

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

In the Matter of the Union Electric Company)
d/b/a Ameren Missouri’s Tariffs to Decrease)
Its Revenues for Electric Service.)
Case No: ER-2019-0335

**PUBLIC COUNSEL’S APPLICATION FOR REHEARING AND REQUEST FOR
CORRECTIONS**

The Office of the Public Counsel (OPC) requests a rehearing before the Missouri Public Service Commission (Commission) pursuant to Section 386.500, RSMo.¹ The Commission should grant this request to rehear issues of fact and law to cure the Commission’s Report and Order. Alternatively, the OPC requests an issuance of a corrected order. The issues justifying a rehearing or corrected order are as follows:

I. Introduction

1. Commission Orders must be both lawful and reasonable. Lawfulness is found by an order acting within the bounds of laws passed by Missouri’s Legislature.² A Commission order is reasonable when it is based on “substantial, competent evidence on the whole record” rather than being arbitrary or capricious or an abuse of discretion.³

2. Union Electric d/b/a Ameren Missouri (Ameren Missouri) initiated this rate case on July 3, 2019. Ameren Missouri and other parties resolved nearly every disputed issue in this proceeding except for the question as to what is an appropriate incentive mechanism to include with Ameren Missouri’s fuel adjustment clause (FAC).

¹ All statutory references are to the 2019 rendition by the Missouri Revisor of Statutes unless otherwise noted.

² *State ex rel. Utility Consumers Council v. Pub. Serv. Comm’n*, 585 S.W.2d 41, 49 (Mo. 1979); *Pub. Serv. Comm’n v. Mo. Gas Energy*, 388 S.W.3d 221, 230 (Mo. Ct. App. 2012).

³ *State ex rel. Praxair, Inc. v. Pub. Serv. Comm’n*, 344 S.W.3d 178, 184 (Mo. banc 2011).

3. Ameren Missouri requested that its previous incentive mechanism of a 95/5 sharing of fuel and purchased power cost increases and decreases be continued. The OPC offered that a sharing ratio of 85/15 better encourages efficient utility behavior by increasing the utility's share of fuel and purchased power cost increases as well as savings benefits.

4. The Commission held a hearing on this issue on March 11, 2020, considered the parties' briefs, and issued its Report and Order to continue a 95/5 sharing on April 29, 2020.

II. The Commission Order Arbitrarily Approves the 95/5 Sharing Mechanism Based on the Supposed Absence of Imprudence by Ameren Missouri.

5. The Commission's Order notes that a determining factor in its decision to maintain a 95/5 sharing is the supposed absence of Ameren Missouri ever acting imprudently with regard to the FAC.⁴

6. This is not a sound basis to support the status quo 95/5 sharing percentages because, as an efficiency mechanism, its purpose within the FAC is not to serve as a punishment for past behavior. Past behavior is addressed in FAC prudence reviews, but "an after-the-fact prudence review is not a substitute for an appropriate financial incentive, nor is an incentive provision intended to be a penalty against the company. Rather, a financial incentive recognizes that fuel and purchased power activities are very complex and there are actions [Ameren Missouri] can take that will affect the cost-effectiveness of those activities."⁵ As the Commission has previously recognized, even a prudently operated utility company can and should be incentivized to secure further fuel efficiencies. Restated, it is arbitrary to demand that things get worse, before we order them to be better.

⁴ *Report and Order*, ER-2019-0335 p. 12 (Apr. 29, 2020) (*Report and Order*).

⁵ *Report and Order*, ER-2008-0318 p. 72 (Jan. 27, 2009).

III. The Commission Order Arbitrarily Approves the 95/5 Sharing Mechanism Based on Past Commission Decisions.

7. The Commission's Order continues the past 95/5 sharing mechanism by noting that the Commission has previously "found on several occasions, that the 95/5 sharing ratio provides Ameren Missouri sufficient incentive to operate at optimal efficiency and still provides an opportunity for Ameren Missouri to earn a fair return on its investment."⁶

8. Although the papers of precedent may appear dispositive when stacked, it was revealed at the evidentiary hearing that the foundation of those previous determinations was a political compromise that settled on a 95/5 split.⁷ The 95/5 ratio was not sponsored by any party to the proceeding that set the first FAC sharing ratio.⁸ Continued reliance on this sharing ratio, absent independent evidence of adequate inducement of efficient behavior, is mere deference to the status quo rather than an independent consideration of the full record.

IV. The Commission's Order Arbitrarily Shifts the Burden of Proof onto Public Counsel.

9. The Commission's Order correctly notes that Ameren Missouri bears the burden to demonstrate that its FAC should continue, and consequentially that it has the same burden to argue for the efficiency incentive included therein.⁹

10. However, the Commission also notes its opinion that the OPC did not present evidence warranting a change to the FAC sharing mechanism.¹⁰ This conclusion undeniably shapes the Commission's ultimate conclusion that the 95/5 sharing should be retained.

⁶ *Report and Order*, p. 12.

⁷ Transcript of Proceedings (Transcript), Evidentiary Hearing, ER-2019-0335 p. 400 (Mar. 11, 2019).

⁸ Exhibit 202, *Surrebuttal Testimony of Lena Mantle*, ER-2019-0335 p. 3 (Feb. 14, 2020).

⁹ *Report and Order*, p. 11.

¹⁰ *Id.* at 8 & 12.

11. Beyond being a mischaracterization of Lena Mantle’s testimony, this discussion within the Commission’s Order reflects a practical shifting of the burdens onto the OPC; expecting a non-company party to present a separate case rather than judging the 95/5 sharing mechanism on its own merits. This treatment effectively and improperly shifts the burden onto the OPC.

V. The Commission’s Order Incorrectly Claims that Ameren Missouri has not Acted Imprudently Regarding the FAC.

12. The Commission’s Order recounts in its findings of fact that no party alleged imprudence on the part of Ameren Missouri in this case, but makes a distinction between imprudence and Ameren Missouri’s prior categorization of “certain costs incorrectly” that warranted a refund to customers.¹¹ This appears to be the Order’s basis to later claim that Ameren Missouri has no “pattern of imprudence.”¹² This distinction is inaccurate, and as such should not be relied upon.

13. Although OPC does not believe that imprudence is a necessary element to alter an FAC incentive mechanism, and did not allege any imprudence against Ameren Missouri regarding the FAC for this case, it is incorrect to categorically say that Ameren Missouri has not acted imprudently in the operation of its FAC notwithstanding the 95/5 sharing incentive. The Commission has actually twice found that Ameren Missouri acted “imprudently, improperly and unlawfully when it excluded revenues derived from power sales agreements” from its FAC.¹³

14. These previous actions are not necessarily reflective of Ameren Missouri’s decision making now, but is inaccurate to not describe these past actions as imprudence.

¹¹ *Id.* at 10.

¹² *Id.* at 12.

¹³ *Report and Order*, EO-2020-0255 p. 2 (Apr. 27, 2011); *Report and Order*, EO-2012-0074 p. 2 (July 31, 2013).

VI. The Commission's Order Misstates the History of Fuel Costs

15. The Commission Order's findings of facts claims that Ameren Missouri "has been more likely to have a decrease in fuel costs than to have an increase."¹⁴ For this point, the Order relies upon a scheduled OPC witness Lena Mantle attached to her surrebuttal testimony. It appears that the Commission Order takes this finding of fact to later posit that Ameren Missouri has a tendency to have decreasing fuel costs and that "fuel costs are regularly lower than estimated."¹⁵

16. Mantle's schedule actually shows that fuel costs are usually higher than expected following a rate case.¹⁶ There has been a recent trend since 2016 for fuel costs to be more likely to lower than expected, and the OPC believes this to be a point why Ameren Missouri should now desire an 85/15 sharing, but the Commission's Order does not distinguish recent observations from the entire experience of Ameren Missouri's FAC.

VII. Conclusion

17. The Commission's Order arbitrarily approves a 95/5 sharing mechanism for Ameren Missouri's FAC, and relies upon certain inaccuracies.

18. A rehearing would enable this Commission to consider the record of what sharing ratio is supported by the evidence. At a minimum, the Commission's Order can be revised for accuracy's sake as to the technical issues addressed in this application.

WHEREFORE, the OPC requests that the Commission grant a rehearing on this case to reconsider the aforementioned issues of fact and law, or alternatively issue a corrected order addressing the technical inaccuracies addressed above.

¹⁴ *Report and Order*, p. 9.

¹⁵ *Report and Order*, p. 12-13

¹⁶ Exhibit 202, LM-S-3.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 28th Day of May, 2020, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall