

**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 REPLY BRIEF

Respectfully submitted,

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The Office of the Public Counsel (OPC) presents its Post-Hearing Reply Brief as follows:

I. Introduction

The OPC is disappointed with the briefing presented by Union Electric d/b/a Ameren Missouri (Ameren Missouri or the Company) and the Staff of the Public Service Commission (Staff). Neither party demonstrates why the current sharing mechanism in which a utility missing out on 5% of increased fuel and purchased power costs, or less than 1% of all total fuel and purchased power costs, is sufficient to incentivize any utility to continually seek lower costs as opposed to any other sharing percentage. Neither party shows why the opportunity to recover 5% of decreased fuel and purchased power costs is adequate encouragement to continue pursuing cost efficiencies. Both parties spend more time entertaining and expounding on misrepresentations and personal attacks upon OPC witness Lena Mantle rather than actually discuss the fuel adjustment clause (FAC).

II. Reply to Ameren Missouri

Ameren Missouri's brief is generally divided into three parts: The first is an introduction, the second part explores Ameren Missouri's presentation of history, and the third portion attempts to justify the 95/5 sharing by attacking strawman representations of the OPC's arguments for an 85/15 sharing.

Ameren Missouri's introduction begins with a brief overview of the Public Service Commission's (Commission) prior orders regarding the FAC efficiency incentive, but then

immediately devolves into an attack upon the motivations of the OPC and Mantle in particular. Ameren Missouri quotes Mantle’s admitted aversion to the FAC and then scoffs that “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.”¹ OPC will not disavow Mantle precisely because, despite her own views, she is not requesting that Ameren Missouri’s FAC be suspended in total.² Rather she plainly recommends that the FAC sharing mechanism be changed to better incentivize prudent utility behavior. She even recommends this for other electric utilities, as Ameren Missouri’s brief acknowledges, and yet the Company still wants to take this personally.³ Despite Mantle’s admitted aversion to the FAC, her testimony in this case and in the numerous cases Ameren Missouri cites in its brief shows that Mantle is consistently working, not to do away with the FAC, but to offer to the Commission alternatives, such as changing the sharing mechanism, for its consideration.

Ameren Missouri’s brief continues to its second portion regarding its view of the history of the Commission’s prior FAC orders. Ameren Missouri accuses the OPC of “opportunistically” feeding into a narrative that the 95/5 sharing ratio was created arbitrarily.⁴ This Commission need not rely upon the OPC’s supposed opportunism for this point. Commissioner Scott Rupp plainly told all parties at the evidentiary hearing, that the 95/5 sharing was a product of political compromise.⁵ Perhaps that compromise was necessary or proper at the time, and compromise is not something to bemoan, but it need not be the final word on what efficiency incentive is appropriate within the FAC for perpetuity. The Commission’s prior orders were decided based on

¹ *Initial Post-Hearing Brief of Ameren Missouri*, ER-2019-0335 p. 3 (March 30, 2020).

² Transcript of Proceedings, Evidentiary Hearing, ER-2019-0335 p. 412 (Mar. 11, 2020).

³ *Initial Post-Hearing Brief of Ameren Missouri*, p. 3.

⁴ *Id.* at 4.

⁵ Transcript, p. 400-1.

the circumstances presented before the Commission at those times. The ghosts of the past need not continually haunt us into the status quo of the maintaining the 95/5 sharing.

The Commission should instead consider what is in the evidentiary record now for this case, including:

- An FAC with a 95/5 sharing mechanism results in an electric utility recovering over 99% of fuel and purchased power costs.⁶
- The FAC prudence review process cannot adequately audit every possible cost included in the FAC or FAC issue.⁷
- The creation of, and consequentially a modification to, an efficiency incentive is not a penalty against an electric utility.⁸
- The Commission’s own recognition that Missouri’s Legislature has determined that an electric utility collecting 85 cents on the dollar is sufficient “skin in the game” to protect customers, while still incentivizing prudent investments.⁹
- A FAC with an 85/15 sharing mechanism triples the incentive for an electric utility to reduce costs, while still securing nearly all fuel and purchased power costs.¹⁰
- Ameren Missouri, a company with a multi-billion dollar revenue requirement, admits that 0.067% of that revenue, or little more than \$2 million, is immaterial.¹¹

⁶ Exhibit 200, *Direct Testimony of Lena Mantle*, ER-2019-0335 p. 7-8 (Dec. 4, 2020).

⁷ Exhibit 114, *Rebuttal Testimony of Shawn Lange*, ER-2019-0335 p. 4 (Jan. 21, 2020) (citations omitted).

⁸ *Report and Order*, ER-2008-0093 p. 72 (Jan. 27, 2009).

⁹ Exhibit 202, *Surrebuttal Testimony of Lena Mantle*, ER-2019-0335 p. 7 (Feb. 14, 2020).

¹⁰ Exhibit 200, p. 7-9.

¹¹ Exhibit 3, *Rebuttal Testimony of Tom Byrne*, ER-2019-0335 p. 3 (Jan. 21, 2020); *see also Public Counsel’s Initial Post-Hearing Brief*, ER-2019-0335 p. 16 (Mar. 29, 2020) (applying the figure Byrne describes as not material to Ameren Missouri’s proposed revenue requirement).

- Simultaneously, Ameren Missouri claims that \$42 million spread out over ten years, or a little more than \$4 million annually, is a “huge number” and a sufficient incentive.¹²

The Commission should apply more consideration to the aforementioned record items rather than rely solely upon prior administrative decisions.

Ameren Missouri instead asks that this Commission attribute the repeated upholding of the 95/5 sharing as examples of continual consideration and rejection of alternative proposals. However, as was revealed by Ameren Missouri’s counsel’s questioning of Mantle, the prior Commission order in ER-2012-0166 on point merely “cut-and-paste” language from the ER-2011-0028 order when deciding to maintain the 95/5 sharing mechanism.¹³ This is one example, but it highlights that the Commission can indeed still seriously consider the appropriate level of incentive necessary for the FAC. Continual reevaluation is exactly what the FAC statute encourages.¹⁴ If Ameren Missouri is going to request that the FAC be modified to include even more costs, there is no reason why the sharing mechanism should conversely be static.¹⁵

The third portion of Ameren Missouri’s brief returns to attacking Lena Mantle and mischaracterizing the OPC’s arguments in favor of an 85/15 sharing. Ameren Missouri’s main thrust against the OPC in this portion is to claim that the OPC bases its position on a

¹² Transcript, p. 358; Exhibit 7, *Rebuttal Testimony of Andrew Meyer*, ER-2019-0335 15-16 (Jan. 21, 2020).

¹³ Transcript, p. 411.

¹⁴ See Mo. Rev. Stat. § 386.266.4 (2018) (“The Commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 4 of this section . . .”).

¹⁵ See Exhibit 6, *Direct Testimony of Andrew Meyer*, ER-2019-0335 p. 14-15 (July 3, 2019) (recommending the inclusion of certain transmission costs that are not currently accounted for in the FAC); see also Exhibit 19, *Direct Testimony of Marci Althoff*, ER-2019-0335 p. 11 (July 3, 2019) (recommending the inclusion of ash disposal costs and revenues, and fuel additives, within the FAC).

“gamesmanship theory,” and that Lena Mantle is insincere in her assertion that she is not accusing Ameren Missouri of manipulating net base energy costs (NBEC).¹⁶ The Commission can read the OPC’s Initial Brief to plainly see that OPC’s argument does not rely on such nefarious claims, and it can read Mantle’s testimony to see that her testimony does not accuse Ameren Missouri of any manipulation.

The Commission should indeed actually turn to Mantle’s actual words, especially when Ameren Missouri provides no quotations of or citations to Mantle’s testimony where Ameren Missouri believes gamesmanship is alleged.¹⁷ Her testimony plainly intends to inform the Commission of “how the FAC may be manipulated” by any party “to present a ‘rate reduction’ in a general rate case when in fact it could easily be a delayed bill increase.”¹⁸ Her testimony, simply echoes the concerns explained in her FAC white paper.¹⁹ Despite attaching that white paper to the very testimony Ameren Missouri takes issue with, the Company does not spurn Mantle for this same academic observation. Ameren Missouri seems to recognize Mantle’s point because its brief quotes Mantle’s observation to Commission Chair Ryan Silvey that Ameren Missouri may be doing a “good job,” and also describes Mantle’s prefiled testimony as “indicat[ing] that the issue she was raising was the prospect that NBEC *could* be manipulated.”²⁰ “Could” is exactly correct. Mantle is not testifying that Ameren Missouri *is* manipulating the FAC, but that the Commission should regularly review the NBEC for accuracy. The OPC suspect that the concerns as to the NBEC may even be alleviated at least somewhat with the existence of a stronger efficiency incentive like an 85/15 sharing.

¹⁶ *Initial Post-Hearing Brief of Ameren Missouri*, p. 9.

¹⁷ *See Id.* at 9-11.

¹⁸ Exhibit 200, p. 2.

¹⁹ *Id.* at LM-D-2 p. 15-16.

²⁰ *Initial Post-Hearing Brief of Ameren Missouri*, p. 9 fn 32 & 11 (emphasis added).

Despite her own words, Ameren Missouri argues that Mantle tacitly admitted making accusations because she supposedly did not adequately contest Andrew Meyer's characterization to that effect.²¹ This is a logical fallacy. Any forensics class teaches that not responding to each and every point in a debate does not mean that a speaker agrees with each and every point said by her opponent. If Ameren Missouri is going to wonder why she did not vocalize disagreement with every argument from Meyer, the Commission should likewise ask why Ameren Missouri did not confront Mantle on her supposed accusations during cross-examination. Ameren Missouri instead asked Mantle to read from Commission orders that the Commission already took into official notice.²²

Regardless, Ameren Missouri's attack upon Mantle does not speak to whether the 95/5 or 85/15 sharing is a more appropriate efficiency incentive. The Commission should therefore ignore these aspersions, and consider the actual arguments made in briefing. An actual argument worth addressing is that Ameren Missouri ultimately claims no more efficiency incentive is needed in the FAC because fuel and purchased power costs are "largely uncontrollable and highly volatile."²³ If Ameren Missouri is truly a passive victim to the market, why should Ameren Missouri's customers support an Energy Management and Trading group with roughly fifty employees, with ten to a dozen being devoted to the FAC?²⁴ Of course, electric utilities cannot control the market, but they are in control for how they prepare for and participate in that market.

²¹ *Initial Post-Hearing Brief of Ameren Missouri*, p. 9.

²² Transcript, p. 408-12.

²³ *Initial Post-Hearing Brief of Ameren Missouri*, p. 12.

²⁴ Transcript, p. 336 & 342.

The OPC believes its initial brief otherwise responds to the rest of Ameren Missouri's arguments and mischaracterizations.²⁵

III. Reply to the Staff of the Public Service Commission

Staff's brief provides little independent analysis. Staff's brief fails to cite even once to its own witness on the FAC sharing mechanism issue, Lisa Wildhaber. Instead, Staff's brief relies almost exclusively on arguments raised by Ameren Missouri in form of testimony from Ameren Missouri witnesses Meyer and Tom Byrne.²⁶ As such, OPC's reply to Ameren Missouri's initial brief speaks to Staff as well, and only two additional discussion points are necessary.

First, Staff puts particular emphasis on Byrne's argument that it is improper to change Ameren Missouri's FAC sharing mechanism because if the Commission were to do so, then Ameren Missouri's FAC would be different from Evergy and Empire's.²⁷ This argument is effectively an impossible, Catch-22 standard. An FAC can only be altered during a general rate case.²⁸ Both Staff and Ameren Missouri seem to maintain that an FAC should only be changed as a penalty for imprudence,²⁹ but Staff also admits that the prudence review process cannot adequately review all FAC issues.³⁰ Therefore, apparently the only way to satisfy Staff and

²⁵ Ameren Missouri claims that the OPC's 85/15 sharing mechanism proposal 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" referring to *In re App. of Union Elec. Co. v. Pub. Serv. Comm'n*, 591 S.W.3d 478 (MO. App. W.D. 2019). *Initial Post-Hearing Brief of Ameren Missouri*, p. 16. As the Commission is well aware, the OPC argued that the Section 393.1400, RSMo's text explicitly called for plant-in-service accounting to operate notwithstanding other mechanisms in Chapter 393. It was actually Ameren Missouri that successfully relied upon statutory silence.

²⁶ *Staff's Post Hearing Brief*, ER-2019-0335 p. 5-7 (March 30, 2020).

²⁷ *Id.* (citing Exhibit 3, *Rebuttal Testimony of Tom Byrne*, ER-2019-0335 p. 55 (Jan. 21, 2020)).

²⁸ Mo. Rev. Stat. § 386.266.5.

²⁹ *See Initial Post-Hearing Brief of Ameren Missouri*, p. 2; *Staff's Post-Hearing Brief*, p. 4.

³⁰ Exhibit 114, p. 4.

Ameren Missouri's standard is to wait until all three³¹ major Missouri electric utilities are in for a rate case at the same time, with the same completion timeline, and then imprudence must be proven for all utilities during the same time period. Even then, the OPC imagines that Ameren Missouri would still contest an increased sharing. The OPC does not see how this standard could be realistically met, and does not understand why Staff feels the need to focus on "business risk" as opposed to incentivizing efficiency as allowed by the enabling statute.³²

Second, also like Ameren Missouri, Staff portrays the OPC as "arguing that Ameren is gaming the FAC to portray this rate case as a decrease."³³ Also like Ameren Missouri, Staff does not provide any quotations from Mantle's testimony or citation to any OPC materials that actually show OPC is accusing Ameren Missouri of "gaming" anything.

Staff's misrepresentation of the OPC's position also makes little sense considering that the OPC, Staff, and Ameren Missouri worked out nearly every issue in this rate case including a decision to use Staff's NBEC. And yet Staff continues to cite to the transcript of the evidentiary hearing for the proposition that OPC is accusing Ameren Missouri of being a "bad actor."³⁴ Nothing on the pages of the transcript Staff cites to shows that the OPC is accusing Ameren Missouri of being a bad actor on this issue. To the contrary, if Staff had turned to just one page prior in its research, Staff would have found Mantle's testimony in response to Commission Chair Silvey's question that:

I'm asserting that a certain amount of pressure needs to be continually on a utility. Whether it's Ameren UE, Evergy, Empire, a certain amount of pressure needs to stay on them so that they are efficient. Complacency can come and set in on the utility that's doing a good job. *And I'm not saying Ameren isn't*, but today's market is different than tomorrow's

³¹ The OPC is treating Evergy Missouri Metro and Evergy Missouri West as the same utility in this instance.

³² *Contra Staff's Post Hearing Brief*, p. 7.

³³ *Id.* p. 4.

³⁴ *Id.*

market and its different than yesterday's market, and the decisions that have to be made, there should be – what is good practice today is likely not necessarily going to be a good practice next year.³⁵

Mantle clearly states that her recommendation that the FAC's sharing mechanism be changed to 85/15 is not rooted in bad actions, but instead that the 95/5 needs to be reevaluated. For whatever reason, Staff continues to ignore Mantle's actual words to misrepresent her and OPC's position. Repeating misrepresentations does not make them any truer. It only makes that repetition that much more deliberate.

Conclusion

There is little to no evidence in the record showing that an FAC sharing mechanism of 95/5 produces any particular efficiency rather than making sure Ameren Missouri continues to recover more than 99% of its fuel costs and simply continuing the administrative status quo. There is evidence that the Missouri Legislature believes that fifteen cents of every dollar is at least sufficient to incentivize capital spending while still protecting customers. A sharing mechanism is not a penalty, but an efficiency incentive designed to keep electric utilities invested in continually reducing costs even as the FAC provides great benefit to them by recovering regulatory lag. Deciding whether sufficient incentive exists within the FAC requires an honest evaluation of any electric utility's incentive under a 95/5 sharing framework, and why it should continue. Convincing arguments in favor of a 95/5 sharing should show exactly how a stake of less than 1% of all fuel and purchased power costs has motivated efficient behavior, or how it will continue to do so in the future. The OPC finds no such arguments in the record.

³⁵ Transcript, p. 397 (emphasis added).

WHEREFORE, the OPC replies to Ameren Missouri and Staff, and renews its request that this Commission order an 85/15 sharing mechanism as an efficiency incentive to be included within Ameren Missouri's FAC.

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 7th Day of April, 2020, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall