BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariffs to Decrease Its Revenues for Electric Service)))

File No. ER-2019-0335

STAFF'S POST-HEARING REPLY BRIEF

COMES NOW Staff of the Missouri Public Service Commission and files *Staff's Post-Hearing Reply Brief*.

Introduction

OPC's essential argument in favor of changing the FAC sharing mechanism ratio from 95% / 5% to its proposed 85% / 15% is that tripling the incentive must create better results. According to OPC reasoning, if a 5% discount to ratepayers is good, a 15% discount must be three times better.[1] This simplistic, perhaps momentarily attractive, argument quickly falls apart when looking at actual data.

The legislature created criteria that the Commission must consider[2] and may consider[3] in crafting a utility's FAC clause. It did not specify a sharing mechanism ratio, acknowledging the Commission's expertise and authority. Applying a one-size-fits-all sharing mechanism removes the Commission's discretion to craft FACs. Further, hijacking a clause from the unrelated plant-in-service accounting ("PISA") statute and applying it to the FAC is unworkable and ignores basic statutory interpretation principles.

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[1] "From a strictly numerical perspective, the 85/15 sharing better incentivizes efficient fuel operations than the 95/5 sharing." The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 9 (Mar 30, 2020).

[2] The FAC must provide the utility with sufficient opportunity to earn its approved rate of return. § 386.266.5(1).

[3] "The commission may take into account any change in business risk to the corporation resulting from implementation of the adjustment mechanism in setting the corporation's allowed return in any rate proceeding, in addition to any other changes in business risk experienced by the corporation." § 386.266.8.

OPC's proposal is also irreconcilable with the law's requirements that a FAC must give the utility sufficient opportunity to earn its return on equity.[4] Ameren has demonstrated responsible management of its FAC with the current 95% / 5% sharing mechanism, and it should continue.

Argument

1. **<u>There is no evidence that an 85% / 15% sharing mechanism incentivizes more efficient fuel operations better than the current 95% / 5% share; in fact, there is evidence to the opposite.</u>**

OPC correctly states that Ameren generally over-collected since its last rate case and because of this, the 85% / 15% sharing mechanism would have been more favorable to Ameren than the current 95% / 5% sharing.[5] However, OPC tells only half of the story: Ameren would have benefited from an 85% / 15% ratio at ratepayers' expense. Attached as Attachment A is a comparison of the two sharing mechanisms from the last eight FAC accumulation periods ("APs"), since Ameren's last rate case in 2016. This table shows that the total amount Ameren collected in rates for net fuel and purchased power expense exceeded Ameren's actual expenses by $6,519,649. Under the current 95% / 5% share, ratepayers realized refunds of $6,193,666, while Ameren received $325,982. In contrast, under an 85% / 15% share, the ratepayers would have received only $5,541,701, and Ameren would have received $977,947. Since its last rate case, Ameren customers received approximately $650,000 that they would not have received under OPC's proposal.

[4] § 386.266.5(1), RSMo.

[5] The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 10 (Mar 30, 2020).

Just as it is impossible to generalize that a tripling from 5% to 15% creates better ratepayer outcomes, it is difficult to identify efficiencies that Ameren can effectuate in its fuel and purchased power costs. The Legislature created the FAC "to reflect increases and decreases in [a utility's] prudently incurred fuel and purchased-power costs, including transportation."[6] The Commission recognizes this by stating that fuel costs, by their nature, fluctuate, and that Ameren has little control over its third party sales.[7] But even in fluctuating markets, Ameren has made inroads in controlling its fuel costs, which OPC acknowledges.[8] As Andrew Meyer testified for Ameren, although fuel costs are volatile, Ameren's efficiencies caused its coal costs to decrease $137,113,931 between 2014 and 2018[9] – an almost 19% decrease.

Nevertheless, for OPC this is insufficient evidence that Ameren efficiently operates its FAC – OPC sanctimoniously writes that "we should expect Ameren Missouri to be able to exploit further efficiencies if it has more incentive to do so."[10] Despite having access to all of Ameren's rate case testimony and worksheets, discovery request responses, prudency reviews, and FAC filings, OPC fails to even attempt to suggest what efficiencies Ameren could implement. Where does OPC believe Ameren can achieve greater

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[6] § 386.266.1.

[7] "Staff contends that increasing the sharing percentage to 85%-15% would give Ameren Missouri a greater incentive to minimize its costs and maximize its off-system sales. However, a greater incentive would be meaningless if there is little the company can actually do to minimize costs or maximize off-system sales. In general, Ameren Missouri's fuel costs are dictated by national and international markets that are largely beyond the company's control." Missouri Public Service Commission, *Report and Order*, ER-2012-0166, 79 (Dec 12, 2012). See also Missouri Public Service Commission, *Report and Order*, ER-2014-0258, 108 (Apr 29, 2015).

[8] "Since 2016, Ameren Missouri has been more likely to return money through the FAC due to reduced fuel costs than having an increase." The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 10 (Mar 30, 2020).

[9] Union Electric Company, d/b/a Ameren Missouri, *Direct Testimony of Andrew Meyer*, ER-2019-0335, 18:5-19:5 (Jul 3, 2019).

[10] The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 10 (Mar 30, 2020).

efficiencies? OPC is silent. Neither does OPC offer what outcomes would satisfy it or how Ameren might achieve those outcomes. It is easy for OPC to criticize Ameren's management of its FAC, but it contributes no constructive solutions.

OPC baldly suggests that prudence reviews are insufficient incentive for Ameren to not abuse its FAC by continually quoting the Commission's statement that "an after-the-fact prudence review is not a substitute for an appropriate financial incentive."[11] Prudency reviews are not the only carrot the Commission holds to prevent Ameren from misusing its FAC. The most drastic carrot is elimination of the FAC, which Ameren recognizes as a potential.[12] Missouri law requires all electric utility FACs to be reviewed every four years, so Ameren has a constant reminder that it must manage its FAC wisely.[13] Lena Mantle demonstrates in her testimony that Ameren collected $804,203,847 in fuel expense from ratepayers since the Commission first permitted it to have a FAC.[14] Fuel expense is a very large category of cost for Ameren. The threat of the loss of a mechanism that has allowed capture of significant changes in prudently incurred fuel costs without the need to file general rate proceedings is a tremendously compelling incentive.

Moreover, the FAC statute requires utilities to undergo prudency reviews every 18 months and refund imprudently incurred costs plus interest.[15] The threat of prudency reviews is real, as proven by the Commission ordering Ameren to refund $17,169,838,

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[11] The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 6, 10, 11, 13 (Mar 30, 2020) quoting Missouri Public Service Commission, *Report and Order*, ER-2008-0318, 72 (Jan 27, 2009).

[12] Union Electric Company, d/b/a Ameren Missouri, *Rebuttal Testimony of Andrew Meyer*, ER-2019-0335, 15:1-4 (Jan 21, 2020).

[13] § 386.266.5(3), RSMo.

[14] The Office of Public Counsel, *Surrebuttal Testimony of Lena M. Mantle*, ER-2019-0335, Sch. LM-S-3 (Feb 14, 2020).

[15] § 386.266.5(4), RSMo.

plus interest, to rate payers after it found that Ameren imprudently failed to flow off-system revenue received from contracts through its FAC.[16] Ameren does not require further incentive to prudently manage its FAC.

2. **<u>The Legislature provided no "foundational guidance" in the PISA statute regarding the appropriate FAC sharing mechanism.</u>**

The Commission did not create Ameren's sharing mechanism "out of whole cloth" as OPC claims.[17] The Commission has provided its reasoning why a 95% / 5% sharing mechanism encourages Ameren to institute efficiencies. For example:

> A 95 percent pass through provides AmerenUE sufficient incentive to operate at optimal efficiency because the company has already several incentives in place that encourage it to minimize fuel costs. First, AmerenUE's largest fuel cost is for the purchase of Powder River Basin coal to fire its power plants. The coal AmerenUE uses is purchased by an affiliated company, AmerenEnergy Fuels and Service Company, which also purchases coal for the unregulated Ameren merchant generating company operating in Illinois. As a result, AmerenUE pays the same price for coal as the unregulated affiliates. Presumably, Ameren has a strong incentive to minimize costs for its unregulated operations, so AmerenUE would benefit from those same incentives.
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> Second, AmerenUE's key employees responsible for managing the company's net fuel costs all have personal financial performance incentives related to things like generation levels, generation availability, and cost of generation. Thus, individual employees have a financial incentive to minimize the company's fuel costs.
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> Third, adjustments under the fuel adjustment clause are based on historical rather [than] projected costs. Hence, AmerenUE will not entirely escape the incentive effects of the regulatory lag between the incurrence of its fuel costs and the recovery of those increased fuel costs from ratepayers under the fuel adjustment clause. Therefore, the company has an incentive to minimize net fuel costs to mitigate that remaining regulatory lag.
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> Fourth, as required by the Commission's rules, AmerenUE's fuel adjustment clause includes a detailed heat rate/efficiency testing plan that will allow the

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[16] Missouri Public Service Commission, *Report and Order*, ER-2010-0255, 22 (Apr 27, 2011).

[17] The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 11 (Mar 30, 2020). Staff is unsure of the relevance of OPC's statement on page 12 of its brief that in the first case allowing a Missouri utility to use a FAC clause, the Aquila case (case number ER-2007-0004), that no party was in favor of the 95% / 5% sharing mechanism. Ameren was not a party to the Aquila case.

> Commission to guard against imprudent operation and maintenance of the company's generating units, thus controlling net fuel costs.
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> Fifth, AmerenUE will need to come back to the Commission in its next rate case to have its fuel adjustment clause renewed. As the Commission has previously indicated, "a fuel adjustment clause is a privilege, not a right, which can be taken away if the company does not act prudently." If AmerenUE does not efficiently control its net fuel costs, the Commission could reconsider the fuel adjustment clause.[18]

The Legislature gave the Commission discretion to craft FAC clauses, recognizing the Commission's expertise and competence in this discrete area. The Legislature created a structure under which the Commission may approve and modify FACs after making findings. For example, the Commission must find that the FAC is "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity."[19] The Commission may also consider business risk.[20] OPC claims that the Legislature provided "foundational guidance" in the PISA statute and attempts to shoehorn the PISA statute deferral sharing mechanism into the FAC.[21] For the reasons Staff cited in page six of its initial brief, it does not fit.

Despite the fact that OPC has not argued that the FAC statute is ambiguous, it requests the Commission adapt the PISA statute deferral to the FAC. This violates well-established statutory interpretation rules that a judicial body will look beyond the statute for guidance "only when the meaning of a statute is 'ambiguous or would lead to

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[18] Missouri Public Service Commission, *Report and Order*, ER-2008-0318, 73-74 (Jan 27, 2 09) (citations omitted). See also Missouri Public Service Commission, *Report and Order,* ER-2011-0028, 83-84 (Jul 13, 2011), Missouri Public Service Commission, *Report and Order,* ER-2012-0166, 79 (Dec 12, 2012), and Missouri Public Service Commission, *Report and Order,* ER-2014-0258, 108 (Apr 29, 2015).

[19] § 386.266.5.(1), RSMo.

[20] § 386.266.8., RSMo.

[21] The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 11-13 (Mar 30, 2020).

an illogical result that defeats the purpose of the legislation.'"[22] The FAC statute is not ambiguous, and there is no reason for the Commission to consider the PISA deferral in interpreting it. Although the FAC statute does not specify a sharing mechanism ratio, it provides criteria the Commission. Had the Legislature meant for the PISA deferral to be included in the FAC statute, it would have done so. It could have easily amended the FAC statute to add the 85% / 15% sharing mechanism when it modified § 386.266, RSMo in other ways. This is not what the Legislature chose to do.

3. OPC produced conflicting argument that the current review process fails to give the Commission and ratepayers security that only prudently-incurred costs flow through the FAC.

OPC does not claim specific imprudence in this case.[23] Nevertheless, OPC believes that the current level of review is insufficient. At the hearing, OPC implied that Staff's prudency reviews are cursory and insufficient.[24] Now OPC argues that the scope of Staff's reviews by necessity are so broad that it is not possible for them to get it right or catch everything. OPC also argues that Staff is overworked so they cannot accurately audit Ameren's FAC.[25]

Conclusion

OPC's arguments leave substantial unanswered questions. As OPC writes, it bears the burden of persuading the Commission that Ameren's FAC sharing mechanism should be changed to 85% / 15%.[26] Then:

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[22] *Ben Hur Steel Worx, LLC v. Director of Revenue*, 452 S.W.3d 624, 626 (Mo. en banc 2015) (citations omitted).

[23] The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 13 (Mar 30, 2020).

[24] Evidentiary Hearing, ER-2019-0335, 372:14-374:8 (Mar 11, 2020).

[25] The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 14-15 (Mar 30, 2020).

[26] The Office of Public Counsel, *Public Counsel's Initial Post-Hearing Brief*, ER-2019-0335, 5 (Mar 30, 2020).

a. How does OPC reconcile its proposal with the FAC statutory requirement that the Commission find the FAC gives the utility sufficient opportunity to earn its rate of return?

b. If the Legislature intended to include an 85% / 15% sharing mechanism in the FAC statute, why did it not amend the FAC statute?

c. How can Ameren create further efficiencies in an adjustment mechanism that was created to reflect increases and decreases in fluctuating fuel and purchased power costs?

These questions create more than enough doubt about the viability of OPC's proposal such that the Commission should reject it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been electronically mailed to all counsel of record this 7th day of April, 2020.

/s/ Karen Bretz