

**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.)

Case No. ER-2014-0258
Tariff No. YE-2015-0003

STAFF'S FURTHER RESPONSE TO OPC

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Further Response to OPC*, states as follows:

1. OPC's *Reply* to Staff's initial *Response* to OPC's rate case expense motion suggests that Staff was not as clear as it could have been. Staff files this *Further Response* in an effort to clarify its position.

2. The present dispute concerns a stipulation and agreement. A stipulation and agreement is a binding contract. "[A]n agreement fairly made and based upon a good consideration, assented to by both parties, is binding on both, even though some of the terms of the agreement remain to be performed." ***Fair Mercantile Co. v. Union-May-Stern Co.***, 359 Mo. 385, 390, 221 S.W.2d 751, 755 (Mo. 1949). On the issue of consideration, stipulations made in the context of litigation for the purpose of simplifying and expediting the proceeding are favored by the courts and may be enforced without regard to consideration. ***Black's Law Dictionary***, p. 1427 (Minneapolis: 7th ed., 1999). In any event, the mutual promises contained in the *Stipulation and Agreement* constitute sufficient consideration.

3. On March 3, 2015, the Office of the Public Counsel ("OPC"), as well as Staff, Ameren Missouri and certain other parties, entered into a nonunanimous stipulation and agreement, entitled *Amended Nonunanimous Stipulation and Agreement*

Regarding Certain Revenue Requirement Issues (“the *Stipulation and Agreement*”), which stated in pertinent part::

The parties agree that the revenue requirement in this case shall include the Company’s prudently-incurred rate case expenses for this case, calculated in accordance with Staff Witness Sarah Sharpe’s position, as reflected in her direct testimony.

4. The *Stipulation and Agreement* can only be understood by reference to Sarah Sharpe’s direct testimony, which is incorporated therein by reference. “In Missouri, matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in *haec verba*.” ***Dunn Indus. Group, Inc. v. City of Sugar Creek***, 112 S.W.3d 421, 435 n. 5 (Mo. banc 2003). “[T]he parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement to which they are not parties, and including a separate document which is unsigned” only if “the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt.” ***Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.***, 204 S.W.3d 183, 196 (Mo. App., E.D. 2006). Sarah Sharpe did not file direct testimony in this case. However, she did contribute a section on rate case expense to Staff’s *Revenue Requirement Cost-of-Service Report* (“*RR Report*”), which Staff filed in place of direct testimony, and there is no doubt that this is what the *Stipulation and Agreement* referred to.¹ A review of Ms. Sharpe’s testimony, which consists of six paragraphs spread over two pages, reveals that all of it is concerned with the calculation of the amount of rate case expense to include in revenue requirement and it

¹ *Staff’s Revenue Requirement Cost-of-Service Report*, pp. 105-106 (HC).

follows that the parties intended to incorporate all of it by reference into their *Stipulation and Agreement*. The relevant portion of the *RR Report* states:

Staff's analysis of rate case expense included a review of the actual amounts spent by Ameren Missouri in previous rate cases and a comparison to the estimated expenses for the current case. As a result, Staff has determined that an appropriate total amount of rate case expense to be included with Staff's direct filing to be \$1,104,706 normalized over 18 months, which results in an annual amount of \$796,530. Staff proposes this adjustment with the intention of updating Ameren's total rate case expense throughout the remainder of this case's proceedings through and up to two weeks after the filing of reply/true-up briefs in this case.

Staff's normalization period of 18 months is supported ** _____

_____ . **

In addition, Staff reviewed the costs related to work performed by an outside consultant with regard to how Ameren Services allocates costs to Ameren Missouri and to affiliates of Ameren Missouri. Staff has learned through data requests that the Company does not intend to repeat this study in the near future, therefore, Staff has normalized this study over a five-year period and included this normalized amount in the cost of service calculation.

Although Staff did not specifically recommend disallowance of consulting costs for performing a CWC lead lag study in Ameren Missouri's previous rate case, ER-2012-0166, Staff continues to have concerns about Ameren Missouri's continued reliance upon an outside consultant to perform CWC-related analysis for every rate case. No other large utility has consistently relied upon a consultant to handle CWC issues in rate proceedings before this Commission. Staff has raised this concern in previous rate proceedings such as ER-2010-0036 and ER-2011-0028 (please refer to Staff witness Lisa M. Ferguson's surrebuttal testimony in each case), which asserted that this type of work can be performed in-house by Ameren Missouri. Staff recommends that the Commission disallow all CWC consulting costs in this rate proceeding. These costs should not be considered for recovery in rates in this proceeding because Ameren Missouri already possesses the regulatory

experience, knowledge, and resources to handle this entry level accounting issue in-house without the 1 continuous assistance of an outside consultant.

The nature of incurring rate case expense in a regulatory proceeding is different from other expenses, as the full expenses related to a rate case filing are not fully known until past the scope of Staff's discovery periods. While Staff's direct filing adjustment includes estimated numbers as supplied by Ameren Missouri, Staff will review documentation of expenses incurred through and up to two weeks after the filing of reply/true-up briefs of this case. Staff requests that Ameren Missouri provide all 2014 rate case proceeding documentation as data is available with a final cut-off date to provide such documentation of April 24, 2015, which would allow Ameren Missouri two weeks to gather the final costs incurred. Staff will require a reasonable amount of time to review all provided expenses and documentation and, as soon as practical after receiving such data, intends to update the normalized rate case expense amount to include only Ameren Missouri's actual incurred expenses.

In September 2013, Staff filed a report in Case No. AW-2011-0330 concerning the topic of rate recovery of rate case expense. Within that report, Staff examined recent trends in incurred rate case expense by major Missouri utilities, and discussed several possible options for allocation of rate case expense responsibility between the utility's shareholders and its customers. In this case, Staff is recommending that Ameren Missouri's rate case expenses be treated in the traditional manner; that is, the Company should be allowed an opportunity to recover in rates the full amount of reasonable and prudent rate case expenses through an expense normalization approach. However, Staff will continue to monitor the rate case expenses incurred Ameren Missouri and other Missouri utilities in current and future rate proceedings, and Staff reserves the right to propose "sharing" or another appropriate alternative approach to rate recovery of this item in future cases, if appropriate.

5. The *Stipulation and Agreement* ripened into a unanimous stipulation and agreement when no party timely objected, and the Commission treated it as such.²

6. The Commission approved the *Stipulation and Agreement* on March 19, 2015, and ordered the signatory parties to comply with its terms.³

² *Order Approving Amended Stipulation and Agreement Regarding Certain Revenue Requirement Issues*, issued and effective March 19, 2015, pp. 1-2.

³ *Id.*, p. 4 (*Ordered Paragraph 1*).

7. So, just what did the parties agree to? They agreed:
- that the revenue requirement in this case shall include the Company's prudently-incurred rate case expenses for this case;
 - calculated in accordance with Staff Witness Sarah Sharpe's position, as reflected in her direct testimony; which is to say:
 - \$1,104,706 normalized over 18 months, which results in an annual amount of \$796,530;
 - the costs of certain studies to be normalized over five years, except that the cost of a Lead-Lag Study shall be disallowed;
 - total costs to be updated "through and up to" two weeks after the filing of reply/true-up briefs in this case. Staff requests that Ameren Missouri provide all 2014 rate case proceeding documentation as data is available with a final cut-off date to provide such documentation of April 24, 2015, which would allow Ameren Missouri two weeks to gather the final costs incurred. Staff will require a reasonable amount of time to review all provided expenses and documentation and, as soon as practical after receiving such data, intends to update the normalized rate case expense amount to include only Ameren Missouri's actual incurred expenses.

8. The term "update" as used in the *Stipulation and Agreement* refers to the practice of replacing incomplete and estimated figures with the latest figures available. The *Stipulation and Agreement* specified that the final cut-off date for the update was

April 24, 2015, and it follows that the parties agreed to replace the figures mentioned in the *RR Report* with the latest figures available on April 24, 2015. Those figures have now been filed by Staff.

9. The parties to the *Stipulation and Agreement* agreed that “the revenue requirement in this case shall include the Company’s prudently-incurred rate case expenses” updated as on April 24, 2015. It follows that the only objection OPC can properly raise concerns prudence.

10. The law governing challenges to the prudence of utility expenses is as follows:

While the burden of proof rests on the [utility], the PSC's practice has been to apply a “presumption of prudence” in determining whether a utility properly incurred its expenditures. The presumption of prudence is not a creature of statute or regulation. It first was recognized by the PSC in ***Matter of Union Electric***, 27 Mo. P.S.C. (N.S.) 183 (1985) and has been applied by it since that point. Under the presumption of prudence, a utility's costs “are presumed to be prudently incurred.... However, the presumption does not survive a showing of inefficiency or improvidence” that creates “serious doubt as to the prudence of an expenditure.” *Id.* at 193, quoting ***Anaheim, Riverside, Etc. v. Fed. Energy Reg. Com'n***, 669 F.2d 799, 809 (D.C. Cir. 1981). If such a showing is made, the presumption drops out and the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent. *Id.*

Office of Public Counsel v. Missouri Public Service Com'n, 409 S.W.3d 371, 376 (Mo. banc 2013). In order to raise a prudence challenge to Ameren Missouri’s rate case expenses, OPC must make a “showing of inefficiency or improvidence” that creates “serious doubt as to the prudence of an expenditure.” *Id.*

11. Public Counsel has certainly waived any prudence challenge to Ameren Missouri’s rate case expenses in so far as they were known as of March 3, 2015, when it entered into the *Stipulation and Agreement*. How does Staff reach that

conclusion? Because the purpose of the *Stipulation and Agreement* was to remove Rate Case Expense from the list of issues to be litigated in the upcoming hearing. And, that was indeed the effect of the *Stipulation and Agreement*. By foregoing its opportunity to challenge the propriety of Ameren Missouri's rate case expenses, OPC waived its right to raise such a challenge. That waiver applies to the amount cited by Sarah Sharpe in her direct testimony and incorporated by reference in the *Stipulation and Agreement*, \$1,104,706, to be included in rates at an annual figure of \$796,530. Because the parties stipulated to that figure, no further evidence is necessary. ***White v. Director of Revenue***, 321 S.W.3d 298, 308 (Mo. banc 2010).

12. What about the updated rate case expenses? They amount to an additional \$1,286,503. Can OPC challenge the prudence of those expenses? Sure, **if it makes a "showing of inefficiency or improvidence" that creates "serious doubt as to the prudence of an expenditure."** ***Office of Public Counsel, supra***. OPC has not made any such showing, or even attempted to do so. "Showing," by the way, means evidence, not rhetoric. ***Black's, supra***, p. 1385.

13. Why does Staff say that OPC has violated the *Stipulation and Agreement* and the Commission's *Order*? Because the parties to the *Stipulation and Agreement* did not intend trial by ambush, which is evidently what OPC has in mind. Staff points out that it is not wrong in its position asserted herein, either by the clear language of the *Stipulation and Agreement* or as a matter of law, contrary to OPC's assertion. Like it or not, OPC agreed that Ameren Missouri will recover in rates its prudently-incurred rate cases expenses as updated to April 24, 2015. That amount is \$2,391,209, at an annual rate of \$1,466,975.

WHEREFORE, because OPC's *Motion* is without merit and violates the *Stipulation and Agreement* and the Commission's *Order* that the parties comply with that *Stipulation and Agreement*, Staff prays that the Commission will deny OPC's *Motion*; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

/s/ Kevin A. Thompson

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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 April, 2015**, to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Kevin A. Thompson