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

| | | |
|---|---|---|
| In the Matter of Ameren Missouri's 2020 Utility Resource Filing pursuant to 20 CSR 4240 – Chapter 22. | ) ) ) | File No. EO-2021-0021 |

**MOTION FOR PROTECTIVE ORDER**

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), and pursuant to 20 CSR 4240-2.135(4) requests issuance by the Missouri Public Service Commission ("Commission") of a protective order as outlined herein. In support of its request, Ameren Missouri states as follows:

1. Under 20 CSR 4240-2.135(6), absent a specific order issued under 20 CSR 4240-2.135(4), information defined as "Confidential" by 20 CSR 4240-2.135(2)(A) is available to the attorneys of record for a party in the Commission case at issue and to employees of a party if those employees are working as subject-matter experts for the attorneys or intend to file testimony upon a filing by such an employee of the certification required by 20 CSR 4240-2.135(7).

2. Under 20 CSR 4240-2.135(4), the Commission may grant protections beyond those provided for by the base terms of the rule. This motion seeks such additional protections due to the unique circumstances (outlined below) surrounding the filing of the Company's 2020 triennial Utility Resource Plan ("IRP") given ongoing litigation involving an expected intervenor in this IRP docket.

3. As the Commission knows, in 2011 the Department of Justice, on behalf of the United States Environmental Protection Agency ("EPA"), filed suit against Ameren Missouri claiming that in performing construction projects in 2007 and 2010 at the Rush Island Energy Center, the Company violated the federal Clean Air Act ("CAA") and Missouri's implementing regulations, known as the State Implementation Plan ("SIP"). EPA contends that Ameren Missouri

should have predicted an emission increase resulting from the projects and that to remedy such violation, injunctive relief is appropriate. Ameren Missouri has consistently defended, and continues to defend, the litigation based among other things on its position that EPA's action fails as a matter of law. The litigation was bifurcated into liability and remedy phases, and following a liability ruling in January 2017 and a remedy ruling in September 2019, is now on appeal before the United States Court of Appeals for the Eighth Circuit. Briefing concluded in May of this year. No date has yet been set for oral argument, though it could occur later this year or in early 2021 because of delays in processing the Eighth Circuit's docket arising from the Covid-19 pandemic.

4. In its September 2019 remedy ruling, the federal district court ordered injunctive relief at two Ameren Missouri facilities, Rush Island and the Labadie Energy Center. Specifically, the district court ordered the installation of a flue gas desulfurization unit (i.e., a "scrubber") at Rush Island and, although there were no violations alleged or found at the Labadie Energy Center, also ordered installation of a dry sorbent injection ("DSI") system at Labadie.

5. Ameren Missouri moved to stay implementation of the remedy order. The district court granted the material respects of Ameren Missouri's motion to stay, and concurred that Ameren Missouri is raising first-impression legal issues to be decided by the Court of Appeals and that implementation of the remedy order while such issues are pending on appeal would result in irreparable injury. A ruling from the Court of Appeals is expected in the first half of 2021, while this IRP docket remains pending. Pending before the Court of Appeals are several first impression issues, which if decided in Ameren Missouri's favor could result in complete reversal and the vacating of the district court's prior rulings. Alternatively, the case could be remanded to the district court for further proceedings. Ameren Missouri believes, given recent United States

Supreme Court decisions on administrative deference, among other reasons, that it is unlikely the district court's order(s) will be simply affirmed.

6. Following the change in presidential administrations and after the January 2017 liability ruling, the Sierra Club intervened in the lawsuit and was an active participant in support of the EPA before the district court and the pending appeal before the Eighth Circuit. That ongoing participation, and the posture of the ongoing litigation, raises serious concerns about Sierra Club's access to analyses required by one of the Special Contemporary Issues ("SCI") adopted by the Commission in its December 3, 2019 *Revised Order Adopting Special Contemporary Issues* issued in File No. EO-2020-0047.

7. Specifically, SCI 1.D requires the Company to "[m]odel scenarios related to environmental upgrades to the Rush Island and Labadie coal-fired plants as mandated by the federal courts." Such "scenarios," however, require the Company to consider a range of assumptions regarding what might potentially happen (and what would be in the best interests of Ameren Missouri customers) should the Eighth Circuit uphold the district court's judgment. As outlined in detail below, sharing with the Sierra Club and its representatives such assumptions, and the results of hypothetical scenarios based on them, could compromise Ameren Missouri's future negotiating posture should modification of the district court's judgment become appropriate and necessary in order to achieve an outcome that is in the best interests of Ameren Missouri customers, in the unlikely event that the district court's judgment was upheld.

8. It should be noted that this SCI was suggested by the Office of the Public Counsel, and the Company did not object to it because it is understandable that the Commission would like to be informed about these "what ifs," regardless of their likelihood. The Company continues to have no objection to providing the Commission and IRP docket intervenors that information.

However, absent a protective order, Sierra Club is in a far different position, including because it is an opposing litigant and given its stated goal, which is to shut down every single coal-fired power plant in the United States. The Company is not inferring that this is Sierra Club's goal—Sierra Club itself does not hide the fact that one of its "Beyond Coal" campaign goals is to "close all the coal plants in the US."[1] The same day that the district court issued its September 2019 ruling, Sierra Club's Senior Campaign Representative for the Beyond Coal Campaign touted the court's ruling on Sierra Club's website and in press releases, specifically noting Sierra Club's intervention in the lawsuit. *See* https://www.sierraclub.org/press-releases/2019/09/federal-court-orders-ameren-comply-clean-air-act-installing-pollution.

9. Keep in mind that operations at Rush Island and Labadie, including since the projects complained about by EPA and Sierra Club were completed, have produced hundreds of millions of dollars of positive margins for Ameren Missouri's customers and continue to do so. Indeed, almost all of those margins have been and are passed through to customers by virtue of the operation of the Company's fuel adjustment clause, including 100% of the margins to the extent they are reflected in base rates and 95% of any increase in those margins as compared to the base between rate reviews. If Ameren Missouri loses its appeal – which it does not expect to ultimately happen – the imposed remedies could drastically cut those margins or even eliminate them. Defending this litigation is not just on Ameren Missouri's behalf but it is also on Ameren Missouri's customers' behalf.

[1] https://content.sierraclub.org/coal/about-the-campaign. Sierra Club is a serial litigant suing utilities across the country as part of its "war on coal." *See* Michael Grunwald, "Inside the War on Coal" (Politico May 26, 2015) (e.g., "You'll definitely find lawyers from the Sierra Club's Beyond Coal campaign, the boots on the ground in the war on coal.") (available at http://www.politico.com/agenda/story/2015/05/inside-war-on-coal-000002).

10. Access to the analyses required by the above-referenced SCI must be limited to the lawyers[2] who have entered their appearance in the IRP docket and not shared more broadly within the Sierra Club's national organization including specifically any Sierra Club employee, consultant, attorney, witness, agent, or representative of any kind that is involved in, in any way, the ongoing above-referenced federal court litigation for a number of reasons.

11. On two separate occasions Sierra Club has mishandled Ameren[3] documents and information that have been designated as confidential or highly confidential pursuant to a protective order. And those are only the occasions Ameren Missouri has been able to discover through its own experience. There is no telling how many other times Sierra Club has mishandled Ameren Missouri's protected materials or how often Sierra Club has similarly mishandled other companies' protected materials. Sierra Club has demonstrated a lack of respect for the necessary procedures, protections, and controls to ensure that confidential materials are carefully quarantined, provided to only the limited individuals authorized to see them, and not disclosed, inadvertently or otherwise, to those who may not access such protected materials.

12. For example, Sierra Club concedes that, in one instance, it (i) obtained highly confidential documents and information that Ameren Missouri produced in Ameren Missouri's 2014 IRP docket pursuant to the Commission's confidentiality rules governing the proceeding, and then (ii) during discovery in the entirely unrelated ongoing CAA litigation described above, Sierra Club produced a highly confidential document that it had previously obtained in the IRP proceeding. Sierra Club conceded that its mishandling of the document violated the terms of the Commission's rules. Sierra Club failed to quarantine Ameren Missouri's protected materials, and

[2] As discussed below, and appropriate clerical support staff.
[3] Ameren Missouri or Ameren Services Company documents produced by Ameren Missouri in the ongoing litigation.

as a result, allowed those materials to be improperly disclosed in an entirely separate and unrelated lawsuit. Equally troubling is the fact that upon learning of the mishandling, Sierra Club did not bring its violation to Ameren Missouri's attention. There is no telling who else has inadvertently received confidential Ameren Missouri materials from Sierra Club through similar mishaps.

13. In addition, before it was allowed to intervene in the district court case, Sierra Club improperly received and mishandled other Ameren confidential information. Sierra Club's litigation counsel asked Department of Justice attorneys to provide deposition transcripts of Ameren Missouri's expert witnesses in the district court case to Sierra Club so that it could use them in a different lawsuit that Sierra Club was then litigating against a Montana utility. Those deposition transcripts contained confidential information subject to the Stipulated Protective Order entered by the federal Court. Sierra Club did not notify Ameren Missouri that it was seeking its confidential information from the Department of Justice and never requested the Court's permission or Ameren Missouri's permission to use the confidential information. The Department of Justice attorneys sent the information to the Sierra Club, and only belatedly realized that they had violated the Stipulated Protective Order entered in the federal case. (*United States v. Ameren Missouri*, Dec. 11, 2014 Hrg. Tr. at 60-61.)

14. Ameren Missouri's experience with Sierra Club's mishandling of confidential materials produced and subject to the Commission's rules, unfortunately, is not unique. Consider an order entered by the Public Service Commission of Oregon in 2014:

> Turning to the facts here, we find that Sierra Club violated the [protective order] by using information that had been designated confidential to draft non-confidential data requests in an out-of-state docket. Sierra Club's repeated and specific references to the confidential presentation as being the source of the information requested in those data requests demonstrate that Sierra Club used the confidential presentation for purposes other than the [PSC] proceeding. We also find that Sierra Club disclosed confidential information. Sierra Club admits that at least some of its data requests referred to matters that were not otherwise discussed in public

> documents, and that it served those data requests on a public service list. This was improper. . . .
>
> [W]e find that Sierra Club's actions violated a duty to protect both PacifiCorp and the Commission's processes from the potential harm that might arise from the public release of information designated as confidential.

Public Service Commission of Oregon's Order No. 14-392 Regarding Violation of Protective Order by Sierra Club at pp. 5-6 (Nov. 6, 2014) (available at http://apps.puc.state.or.us/orders/2014ords/14-392.pdf).

15. Ameren Missouri has a separate and additional concern that warrants entry of a protective order here – that Sierra Club will use information it gleans from other proceedings to take contradictory positions in a future rate case or other Commission proceeding, in an effort to oppose the same controls which it sought to impose through the federal litigation.

16. Sierra Club regularly takes positions and files lawsuits seeking installation of control equipment or other injunctive relief (e.g., installation of baghouses, ESP upgrades, gas conversions) against utilities such as Ameren Missouri, often based on claims of environmental or health risk. Yet at the same time, Sierra Club also intervenes in regulatory or ratemaking proceedings to advocate that utilities should be denied any cost recovery for costs associated with the very same types of equipment or injunctive relief for which Sierra Club advocated.

17. For example, just a few years ago, Sierra Club both opposed as imprudent Ameren Missouri's request for rate recovery for ESP upgrades at its Labadie Energy Center, yet also sued Ameren Missouri seeking to force upgrades to its plants' ESPs. *Compare* Sierra Club Initial Post-Hearing Brief, File No. ER-2014-0258 (Mar. 31, 2015) (opposing rate recovery for ESP upgrades in Ameren Missouri's 2014 rate review), *with* Expert Report of Bill Powers, P.E. on behalf of Sierra Club, the plaintiff in *Sierra Club v. Ameren Missouri*, Case No. 14-cv-00408-AGF, ECF No.112-1 (E.D. Mo. May 2, 2016) (opining that ESP upgrades were necessary and proper) (this is

a different lawsuit then the pending CAA lawsuit currently on appeal before the Eighth Circuit which has since been dismissed). Ameren Missouri is also aware of other instances in other jurisdictions where Sierra Club opposed recovery of pollution control equipment where the installation of such equipment was required either by the applicable state law or by a Federal Implementation Plan. *See, e.g.* Expert Testimony of Dr. Ranajit (Ron) Sahu on behalf of Sierra Club, New Hampshire Public Utilities Commission Docket No. DE 11-250 (Dec. 20, 2013) (opposing installation of scrubbers mandated by a 2006 state law), and Direct Testimony of Jeremy I. Fisher, PhD, on behalf of Sierra Club, Washington Utilities and Transportation Commission Case UE-152253 (Mar. 17, 2016) (opposing installation Selective Catalytic Reduction, the installation of which was required by a Federal Implementation Plan).

18. Given Sierra Club's prior actions and positions, Ameren Missouri is concerned that, despite requesting the district court to order installation of wet FGD at Rush Island and controls at Labadie, Sierra Club will take the opposite position before this body, arguing that such controls are imprudent and that the plants ought to be shutdown instead, all as part of its "Beyond Coal" strategy, which has as its agenda the closure of all coal-fired power plants.

19. For the foregoing reasons, Ameren Missouri seeks a protective order from the Commission providing that no Sierra Club employee, consultant, attorney, witness, agent, or representative (collectively, a "Sierra Club representative") having involvement of any kind in the above-described NSR litigation (*United States v. Ameren Missouri*, Case No. 11-cv-00077 (E.D. Mo.)) shall have access to the Company's SCI 1.D related filings in its IRP docket, to its discovery responses regarding SCI 1.D in such docket, or to any workpapers or other materials respecting its response to SCI 1.D (collectively, the "SCI 1.D IRP materials") provided to Sierra Club in connection with such docket and, further, those Sierra Club representatives who may access the

SCI 1.D IRP materials shall not disclose any information about the SCI 1.D IRP materials to any Sierra Club representative otherwise prohibited from having access to the SCI 1.D IRP materials. Notwithstanding the foregoing request for a protective order, Ameren Missouri agrees that the order should allow Sierra Club clerical support staff who may, as part of their day-to-day work duties support Sierra Club lawyers both who may have involvement in the NSR litigation and who have involvement in this IRP docket, to access the SCI 1.D IRP materials only to the extent necessary to perform their administrative duties; provided, that Sierra Club identify each such person via a filing in this docket prior to providing access to the SCI 1.D IRP materials and certifies in such a filing that such clerical employees were instructed not to share the SCI 1.D IRP materials with any person prohibited by the protective order from accessing them. The Company further requests that the Commission authorize it to label the SCI 1.D IRP materials as "highly confidential" so that they may be distinguished from any other confidential materials in the docket. To that end, the Company is filing three versions of its triennial IRP, as follows: a public version, which redacts both confidential and SCI 1.D IRP materials for which Ameren Missouri seeks highly confidential treatment; a confidential version, which redacts the SCI 1.D IRP materials; and a highly confidential version, containing the entire IRP filing. See 20 CSR 4240-2.135(4)(A), which affords highly confidential protection to materials for which such protection is sought pending ruling on motions such as this.

20. Ameren Missouri specifically acknowledges its ongoing obligations under 20 CSR 4240-22.080(12), including specifically section (12)(B), which could be triggered by a full and final resolution of the above-referenced litigation.

21. As required by 20 CSR 4240-2.135(4)(A), in summary, the information for which highly confidential information is sought by this motion consists of modeling assumptions,

modeling results, and associated narrative discussion of scenarios related to environmental upgrades to the Rush Island and Labadie coal-fired plants as mandated by the federal courts.

22. Counsel for the Staff of the Commission ("Staff") and the Office of the Public Counsel ("OPC") have indicated, respectively, that Staff and OPC do not oppose issuance of the requested protective order.

WHEREFORE, Ameren Missouri requests that the Commission issue the above-described protective order.

Respectfully submitted,

/s/ *James B. Lowery*
**James B. Lowery**, Mo. Bar #40503
SMITH LEWIS, LLP
P.O. Box 918
Columbia, MO 65205-0918
(T) 573-443-3141
(F) 573-442-6686
lowery@smithlewis.com

**Wendy K. Tatro**, #60261
Director & Assistant General Counsel
**Paula N. Johnson**, #68963
Senior Corporate Counsel
Ameren Missouri
1901 Chouteau Avenue, MC 1310
St. Louis, MO 63103
(314) 554-3484 (phone)
(314) 554-4014 (fax)
AmerenMOService@ameren.com

**Attorneys for Union Electric Company d/b/a Ameren Missouri**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion has been served on counsel for Staff and OPC by electronic mail on this 27th day of September, 2020.

*/s/ James B. Lowery*
James B. Lowery