BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage A Utility Waste Landfill and Related Facilities at its Labadie Energy Center.	)	File No. EA-2012-0281

MOTION FOR CLARIFICATION OR, ALTERNATIVELY,
MOTION FOR RECONSIDERATION OF
AUGUST 14, 2013 ORDER REVISING PROCEDURAL SCHEDULE

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri"), and moves the Public Service Commission ("Commission") to clarify or, alternatively, to reconsider its August 14, 2013 Order Revising Procedural Schedule.

Background

Following the two local public hearings held in this matter, Ameren Missouri filed objections and a motion to strike certain documents presented to the Commission by the lay witnesses at those hearings; additionally, Ameren Missouri moved the Commission to modify the procedural schedule by delaying the hearing date and allowing Ameren Missouri to file surrebuttal testimony in response to the new issues raised at the local public hearings through what was in substance "rebuttal testimony" received at the local public hearings. This rebuttal testimony was not finally received until after the date of surrebuttal testimony was due under the Commission's procedural schedule.[1] The Commission, in response to this August 1, 2013 filing

[1] As the Commission observed in the August 14, 2013 Order Revising Procedural Schedule, Ameren Missouri did not file surrebuttal testimony because Intervenors had not pre-filed any rebuttal testimony; consequently, "there was nothing for Ameren Missouri to address through surrebuttal testimony." Order at 1. Only Commission Staff filed rebuttal testimony.

by Ameren Missouri, directed the parties to respond to the proposal to modify the procedural schedule. Staff and Labadie Environmental Organization/Sierra Club ("Intervenors") filed timely responses on August 7, 2013.

In their responses, neither Staff nor Intervenors objected to modification of the procedural schedule, and all parties joined together to propose a revised procedural schedule, which they submitted to the Commission on August 13, 2013. On August 14, 2013, the Commission issued an order granting Ameren Missouri's requests to delay the hearing and to file surrebuttal testimony and, despite the fact that no other party had requested to file additional testimony, also ordered "all other parties" to file cross-surrebuttal testimony on the same day that Ameren Missouri's surrebuttal testimony was to be due. While the Commission's order specifically directed "the parties" to address the issue (raised at the local public hearings) of whether Ameren Missouri had documents "examining alternative sites, options, or possibilities" for the siting of the utility waste landfill, the Commission did not otherwise direct or restrict in any way the scope of cross-surrebuttal testimony but instead indicated that the parties were not limited to this "single issue and may address other issues in surrebuttal testimony." Order at 3.[2]

Issue

The issue raised by the Commission's order that all other parties file cross-surrebuttal testimony is this:

> Where Ameren Missouri did not pre-file surrebuttal testimony in accordance with the Commission's procedural schedule because Intervenors had not pre-filed any rebuttal testimony, should Intervenors, who instead rebutted Ameren Missouri's request for a CCN through the testimony of lay witnesses at the local public

[2] Ameren Missouri does have such documents, and they were provided to the Staff and Intervenors through data request responses submitted to Ameren Missouri early in this case (before rebuttal testimony was due). Ameren Missouri will provide those documents and further address them when it files its surrebuttal testimony on September 13, 2013.

hearings, be allowed to offer *additional* evidence opposing Ameren Missouri's request for a CCN as part of its pre-filed cross-surrebuttal testimony?[3]

Analysis

The Company understands why the Commission has directed all of the parties to address the existence of studies relating to alternative sites. As the statement of the issue above indicates, what is unclear about the Order is the permissible scope of cross-surrebuttal testimony, particularly from Intervenors who properly should have already provided (as rebuttal testimony) "all testimony which explains why a party rejects, disagrees with or proposes an alternative to the moving party's [the Company's] direct case." 4 CSR 240-2.130(7)(C). Both the Commission's rules and traditional notions of fairness, however, prevent Intervenors from getting a second bite at the apple in opposing Ameren Missouri's request for a CCN by including testimony that bolsters or adds to their case—especially after having already sidestepped the above-quoted rule. Ameren Missouri seeks clarification that the Order does not somehow purport to allow Intervenors to misuse cross-surrebuttal testimony to do just that or, alternatively, reconsideration if the Order originally did intend to allow broader cross-surrebuttal testimony. Intervenors should only be allowed to address the existence of studies, etc. relating to alternative sites question.[4]

[3] This is not an issue if the true intent of the Order is simply to have the other parties file testimony on the question of documents relating to studies of alternative sites, but the Order is unclear on that point, as discussed below.

[4] Nor should any party be allowed to cross-surrebut Staff's rebuttal testimony, filed on May 31, 2013. If a party wanted to do so, that party should have filed surrebuttal on or before June 28, 2013, as provided for in the Commission's order adopting the original procedural schedule in this case.

A. Commission rules prohibits the filing of cross-surrebuttal testimony that is not responsive to rebuttal testimony but instead should have been provided as rebuttal testimony or that otherwise in effect supplement a party's prior testimony.

Not only does the Commission's rule governing what must be included in rebuttal testimony preclude Intervenors from further rebutting the Company's Application under the guise of cross-surrebuttal testimony, the Commission's rule regarding the filing of surrebuttal testimony does so as well. It provides that "[s]urrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony." 4 C.S.R. 240-2.130(7)(D). The Commission has consistently sustained objections to surrebuttal testimony that does not respond to rebuttal testimony. In *Ahlstrom Dev. Corp., et al., v. The Empire Dist. Elec. Corp.*, 1995 Mo. PSC LEXIS 49 (Case No. EC-95-28, Nov. 8, 1995), for example, the Commission struck portions of surrebuttal testimony of two witnesses because the testimony did not respond to rebuttal testimony but instead were both attempts to inject a new request for relief. In that case the Commission also ruled that cross-surrebuttal testimony is not for the purpose of "bolster[ing] matters previously presented in direct or rebuttal testimony and schedules." *Id.* Similarly, in *Orler v. Folsom Ride, LLC, et al*., 2007 Mo. PSC LEXIS 517 at *4 (Case No. WC-2006-0082, Apr. 12, 2007), the Commission sustained "[a]ll objections based upon the misuse of surrebuttal testimony for failing to address rebuttal testimony of any other party or for being used as supplemental direct testimony."

In a recent decision issued by the Commission, *In re: Union Elec. Co., d/b/a Ameren Missouri's Voluntary Green Program/Pure Power Program Tariff Filing*, 2013 Mo. PSC LEXIS 237 at *8 (Case No. EO-2013-0307, Mar. 6, 2013), the Commission granted Ameren Missouri's motion to strike pre-filed testimony offered by Renew Missouri because it was in the nature of direct testimony and "not responsive testimony as is required by the Commission's rules." As the

Commission recognized, "[t]o allow that testimony to be offered into the evidentiary record at the hearing would condone a violation of the Commission's rules on prefiled testimony." *Id.*

The rules are clear. First, Intervenors were required to state all of their reasons for opposing the Company's Application in rebuttal testimony. The Intervenors chose not to file rebuttal testimony in accordance with the Commission's schedule, but instead chose to make their case at the local public hearing, effectively submitting their rebuttal testimony in that forum. Second, surrebuttal testimony *must* be responsive to rebuttal testimony, but cannot be used as a vehicle for a party to bolster its previous testimony. Missouri courts similarly prohibit a party from using surrebuttal testimony to supplement direct testimony. *See Naylor v. St. Louis Pub. Serv. Co*., 235 S.W.2d 72, 75 (Mo. App. E.D. 1950) ("Defendant was not entitled, as of right, to put in, in surrebuttal, evidence merely cumulative or confirmatory of that already adduced by him in his original case."). Under the Commission's rule, then, Intervenors have nothing to rebut because Ameren Missouri did not file rebuttal testimony. As a result, the only permissible topic on which Intervenors may file cross-surrebuttal testimony, assuming it has any testimony to offer on this issue, is the Commission's request for testimony on the existence of studies relating to alternate locations for the proposed utility waste landfill. The rules do not provide otherwise.

B. Because Ameren Missouri has the burden of proof in its request for a CCN, traditional notions of fairness require that it be allowed the last word.

The Commission's own rules regarding the prefiling of testimony and its practice at hearing that routinely provides the party bearing the burden of proof the final opportunity to present evidence are consistent with that of the judicial system in Missouri where the party bearing the burden of proof traditionally has the right to open and close evidence in the proceeding.

In a case contesting the validity of a will, the Missouri Supreme Court observed in *Meyers v. Drake*, 24 S.W.2d 116 (Mo. 1930), that it was the "uniform practice" that the proponents of the will bear the burden of proof on the mental capacity of the testator and, therefore, "have the right to open and close" the evidence in the case. *Id.* at 121. Affirming as "essential" the orderly introduction of evidence as a means to prevent "injurious surprises, and annoying delays in the administration of justice," the court cautioned that evidence should be introduced in its regular stage of process; "'[o]therwise, the trial will be in perpetual confusion.'" *Id.* at 123. To some extent, this case has been put into a state of confusion or, at the very least, has proceeded in an unorthodox manner all because "we [Intervenors] decided we were going to attack it [Ameren Missouri's Application] by other than filing prefiled testimony."[5] Intervenors should not be allowed to further profit from their conscious decision to disregard the Commission's rules on pre-filed testimony, nor should Ameren Missouri be further prejudiced by it, particularly given that Ameren Missouri bears the burden of proof in this case.

Allowing Intervenors yet another opportunity to make its case against Ameren Missouri by authorizing them to file cross-surrebuttal on any topic and not in response to any rebuttal testimony would prejudice Ameren Missouri by precluding it from being able to respond to that testimony.[6] Further, to do so constitutes a derogation of long-standing Commission rules and practice which are designed to prevent such prejudice and promote the orderly processing of cases. Intervenors had their opportunity to prefile rebuttal testimony; they elected not to take that opportunity. They were then given two nights of public hearing to make their case, as their

[5] Tr., June 19, 2013 On-the-Record Conference, p. 30 (Intervenors' Counsel Ms. Lipeles speaking).

[6] Or it would then force Ameren Missouri to seek leave to respond, creating yet another round of testimony that would have to be prepared and submitted shortly before the scheduled evidentiary hearings.

attorney said they would. Having had their opportunity to rebut Ameren Missouri, Intervenors should not receive any special treatment that would allow them yet another bite at the apple and disrupt the orderly filing of testimony in this case.

Relief Sought

Ameren Missouri respectfully requests that the Commission clarify that cross-surrebuttal from the Intervenors is to be limited to addressing the question of whether other studies relating to alternative sites exists, as provided for in the last two sentences of the paragraph at the top of page 3 of the Order. If the Order was originally intended to allow broader cross-surrebuttal, however, Ameren Missouri respectfully requests the Commission reconsider the Order to restrict the scope of cross-surrebuttal to that question.

Respectfully submitted,

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