that one component of NBEC – off-system sales – had for the past couple of years been less than the normalized level reflected in the Company's and the Staff's production cost modeling runs that underlie the Staff's and the Company's NBEC recommendations.[33] The Company addressed this in its surrebuttal testimony, pointing out that (a) Ms. Mantle essentially made the same argument in File Nos. ER-2012-0166 and ER-2011-0028; and (b) the Commission rejected her arguments in both of those cases, specifically finding that the practice of using historical data to develop normalized off-system sales levels "does not reflect a flaw in the Company's [or Staff's development …]" of the same.[34]

Not only did OPC's witness (as opposed to OPC's counsel in opening statement) not dispute that she was implying that the Company had manipulated its NBEC recommendation, just as Mr. Meyer testified, but Ms. Mantle also ignored the most obvious reason the NBEC recommendations of both the Company and the Staff were substantially lower in this case than

[33] Ex. 201 (Mantle Rebuttal), pp. 12-15.
[34] Ex. 202 (Meyer Surrebuttal), p. 2, l. 4 to p. 6, l. 9 (and specifically, p. 5, ll. 1-11). As Chairman Silvey's questioning confirmed, OPC indeed signed off on the NBEC used to set the base in this case.

they were in the last rate review: the substantial decreases in the delivered price of coal achieved by the Company, as outlined by Mr. Meyer in his testimony.[35] One can understand why Ms. Mantle ignored these inconvenient facts as it is difficult to argue that additional sharing should be imposed on a utility operating with a 95%/5% mechanism that proactively took steps to substantially lower its delivered fuel costs.[36]

b. OPC's "constant pressure" justification.

Under questioning from Chairman Silvey, Ms. Mantle synthesized her entire argument in this case (which is no different, putting aside the PISA argument to be addressed below) than were her repeatedly rejected arguments over many cases going back many years: Question: "Are you asserting in any way that the Company could do more or isn't doing enough to keep its costs as low as possible related to fuel?" Answer [noticeably dodging the direct question she was asked]: "I'm asserting that a certain amount of pressure needs to be continually on a utility," with that statement followed up by a somewhat rambling answer about "complacency" and theorizing that what is a "good practice" today may not be tomorrow while also discussing not putting "blinders on," ultimately admitting in the middle of her long non-answer that "I'm not saying Ameren isn't . . . [doing a good job]."[37]

Ameren Missouri is under "constant pressure." As Mr. Meyer testified and as the Commission has repeatedly found, that pressure comes from, among other things:

- The fact that having an FAC is a privilege and not a right and the powerful incentive that fact provides to, to use Ms. Mantle's words, "do a good job";

[35] Meyer Rebuttal, p. 8, l. 9 to p. 9, l. 9.

[36] OPC may contend that this shows a high level of control over fuel costs, which in turn OPC may claim shows there should be more sharing. To the contrary, as Mr. Meyer testified, the 5% share of the savings the Company will realize has nothing to do with the efforts Mr. Meyer and his team undertook, and layering in new contracts to hedge coal needs (i.e., locking in lower prices for some volumes of coal) does not equate to control. Tr., p. 325, l. 19 to p. 336, l. 2; p. 336, ll. 12-20; p. 354, l. 20 to p. 355, l. 2.

[37] Tr. p. 396, l. 23 to p. 397, l. 12.

- The fact that the risk of a prudence disallowances gives the Company the incentive to do a good job and the powerful incentive that too provides to do a good job;[38] and
- The fact that the Commission has concluded that the 5% share the Company bears of changes in *prudently-incurred* net energy costs, provides an incentive as well.

c. OPC's "Why wouldn't the Company want to make more money" theory.

While Ms. Mantle has indirectly raised this point in prior cases, she went "all in" in this case (as did her counsel at the evidentiary hearing) by suggesting that OPC's recommendation to change the sharing percentage amounts to doing the Company a favor since the Company can achieve greater profits by virtue of the operation of the FAC if it can lower net energy costs as against the base.[39] This wrong-headed thinking lays bare OPC's failure to appreciate (or acknowledge) why utilities should have an FAC in the first place. FACs should not be mechanisms designed to let utilities make or lose money on the largely uncontrollable and highly volatile fuel and purchased power costs and off-system sales that make up the costs and revenues tracked in the FAC. Absent the Commission's obvious and consistent view that some sharing should be included – to enhance the other incentives the utility already has – Ameren Missouri would advocate for an FAC with no sharing at all so it could neither gain nor lose just because it's prudently-incurred net energy costs go up or down. However, having made that point many times and recognizing the Commission has many times re-affirmed that it believes some additional incentive is warranted – and there being no new evidence to offer on that point –

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[38] Ms. Mantle admits that the fact that the FAC is a privilege that can be taken away, and that costs can be disallowed for imprudence, are both "powerful" incentives. Meyer Rebuttal, p. 15, n. 11 (quoting Ms. Mantle's deposition in File No. ER-2011-0028).
[39] Tr., p. 318, ll. 21-22 (OPC's counsel); p. 399, ll. 16-18 (Ms. Mantle).

Ameren Missouri has accepted the current mechanism. OPC clearly has not. That is OPC's right, but OPC presents nothing but the same stale and unpersuasive arguments (again, aside from its new PISA argument).

The fact is that Ameren Missouri does not know whether its future net energy costs will go up or go down and it therefore does not know whether the sharing percentage will force it to absorb prudently-incurred costs or whether the 5% share will give it a windfall. It doesn't know what its fuel burn will be, and it doesn't know what power prices will do and it can't control either one.[40] All it does know, as Mr. Meyer testified, is to make its net energy cost management decisions as if there were no sharing percentage in place, mindful of the privilege it has of operating with an FAC.[41]

The Company doesn't want to make money (or lose it) on net energy costs and is content to make money by earning on prudent investments in its infrastructure and controlling its non-energy related costs where it can. This is how the vast majority of other utilities that have FACs with no sharing at all operate. There is no reason for Ameren Missouri to operate any differently.[42]

d. OPC's false claim that Ameren Missouri does not believe that more than $125 million of lost, prudently-incurred costs it would have lost under an 85%/15% sharing mechanism approach would be material.

As earlier noted, the Commission itself recognizes that the tens of millions of dollars of prudently-incurred net energy costs not recovered by the Company due to the 5% sharing is significant for Ameren Missouri. And as the undisputed facts show, had OPC's proposal been in

[40] Tr., p. 336, ll. 15-16.
[41] Tr., p. 339, ll. 13-16.
[42] Counsel for OPC's claim that imposing more sharing is a "win, win, win" is false. Tr. p. 317, ll. 5-6. Nobody "wins" when a utility gets lucky and profits at customers' expense from decreases in costs over which it has little control, or when the utility gets unlucky and loses money for the same reason.

effect in the past, Ameren Missouri would have absorbed more than $125 million of prudently-incurred net energy cost changes.[43]

In a desperate or perhaps careless attempt at a "gotcha" moment, OPC's counsel claimed that Mr. Byrne had admitted that $218 million was not material so surely, was the implication, $42 million or $126 million must also not be material so why not change the sharing to 85%/15%?[44]

As the prefiled testimony cited by OPC's counsel already made clear – and as Mr. Byrne directly confirmed on the witness stand – no such admission was ever made and indeed OPC's claim is at best misleading. Any fair reading of Mr. Byrne's prefiled rebuttal testimony (page 2, l. 22 to p. 3, l. 12) makes crystal clear that the immaterial transactions to which Mr. Byrne referred were the .067% of Ameren Missouri's revenue requirement represented by transactions with affiliates other than Ameren Services Company and not the $218 million of Ameren Services Company costs OPC sought to disallow in this case before a settlement of that issue was reached. And in response, both to questions from Commissioner Rupp and on redirect, Mr. Byrne confirmed that not only is $218 million material but so is $42 million (and obviously, three times that much, $126 million, had Ameren Missouri had to bear 15%).[45]

e. OPC's only new argument: that the ability to defer 85% of return and depreciation on qualifying electric plant (instead of 100%) under the PISA statute.

Try as it might, the evidentiary hearing in this case made crystal clear that OPC is struggling to coherently turn the General Assembly's adoption of the PISA statute into a justification to arbitrarily impose 85%/15% sharing on the Company in its FAC. As

[43] Ex. 7, p. 15, l. 12 to p. 16, l. 2.
[44] Tr., p. 326, ll. 14-18.
[45] Tr., p. 358, ll. 1-7; p. 358, l. 19 to p. 359, l. 15.

Commissioner Kenney's questions to counsel for OPC confirmed, while the General Assembly chose 85% *in the PISA statute*, it did not do anything at all to the FAC statute (Section 386.266) in terms of sharing mechanisms or incentives.[46] Counsel's answers to Chairman Silvey's questions similarly revealed that while OPC can argue that the legislature provided "explicit guidance on what is the baseline sharing that is necessary to "encourage the utility to engage in [capital] investment while protecting customers," the legislature "did not explicitly address this language [FAC sharing percentages or incentives at all for the] . . . . hypothetical that I presented . . .."[47] And as earlier discussed, OPC went on to, in effect, concede that more sharing "may be required" for "particular utilities in certain instances," that it is "not targeting Ameren" [because it hasn't proven any such circumstances], and that since it is raising this argument for Empire (and wants to raise it generally), it raised it in Ameren Missouri's case as well.[48]

What OPC *didn't* say on this topic in this case is also telling. After Mr. Byrne rebutted the notion that the PISA statute has anything whatsoever to do with the appropriate sharing percentage in an FAC (Byrne rebuttal (Ex. 3), p. 56, ll. 1-18), what did OPC's FAC witness say in response when she had the chance to do so in surrebuttal? *Nothing at all*, aside from repeating what she had already said in her direct testimony.[49] Despite specific evidence presented by Mr. Byrne to the contrary, OPC did not (and cannot) rebut the fact that net energy cost components, over which the Company has little control, are much different than capital costs over which the Company has far more discretion and control. And as Mr. Byrne also pointed out, utilities earn on the capital investments they make but do not earn on the pass-through revenues and expenses

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[46] Tr. p. 320, l. 7 to p. 323, l. 22. The bill that enacted the PISA statute did amend Section 386.266, but only by adding a decoupling option under certain circumstances and having nothing to do with the FAC.
[47] Tr. p. 324, ll. 7-23.
[48] Tr. p. 324, l. 23 to p. 325, l. 18.
[49] *Cf.* Ex. 200 (Mantle Direct), p. 8, l. 12 to p. 9, l. 20, with Ex. 202 (Mantle Surrebuttal), p. 3, l. 15 to p. 4, l. 3. They are in substance the same.

included in the FAC (except, by luck, as earlier discussed and solely because there is 5% sharing).[50]

OPC's argument here is simply that the Commission should infer, from the General Assembly's *silence*, that it has given the Commission guidance on FAC sharing when that is patently not the case. This is the second time OPC has tried to convince this Commission to use the PISA statute's silence as a weapon to deny cost recovery to a utility. See Slip Opinion, Missouri Court of Appeals, Western District, Case No. WD82492 (Oct. 22, 2019), p. 13, n. 13 (rejecting OPC's claim that the General Assembly's silence in the PISA statute precluded recovery of the remaining 15% in a RESRAM).

D. CONCLUSION

The Commission has been given absolutely no reason, no evidence; indeed, has been given nothing, that would justify a decision to change the sharing percentage in Ameren Missouri's FAC. In stark contrast, the Commission has many reasons – and has a strong record before it – upon which it can and should once again affirmatively determine that the sharing percentage should remain at 95%/5%.

[50] OPC's counsel tried to "testify" on this point at the hearing, implying that because components that make up the cost of capital projects (like steel) have market prices capital investments might be like net energy costs. Tr. p. 318, ll. 5-16. Aside from there being no evidence of this (again, why didn't Ms. Mantle disagree with Mr. Byrne in her surrebuttal testimony) even if this is so, it has nothing to do with the fact that Ameren Missouri must buy fuel to run its plants but has significantly more discretion in what capital projects to do, or not do, and when.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 30th day of March, 2020.

/s/James B. Lowery
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