

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

In the Matter of the Application of Evergy Metro,)
Inc. d/b/a Evergy Missouri Metro and Evergy)
Missouri West, Inc. d/b/a Evergy Missouri West) File No. EU-2020-0350
for an Accounting Authority Order Allowing the)
Companies to Record and Preserve Costs Related)
to COVID-19 Expenses.)

REPLY BRIEF OF AMEREN MISSOURI

COMES NOW, Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”),
and for its Reply Brief, states as follows:

As it did for its Initial Brief, Ameren Missouri will confine its Reply Brief to issues relating
to whether the Commission has the authority to impose the conditions National Housing Trust
(“NHT”) and the Office of the Public Counsel (“OPC”) seek in this AAO case.

Reply to NHT’S Initial Brief

NHT’s Initial Brief contains a scattershot of conclusory and inaccurate assertions about the
Commission’s authority in an Accounting Authority Order (“AAO”) case. In some instances,
NHT cites no authority for its assertions at all, and in others, it cites authority that demonstrably
either fails to support its assertions, or that NHT misstates as a matter of law.

1. Conditions Cannot Be Justified Based on Possible, Later Rate Impacts of Deferrals
Authorized by an AAO.

NHT’s principal tact is to conflate cases and statutes that involve the setting of just and
reasonable rates, with cases and statutes that govern AAO cases. Put another way, NHT relies on
standards that undoubtedly do apply in ratemaking proceedings to justify imposition of conditions

in this AAO case.¹ The problem for NHT is that those ratemaking standards have nothing to do with an AAO case, as the Commission itself has made clear.

A good example of this clarity is the Commission's 2004 decision in a post-911 security cost AAO case brought by Missouri-American Water Company ("MAWC").² In that case, the Staff had urged the Commission to adopt a 4-factor test for use in AAO cases. The fourth factor would have required an AAO applicant to show why it could not file a rate case immediately to recover the amount to be deferred, i.e., it was essentially an attempt to get the Commission to make ratemaking judgments in an AAO case. The Commission rejected each of the 4 factors, including the fourth one. In rejecting the fourth factor, the Commission stated that "[n]one of the deferred amount will be recovered from ratepayers, however, unless it is included in rates. That is the *only connection a deferral has with a rate case*" (emphasis added). In further explaining its rejection of the fourth factor, the Commission stated that "this [the question of recovery in a rate case] is a rate case issue and it *has no place in the analysis of an AAO request . . .*" (emphasis added). Likewise, NHT's favored conditions have no place in this AAO case.

Boiled down to its essence, the question in *this* case is "whether or not the amounts sought to be deferred are indeed extraordinary."³ The question is not whether Evergy has made all the right management decisions in how it has responded to the Pandemic, or whether had it made different decisions (or offered more programs, or donated more money), the sums to be deferred

¹ See NHT Initial Brief, p. 3 (attempting to justify its conditions because, it claims that without them uncollectibles may rise, or that there may be "significantly higher cost impacts"); pp 7-9.(claiming conditions can be imposed as part of the Commission's authority to ensure "just and reasonable rates"); pp. 3, 10-11 (similarly, attempting to justify the authority to impose conditions based on "least-cost" considerations and considerations of "efficient and economic management"). Note that page references to NHT's Initial Brief are to the pages in the .pdf file submitted by NHT in EFIS and not to page numbering in NHT's brief, since the brief lacks page numbers.

² *Report and Order on Remand*, File No. WO-2002-273, 2004 WL 2579639 (Mo.P.S.C.), 237 P.U.R.4th 353 (Nov. 10, 2004) ("MAWC Decision").

³ MAWC Decision, p. 15.

would have been less or more. NHT can argue about those issues when the “only connection” between a deferral and rates happens: when Evergy asks the Commission to include deferred sums in its revenue requirement in a rate case. But the fact that the Commission has the authority *in a rate case* to consider such issues does not give the Commission the authority to impose conditions related to those rate case issues in this AAO case.

2. There is no “General Authority” under Section 393.140 to Impose Conditions in an AAO Case.

In the “Authority” section of its Initial Brief (starting at page 4), NHT reproduces four subsections of § 393.140, subsections (1), (4), (5), and (8). NHT immediately follows those statutory references with a citation to the July 28, 2020 decision of the Western District of the Court of Appeals in *Office of Pub. Counsel & Midwest Energy Consumers Grp. v. Evergy Mo. W., Inc.*, No. WD83319, 2020 Mo. App. LEXIS 946 (Mo. App. W.D. July 28, 2020). Fairly read, what NHT’s Initial Brief suggests is that the Court of Appeals’ decision stands for the proposition that the authority NHT cites (subsections (1), (4), (5), and (8)) constitutes authority for imposing conditions on AAOs. It does not.

Midwest Energy Consumers Group involved what started as a petition for an AAO by the Midwest Energy Consumers Group (“MECG”) and OPC. However, the Commission, on its own motion (*see* § 393.140(5)) closed the AAO case and the case was heard and tried as a complaint case in which MECG and OPC bore the burden of proof.⁴ Why is this important? Because while it is fair and accurate for NHT to claim that the Western District’s opinion in an appeal of that *complaint case* rests in some way on subsections (4), (5), and (8) of § 393.140, it is a misuse of that opinion to suggest that it stands for the proposition that the Commission has some some kind of “general” authority under subsection (1) to impose conditions in AAO cases.

⁴ *Report and Order*, File No. EC-2019-0200, p. 4.

While the Western District does state that the Commission’s general powers are found in §393.140, that statement is immediately followed by a detailed discussion of the “general authority” *at issue in that case*, that is, subsections (4) and (8). *Midwest Energy Consumers*, 2020 Mo. App. LEXIS 946, *17, *28. The case had absolutely nothing to do with subsection (1) or the Commission’s general authority to regulate utilities at all. Indeed, NHT does not cite to a single case where the Commission granted an AAO (or the courts sanctioned such a grant) under some general, undefined authority found in subsection (1). To the extent NHT claims that the Commission can, in effect, do whatever it wants because it happens to have the general power to regulate utilities (i.e., that this gives it license to impose whatever conditions it wants in an AAO case), such a claim is without support as a matter of law.

Nor does subsection (5) have anything to do with this case, contrary to NHT’s argument otherwise, because all subsection (5) does is grant the Commission the power to entertain complaints.⁵ But this is not a complaint case. Indeed, if NHT believes that Evergy’s response to the Pandemic, as reflected in its “acts and regulations,” are “unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law,”⁶ then NHT is free to file a complaint against Evergy and carry *its* ultimate burden of production and persuasion to so establish. But the Commission’s authority to entertain and adjudicate a complaint does not give the Commission authority, in *an AAO case under subsections (4) and/or (8)*, to impose conditions that are premised on findings that it did not make and cannot make in an AAO case.

⁵ NHT’s Initial Brief, pp. 7-8.

⁶ As provided for in § 393.140(5), upon which NHT relies.

Understanding the law governing AAOs and the fact that subsections (1) and (5) in § 393.140 have nothing to do with this case makes it clear that the following assertions by NHT are just plain wrong as a matter of law:

- “Assuming the Commission decides that COVID-19 is an extraordinary event, the Commission then has the choice of whether to approve the requested AAO application, deny it, *or approve it with conditions*” (emphasis added).⁷
 - NHT cites to no authority for this claim, aside from its flawed reliance on subsections (1) and (5); there is none.
- The Commission can “articulate what conditions the Commission would accept in order to approve an AAO.”⁸
 - NHT cites to no authority for this claim, aside from its flawed reliance on subsections (1) and (5); there is none. As explained in detail in Ameren Missouri’s Initial Brief, there is no statutory authority to impose conditions under subsections (4) and (8), in contrast to other statutory grants of authority cited therein that explicitly provide the Commission with such authority.
- “NHT asserts that the Commission does indeed possess this [authority to impose the conditions NHT wants] authority.”⁹
 - NHT follows this assertion with its discussion of subsection (5) which, as noted, is inapplicable in this AAO case.

The foregoing discussion makes clear that NHT’s claim that “[t]hese principles [that it relies on in this AAO case] . . . [are] indisputable”¹⁰ are in fact quite clearly disputable, in this AAO case, because they *do not apply in such a case at all*.

3. NHT’s Reliance on Evergy’s MEEIA Case is Misplaced.

NHT’s also tries to find support for the authority to impose conditions in an *AAO case* from the Commission’s modification of Evergy’s MEEIA plan to include a PAYS program that, during the hearing of the case, Evergy opposed. NHT’s analysis once again fails as a matter of law.

⁷ NHT Initial Brief, p. 5.

⁸ *Id.*, p. 4.

⁹ *Id.*, p. 5.

¹⁰ *Id.*, p. 9.

Under 20 CSR 4240-20.094(3), the Commission is expressly authorized to approve a MEEIA plan “with modifications acceptable to” the utility and is also expressly empowered to reject a MEEIA plan. If the Commission modifies the utility’s plan, the utility is free to walk away from it.¹¹ The Commission modified Evergy’s MEEIA plan and Evergy then implemented the Plan, as modified; clearly, Evergy ultimately decided, as the rule contemplates, that the PAYS condition was acceptable and thus implemented the MEEIA plan, as modified, pursuant to the cited rule.

In this case, however, there is no statute or rule that gives the Commission the authority to impose conditions on the requested AAO. The Evergy MEEIA case relied upon by NHT is inapposite.

Reply to OPC’s Initial Brief

OPC’s Initial Brief largely mimics the unsupported argument that the Commission can impose conditions anytime it wants if the case involves a situation where the Commission has some level of discretion respecting whether to grant the requested relief at all. Ameren Missouri will not repeat the analysis reflected in its Initial Brief on this topic that demonstrates that if such an argument were true it would mean, contrary to basic statutory interpretation principles, that the General Assembly engaged in meaningless acts when it specifically authorized the Commission to impose conditions in certain provisions of the PSC Law, yet it clearly did not do so in subsections (4) or (8) of § 393.140. It should also be pointed out that OPC cites absolutely no case law to support its claim that the Commission possesses this over-arching power to impose conditions.

The best OPC can do is point to the MAWC Decision and the Commission’s decision to issue an AAO that required the deferred sums be deferred over a 10-year period instead of the 20-

¹¹ 20 CSR 4240-20.094(4)(M).

year period requested by MAWC.¹² However, as discussed in Ameren Missouri’s Initial Brief, the Commission’s authority must rest on express statutory grants of power or implied authority that is “reasonably incidental” or “clearly implied” as necessary to the exercise of those express statutory powers. Prescribing the period over which the utility’s income statement will be insulated from the impact of the extraordinary expense is incidental to the grant of the deferral in the first place, since both decisions impact the *accounting* for the deferral, as clearly contemplated by subsections (4) and (8). While the Commission’s discussion in the MAWC case spoke in terms of “conditions” when discussing the amortization period, the order itself does not purport to “condition” grant of the deferral on an amortization period, but instead, it requires that MAWC start amortizing the deferred sums (i.e., accounting for the deferral by expensing on its books) over 10 years. That ordered term is completely unlike the non-accounting, non-deferral related conditions OPC seeks in this AAO case.

OPC’s citation to the Commission’s *Report and Order* in File No. ET-2018-0132 also misses the mark. In that case, the Commission analyzed four conditions other parties wanted imposed on Ameren Missouri’s Charge Ahead Program: 1. Creation of a stakeholder process; 2. Restrictions on the placement of corridor charging stations; 3. An “equitable access” condition; and 4. Reporting conditions.¹³ The Commission did not impose conditions 1 – 3 (by *separate order* it created a working docket for stakeholder participation), and while it did adopt reporting mechanisms, Ameren Missouri had *agreed to them*. This example hardly establishes that the Commission can impose the kind of conditions OPC seeks in this case.

¹² OPC Initial Brief, p. 28.

¹³ *Report and Order*, File No. ET-2018-0132, pp. 33-36.

Conclusion

Neither NHT nor OPC have identified any express statutory authority, or any authority that is reasonably incidental to that express authority or otherwise clearly implied, that gives the Commission the power to impose the NHT/OPC-requested conditions on an AAO granted to Evergy in this case. For the reasons discussed in Ameren Missouri's Initial Brief, the lack of such authority means the Commission has no such authority as a matter of law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Initial Brief of Ameren Missouri was served on all parties of record in this case via electronic mail (e-mail) or via regular mail on this 14th day of December, 2020.

/s/ James B. Lowery
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