

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filings of Union)
Electric Company, d/b/a Ameren Missouri, to) Case No. ER-2011-0028
Increase Its Revenues for Retail Electric Service.)

**MOTION TO STRIKE, OR OTHERWISE DISALLOW, PORTIONS OF THE
PREPARED SURREBUTTAL TESTIMONY OF MICHAEL WALTER**

Union Electric Company, d/b/a Ameren Missouri (the “Company” or “Ameren Missouri”), hereby moves the Missouri Public Service Commission (“Commission”) for an order striking, or otherwise disallowing, portions of the prepared surrebuttal testimony of Michael Walter, which was initially filed in this case on April 15, 2011, on behalf of the International Brotherhood of Electrical Workers Local 1439 (the “Union”). Without obtaining, or even seeking, leave of the Commission to do so, the Union filed a “corrected” version of Mr. Walter’s testimony on April 18, 2011 – three days after the deadline for filing surrebuttal testimony that the Commission prescribed in the procedural order issued in this case. Moreover, Mr. Walter’s corrected testimony includes attachments that present information that is either improper hearsay evidence or that should have been filed as part of the Union’s case in chief.

Specifically, Ameren Missouri asks the Commission to strike the following portions of Mr. Walter’s surrebuttal testimony: 1) an attachment entitled “Proposed Relief on Union Issues,” which, although not labeled as such, is identified in that testimony as Exhibit 1; 2) the prepared direct testimony of David Desmond filed in Case No ER-2008-0318, which is attached to Mr. Walter’s surrebuttal testimony and, although not labeled as such, also is identified in that testimony as Exhibit 1; and 3) all references in Mr. Walter’s surrebuttal testimony to either the “Proposed Relief on Union Issues” or Mr. Desmond’s prior testimony.

As shown herein, the attachment entitled “Proposed Relief on Union Issues” is not proper “surrebuttal testimony,” as defined by 4 CSR 240-2.130(7)(D), because the information contained in that attachment is not “limited to material which is responsive to matters raised in another party’s rebuttal

testimony.” The other attachment to Mr. Walter’s surrebuttal testimony –the copy of Mr. Desmond’s direct testimony from a previous case – is inappropriate because the information contained in that attachment is improper hearsay that, if admitted into evidence in this case, will deny Ameren Missouri its due process right to confront and cross examine witnesses whose testimony is adverse to the Company’s interests. Finally, and more generally, Mr. Walter’s surrebuttal testimony is merely the latest example of what appears to be a conscious decision by the Union to utterly disregard – or even flout – the Commission’s rules and orders governing how and when prepared testimony is to be filed by parties who have been authorized to participate as intervenors.

In support of its motion, Ameren Missouri states as follows:

1. On November 10, 2010, the Commission issued its *Order Adopting Procedural Schedule and Establishing Test Year*. That order required all parties to file surrebuttal testimony regarding all issues on April 15, 2011. In addition, at page 5 of that order, the Commission specifically stated as follows:

4. The parties shall comply with the following procedural requirements:

(A) Testimony shall be prefiled as defined in Commission Rule 4 CSR 240-2.130. All parties must comply with this rule, including the requirement that testimony be filed on line-numbered pages.

2. Three Commission rules define direct, rebuttal, and surrebuttal testimony and prescribe what must be included in each of those types of testimony. 4 CSR 240-2.130(7)(A), states that “[d]irect testimony shall include all testimony and exhibits asserting and explaining that party’s entire case in chief.” 4 CSR 240-2.130(7)(B), which applies to cases, such as this one where all parties file direct testimony, states, in relevant part, that “rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party’s direct case.” And 4 CSR 240-2.130(7)(D) states that “[s]urrebuttal testimony shall be limited to material which is responsive to matters raised in another party’s rebuttal testimony.”

3. In his prepared direct testimony, which was filed on February 4, 2011, Mr. Walter stated, at page 8, lines 40-41, “[p]rior to the hearing in this matter, I intend to prepare a specific proposal that fleshes out these recommendations and share that proposal with all the parties and the Commission.” The recommendations referenced in that statement apparently pertained to proposals for increased training of Ameren Missouri’s internal workforce, changes in certain apprenticeship programs, and concerns regarding the Company’s use of outside contractors that were discussed elsewhere in Mr. Walter’s direct testimony.

4. Because Mr. Walter announced in his direct testimony that the Union intended to make specific recommendations regarding training, the apprenticeship programs, and Ameren Missouri’s use of outside contractors, those recommendations were an integral part of the Union’s case in chief and, accordingly, should have been presented in direct testimony. But both Mr. Walter and the Union chose to ignore the Commission’s rule prescribing what must be included in direct testimony, opting, instead, to present those recommendations at some unspecified time “[p]rior to the hearing in this matter.”

5. Neither Mr. Walter nor any other witness for the Union filed prepared rebuttal testimony in this case. Therefore, for reasons Ameren Missouri believes were deliberate and designed to gain strategic advantage, the Union waited to present its long-awaited recommendations until Mr. Walter’s surrebuttal testimony, which was not filed, in full, until April 18th.

6. As the preceding discussion makes clear, waiting until surrebuttal testimony to introduce recommendations that were referenced in, and therefore were part of, the Union’s case-in-chief is a violation of the Commission’s rules. In addition, the Union’s action also is contrary to the procedural order in this case, wherein the Commission specifically admonished the parties to comply with the requirements of 4 CSR 240-2.130. But most significantly, the Union’s strategic choice to wait until surrebuttal testimony to introduce its recommendations denies Ameren Missouri any opportunity to address those recommendations through the prepared testimony of one or more of the Company’s own

witnesses. This fundamentally deprives Ameren Missouri of its due process right to confront, address, and controvert prepared testimony that is adverse to the Company's interests in this case.

7. The Union compounds its assault on Ameren Missouri's due process rights by seeking to attach to, and incorporate therein, Mr. Walter's surrebuttal testimony a copy of the direct testimony filed by David Desmond in Case No. ER-2008-0318, which, though not labeled as such, also is designated by Mr. Walter as Exhibit 1. This attempt by the Union to augment Mr. Walter's surrebuttal is inappropriate for many reasons. Foremost among those are (1) Mr. Desmond's testimony is inadmissible hearsay, and (2) because Mr. Desmond will not appear as a witness in this case, the Company will have no opportunity to cross examine him on any of the statements contained in his previous testimony. And, as noted earlier in this motion, taking away from the Company its right to confront, address, and controvert adverse testimony is a denial of fundamental due process rights.

8. But even beyond these due process considerations, Mr. Desmond's testimony is both unreliable and inadmissible because, contrary to the requirements of 4 CSR 240-2.130(6), that testimony was not filed separately and is not accompanied by a signed and notarized affidavit whereby the witness attests to its accuracy. Although a form affidavit from Case No. ER-2008-0318 is attached to Mr. Desmond's testimony, that affidavit is not signed or notarized. In addition, it bears a date sometime in 2008. The testimony therefore lacks any verification, as required by the Commission's rule, that the information contained therein is true and correct, either in 2008 or, more importantly, at the present time.

9. More generally, the manner in which it has chosen to file Mr. Walter's surrebuttal testimony is just the latest example of the Union's utter disregard for the Commission's rules and orders governing the conduct of this case. As noted earlier in this pleading, the "corrected" version of Mr. Walter's surrebuttal testimony was not filed until April 18, 2011 – three days after the filing date prescribed in the Commission's procedural order. Yet there is nothing indicating that the Union sought the Commission's leave to file the testimony out of time. Moreover, there is no evidence that the Union saw fit to serve all counsel of record with a copy of the corrected filing. In addition, both Mr. Walter's

prepared direct and surrebuttal testimonies fail to comply with 4 CSR 240-2.130(6), which requires that all prepared testimony be double-spaced, a requirement the Commission admonished all parties to observe through specific language that was included in the procedural order. Admittedly this last point is a technical violation, but it underscores the Union's cavalier attitude toward the Commission's rules and procedures. Such conduct should not be tolerated, much less rewarded, but that will be the result if the Commission does not grant the relief sought in this motion.

WHEREFORE, for all the reasons stated herein, Ameren Missouri hereby requests the Commission to enter an order that: (i) strikes, or otherwise disallows, the document entitled "Proposed Relief on Union Issues" that is appended to Mr. Walter's prepared surrebuttal testimony as an exhibit; (ii) strikes, or otherwise disallows, that portion of Mr. Walter's surrebuttal testimony that relates to the "Proposed Relief on Union Issues" (*i.e.* testimony on page 2, beginning on line 42 and ending on line 45); (iii) strikes, or otherwise disallows, the direct testimony of David Desmond in Case No. ER-2008-0318, which is appended to Mr. Walter's prepared surrebuttal testimony as an exhibit; (iv) strikes, or otherwise disallows, that portion of Mr. Walter's surrebuttal testimony that relates to Mr. Desmond's testimony (*i.e.* testimony on page 1, beginning on line 30 and ending on line 34); and (v) grants the Company such other relief as the Commission deems reasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, on the following parties on the 5th day of May, 2011:

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