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Board Documents; Late  
Fees  
Witness: Tom Byrne  
Type of Exhibit: Rebuttal Testimony  
Sponsoring Party: Union Electric Company  
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**MISSOURI PUBLIC SERVICE COMMISSION**

**FILE NO. GR-2021-0241**

**REBUTTAL TESTIMONY**

**OF**

**TOM BYRNE**

**ON**

**BEHALF OF**

**UNION ELECTRIC COMPANY**

**D/B/A AMEREN MISSOURI**

**St. Louis, Missouri**  
**October, 2021**

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**REBUTTAL TESTIMONY**

**OF**

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**FILE NO. GR-2021-0241**

**I. INTRODUCTION**

1

2

**Q. Please state your name and business address.**

3

A. My name is Tom Byrne. My business address is One Ameren Plaza, 1901  
4 Chouteau Ave., St. Louis, Missouri.

5

**Q. Are you the same Tom Byrne that submitted direct testimony in this  
6 case?**

7

A. Yes, I am.

8

**Q. To what testimony or issues are you responding?**

9

A. I am responding to the Missouri Public Service Commission Staff ("Staff") Cost  
10 of Service Report ("COS Report") on the following topics:

11

- Staff's recommendation regarding the amount of rate case expense to be  
12 included in the revenue requirement in this case;

13

- Staff's recommendation that the Company make documents from its  
14 Board of Directors' meetings and various committee meetings available  
15 to Staff on a continuous basis; and

16

In addition, I am responding to the recommendations of the Office of the Public  
17 Counsel ("OPC") to greatly lower, or remove, late fees.

**II. RATE CASE EXPENSE**

1  
2 **Q. What is Staff recommending with regard to rate case expense to be**  
3 **included in the revenue requirement in this case?**

4 A. Like the Company, Staff witness Jason Kunst developed a normal level of rate  
5 case expense by averaging the rate case expense for Ameren Missouri's last two rate cases. That  
6 resulted in a normal level of rate case expense of \$0.420 million for each rate case. Staff further  
7 normalized this amount over three years<sup>1</sup>—in other words, Staff presumed that the Company  
8 would file rate cases every three years and so 33% of the normal level of rate case expense  
9 should be included in the annual revenue requirement. However, Staff witness Kunst diverged  
10 further from the Company's approach in that he is recommending sharing of rate case expense  
11 50/50 between customers and shareholders, so he is only recommending that half of the  
12 normalized amount be included in the revenue requirement.

13 **Q. Is Mr. Kunst's proposal to share rate case expense 50/50 between**  
14 **customers and shareholders appropriate in this case?**

15 A. No, it is not. The section of the Staff's COS Report that addresses this issue  
16 suggests that Mr. Kunst applied the 50/50 sharing as a matter of general policy, not based on  
17 the facts of this particular case. Specifically, Mr. Kunst bases his proposed cost sharing on the  
18 following justifications, which would apply to any rate case:

19 1) The sharing of rate case expenses creates an incentive for the utility to  
20 control rate case expense to a reasonable level, while eliminating the  
21 disincentive for the utility to control the rate case expense;

22 2) Ratepayers and shareholders both benefit from the rate case process.  
23 While the ratepayer receives safe and adequate service at a just and  
24 reasonable rate, the shareholder is afforded the opportunity to earn an  
25 adequate return on their investment;

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<sup>1</sup> Although the Company normalized rate case expense over two years in its direct filing, Staff's proposed normalization over three years is reasonable in this case.

1           3) Ratepayers will continue to pay for the majority of the rate case expense  
2           regardless of any sharing mechanism when including the internal labor costs  
3           that are not included in the sharing mechanism; therefore, it is fair and  
4           equitable to allocate a portion of the rate case expense to the shareholders;  
5           and

6           4) It is highly probably that some recommendations advocated by the utility  
7           through the rate case process will ultimately be determined to be not in the  
8           public interest by the Commission.<sup>2</sup>

9           Again, these are general policy considerations that would apply to any rate case filed by  
10          any utility.

11           **Q.       What is wrong with the Commission adopting a generic policy to allocate**  
12          **rate case expense 50/50 based on general policy considerations that would be applicable**  
13          **to any rate case filed by any utility?**

14           A.       If the Commission wants to adopt a policy of general applicability to all utilities  
15          it must do so through a rulemaking proceeding, where it provides notice to the public and an  
16          opportunity to comment to all interested stakeholders. After considering those comments, and  
17          following the procedures in the Missouri Administrative Procedure Act, the Commission can  
18          adopt a rule of general applicability on the allocation of rate case expense between customers  
19          and shareholders. However, the Commission has not conducted such a rulemaking proceeding,  
20          so any allocation of rate case expense between customers and shareholders must be based on  
21          the specific facts of each case.

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<sup>2</sup> File No. GR-2021-0241, Staff Cost of Service Report, p. 68, l. 25 to p. 68, l. 7.

1           **Q.     Has the Commission recognized this limitation on its ability to apply a**  
2 **generic policy to the allocation of rate case expenses?**

3           A.     Yes it has. In an appeal by Kansas City Power & Light Company ("KCPL") of  
4 the Commission's allocation of rate case expenses between customers and shareholders, KCPL  
5 alleged that the Commission had improperly established a policy of general applicability to all  
6 utilities for sharing rate case expense without following the procedures for rulemaking. The  
7 Commission recognized this limitation on its ability to enact a policy of general applicability  
8 without following rulemaking procedures, but denied it had done so in that case. The  
9 Commission's brief in that case stated:

10           **B. The Commission established a method of rate case allocation based**  
11 **only of the facts of this case and did not engage in improper**  
12 **rulemaking.**

13           “Agency rulemaking occurs with the formulation, or repeal, of a statement  
14 of general applicability that implements, interprets or prescribes law or  
15 policy, or that describes the organization, procedure, or practice  
16 requirements of any agency.” *Greenbriar Hills Country Club v. Dir. of*  
17 *Revenue*, 47 S.W.3d 346, 357 (Mo.banc 2001) (internal quotation and  
18 citation omitted). An agency rule cannot be promulgated or repealed in an  
19 adjudicatory proceeding. *Id.* To effect a rule change applicable to all  
20 utilities, the Commission would have to undertake a rulemaking under  
21 Chapter 536. *Id.*

22           Contrary to KCPL’s assertions, the Commission did not announce a new  
23 rule applicable to all utilities in this case. KCPL asserted during the rate  
24 case that the Commission was engaging in a rulemaking through an  
25 adjudicatory order. (LF 1522). ***The Commission expressly denied that it***  
26 ***was announcing a general change in policy regarding rate case expense***  
27 ***in this Report and Order.*** (LF 1522). The Commission instead set just and  
28 reasonable rates under the particular facts of this case and did not engage in  
29 improper rulemaking. (LF 1522). ***The Commission may handle rate case***  
30 ***expense differently in future rate cases.***<sup>3</sup>

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<sup>3</sup> *Brief of Respondent Public Service Commission in Response to Kansas City Power & Light's Brief*, May 5, 2016, Case No. WD79125, Missouri Court of Appeals, Western District of Missouri, pp. 52-53 (emphasis added).

1           **Q.     Did the court accept this argument?**

2           A.     Yes, it did. The court's opinion stated: "Contrary to KCPL's argument, the  
3 PSC clearly established that the formula was proper *in this case* due to the unique  
4 circumstances of this rate case and it was not announcing a new policy of general  
5 applicability to all utilities."<sup>4</sup> The court cited a number of specific circumstances in the case  
6 that justified the Commission's allocation of rate case expenses, including the following  
7 statement from the Commission's order in that case:

8           The evidence shows that the expenses in this case are driven primarily by  
9 issues raised by KCPL, which has complete control over the content and  
10 methodologies proposed when it files its rate cases. In this case, KCPL has  
11 requested three new trackers, two of which have never been requested  
12 before in Missouri. KCPL has also requested recovery in rates of the  
13 expenses from the Clean Charge Network, which is a type of expense that  
14 has never been raised in a rate case before this Commission. Each of these  
15 issues are unique to KCPL, and while KCPL always has the opportunity to  
16 pursue new and unique issues in a rate case, the decision to do so is entirely  
17 with[in] KCPL's power. In addition, KCPL has pursued some issues that  
18 only directly benefit shareholders, such as the La Cygne accounting  
19 authority and, of course, a higher ROE. In recent rate cases, KCPL has  
20 incurred rate case expenses substantially higher than historical levels and  
21 higher than other utilities in Missouri.<sup>5</sup>

22           **Q.     Have there been any other Missouri court decisions addressing the**  
23 **allocation of rate case expense?**

24           A.     Yes. Earlier this year, the Missouri Supreme Court addressed the Commission's  
25 order allocating 50% of Spire Missouri's rate case expense to shareholders. The Court upheld  
26 the Commission's decision, but again the decision was grounded in the specific facts of that  
27 case. The Supreme Court said:

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<sup>4</sup> *In the Matter of Kansas City Power Light Company's Request v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d 757, 777 (Mo. App. W.D. 2016) (emphasis added).

<sup>5</sup> *Id.*, quoting the Commission's Report and Order in File No. ER-2014-0370.

1 As of September 30, 2017, Spire's total rate case expenses were \$1,393,399.  
2 The PSC's staff of technical and subject matter experts ("Staff")  
3 recommended disallowing expenses relating to the procurement of a Cash  
4 Working Capital study by the consultant firm Scott Madden. The Office of  
5 Public Counsel recommended disallowing expenses related to Spire's  
6 expert witness Thomas Flaherty because of the high hourly rate charged.  
7 The PSC determined that approximately half the litigated issues in this case  
8 were driven by Spire and among these issues were the proposed use of  
9 various shareholder-favorable ratemaking tools, including a revenue  
10 stabilization mechanism, a rate of return on equity of 10.35 percent (which  
11 would have been the highest of any large utility in Missouri), tracking  
12 mechanisms to limit shareholder risk, and earnings-based incentive  
13 compensation. The PSC further determined Spire "padded" its revenue  
14 requirement by pursuing positions it did not expect to win. Accordingly, the  
15 PSC determined Spire should recover the entire cost of customer notices,  
16 totaling \$436,000, and Spire's depreciation study,<sup>[4]</sup> totaling \$54,114, but  
17 only 50 percent of Spire's remaining rate case expenses.<sup>6</sup>

18 **Q. Has Staff cited any specific facts in this case that would justify allocation of**  
19 **any part of the rate case expense to Ameren Missouri shareholders?**

20 A. No, it has not. As I previously mentioned, Staff witness Kunst's adjustment is  
21 only based on general policy considerations that would be applicable to any rate case. He has  
22 cited no case-specific evidence that would justify allocation of any portion of the rate case  
23 expense to Ameren Missouri shareholders, let alone 50%.

24 **Q. Do the specific circumstances of this case justify the allocation of rate case**  
25 **expense to shareholders?**

26 A. No, they do not. Ameren Missouri has filed a very "clean" case driven largely  
27 by rate base investment needed to serve customers. Ameren Missouri has not raised unique  
28 issues designed to benefit shareholders. Ameren Missouri has not proposed multiple  
29 shareholder-favorable ratemaking tools. Ameren Missouri has not "padded" its revenue  
30 requirement taking positions on issues it did not expect to win. Ameren Missouri has not asked

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<sup>6</sup> *Spire Missouri, Inc. v. Pub. Serv. Comm'n*, 618 S.W.3d 225, 229 (Mo. Banc 2021) (footnotes in quote omitted).



1 for an unreasonably high return on equity—the 9.8% request is the same as a 9.8% return  
2 granted to Spire in a recent case and only 5 basis points higher than the range of reasonable  
3 returns on equity supported by the Staff in this case. Ameren Missouri is asking for no new  
4 trackers in this rate case. The normalized rate case expense calculation is also based on previous  
5 cases, and parties did not challenge the reasonableness of attorney or witness fees in any of those  
6 cases. The total amount of rate case expense proposed for inclusion in this case — \$0.210  
7 million — is a normalized three-year average and is not unusually high compared to other  
8 utilities' rate case expense. As a consequence, there is no basis whatsoever to allocate any rate  
9 case expense to shareholders in this case.

10 **III. AMEREN BOARD OF DIRECTORS DOCUMENTS**

11 **Q. Please summarize Staff's recommendation regarding documents from the**  
12 **Company's Board of Directors' meetings and Board Committee meetings.**

13 A. Staff witness Lisa Ferguson expressed concerns that it took extra time for  
14 Ameren Missouri to respond to Staff's request to review Board and Board Committee  
15 documentation in this case. She said that this type of delay can create problems due to the limited  
16 timeframe that Staff has to conduct its audit in a rate case. Consequently, she recommended that  
17 the Commission order Ameren Missouri to make such documentation available to Staff upon  
18 request at any time, outside of a rate case or any other proceeding.<sup>7</sup>

19 **Q. Were there delays in getting Staff copies of Board and Board Committee**  
20 **documentation in this case?**

21 A. Yes, there were some delays. Typically, Staff reviews physical copies of Board  
22 documents at Ameren Missouri's office. However, due to COVID, Ameren Missouri's offices

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<sup>7</sup> File No. GR-2021-0241, Staff Cost of Service Report, p. 2, l. 21 to p.3. l. 28.

1 were closed. Therefore, the Company had to develop a method to share the documents Staff  
2 sought electronically, and development of that process delayed the provision of the documents.  
3 In addition, there was a slight delay due to the unavailability of the custodian of the Board  
4 documents. However, these delays did not prevent the Staff from having the opportunity for full  
5 review of the documents for its audit. Moreover, these were one-time issues that should not  
6 recur in the future. The method for electronic review is now fully functional, and can be used in  
7 future cases.

8 **Q. Do the delays mentioned above justify the Commission ordering the**  
9 **Company to provide Board and Board Committee documentation to Staff at any time**  
10 **Staff requests, whether there is a case pending or not, whether they are relevant to any**  
11 **legitimate Staff inquiry or not?**

12 A. No. Staff reviews Board documents in every rate case and in some Purchased  
13 Gas Adjustment and Fuel Adjustment Clause cases, but to my knowledge, they have never even  
14 asked to see Board documents in any other situation. Although they certainly could discover  
15 Board documents in other cases, such as a Staff investigation for example, the documents would  
16 have to be relevant to the inquiry at hand. It is not appropriate, in my opinion, for Staff to access  
17 these sensitive documents at all times and for any or no reason at all.

18 **Q. Is the Company willing to agree to any steps to make sure that Board and**  
19 **Board Committee documents are available to Staff on a timelier basis in rate cases?**

20 A. Yes. The Company is willing to commit to providing Staff with Board and  
21 Board Committee documents within two weeks of filing a general rate case. These documents  
22 would be for the period beginning with the true-up date in the Company's previous rate case  
23 until the date of filing of the new rate case. The Company would also provide regular updates

1 as the case progresses. This should provide Staff plenty of time to review these documents  
2 during the 11-month period of the rate case. The Company will also provide the documents  
3 pursuant to discovery requests in any other case where the Staff requests them, subject to any  
4 valid objections.

5 **IV. LATE FEES**

6 **Q. OPC witness Dr. Geoffrey Marke recommended removing or drastically**  
7 **reducing late fees. Do you believe such changes are appropriate?**

8 A. I do not. The Commission should recognize that adoption of this type of a policy  
9 would constitute a complete change in cost recovery philosophy and would result in different  
10 utilities having very different approaches to late fees across the state. If the Commission believes  
11 a policy change should be examined, then it should establish a workshop docket to discuss the  
12 potential impact upon all customers and utilities and, if appropriate, adopt an administrative  
13 rule. The rule could then be applied and implemented in each utility's rate case.

14 **Q. Is it unusual for utilities to charge late fees?**

15 A. It is not. Every utility in the state charges a late fee for bills paid after a due date.  
16 I have not done a survey outside of the State of Missouri but it is my impression that late fees  
17 are commonplace the industry. In fact, late fees are common for almost every billed service that  
18 I can think of, even beyond utilities – credit card payments, leases, home loans, car loans, etc.  
19 The idea is to incentivize customers to pay their bills on time. Utilities, like all businesses, rely  
20 on cash flow to pay their bills and to function. Incentivizing people to pay on time helps to  
21 maintain a necessary cash flow.

1           **Q.     If the Commission decided to do away with or greatly lessen these fees,**  
2 **would there be an impact on the Company's revenue requirement?**

3           A.     This action would not lower the total revenue requirement (although the  
4 requested increase would go up), but it would mean the costs of late paying customers would  
5 be borne by all customers instead of by the cost causers. In other words, if the Commission  
6 eliminated or reduced these fees, this revenue would have to be collected elsewhere within  
7 Ameren Missouri's rates, most likely by adding them to the volumetric rates paid by all  
8 customers.

9           Additionally, the Cash Working Capital ("CWC") study (a study which compares  
10 when cash comes into Ameren Missouri to when cash is paid out by the Company)  
11 submitted in this case would no longer be accurate because the Company's cash working  
12 capital requirement would be understated. That study determined the costs associated with  
13 the existing level of late payments. However, as the number of customers who pay late  
14 increases because of the removal of the incentive to pay on time, the Company's cash  
15 working capital needs will also increase. Consequently, if the Commission were to  
16 eliminate late fees it would also need to increase the revenue requirement to account for  
17 these higher cash working capital needs resulting from that change.

18           **Q.     Do you believe greatly reducing or removing late fees would impact**  
19 **customer behavior?**

20           A.     I do. During the first several months of the COVID-19 pandemic, Ameren  
21 Missouri sought and was granted the ability to not impose late fees. During that time,  
22 approximately March through August of 2020, we saw arrears increase substantially both for  
23 customers who had a history of delinquency and for those who did not. Once we reinstated those

1 charges, arrears and write-offs have normalized. While there are likely other factors involved in  
2 this situation, it is clear that while late fees were eliminated that the incentive to pay on time had  
3 been reduced.

4 **Q. Are there any other problems that could be caused by reducing/eliminating**  
5 **late fees?**

6 A. Yes. Customers will have less incentive to pursue energy assistance dollars that  
7 are available to them. They may also run up larger balances that ultimately are impossible for  
8 them to pay. For all of these reasons, reducing or eliminating late fees is not appropriate.

9 **Q. Does this conclude your rebuttal testimony?**

10 A. Yes, it does.

