

**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 Increase Its Revenues for) File No. ER-2014-0258
Electric Service.)

**AMEREN MISSOURI’S OBJECTION TO THE ADMISSION OF THE
TESTIMONIES OF WITNESSES GREG R. MEYER AND JAMES R. DITTMER**

COMES NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”), and for its objections to portions of the Direct Testimony and Schedules of Greg R. Meyer and to the entirety of the Rebuttal Testimony of James R. Dittmer, and its further objections to any testimony from these witnesses in opposition to the amortization in rates of the regulatory asset balance for solar rebates at issue in this case, states as follows:

Objection to Mr. Meyer’s Testimony

1. On November 8, 2013, Ameren Missouri and several other parties, including the Missouri Industrial Energy Consumers (“MIEC”), entered into a Stipulation and Agreement (the “Stipulation”) in Case No. ET-2014-0085, whereby the parties agreed that Ameren Missouri would not stop paying solar rebates in 2013, but instead would create a \$91.9 million “pool” of solar rebates that would be paid until exhausted. The parties also agreed that the solar rebate amounts paid by Ameren Missouri would be recorded to a regulatory asset to be considered for recovery in rates in a rate case after December 31, 2014, through a three-year amortization.

Stipulation, Pg. 5 at ¶ 7d.

2. As part of said Stipulation, the parties agreed that “[i]f approved and adopted by the Commission, this Agreement shall constitute a binding agreement among the Signatories,”

and further provided that “[t]he signatories agree not to object to Ameren Missouri’s recovery in retail rates of prudently paid solar rebates....” Stipulation, Pg. 11 at ¶ 11 and Pg. 6 ¶ 7d.

3. The Commission then entered an *Order Approving Stipulation and Agreement* in that case (the “Order”), which specifically requires the parties to “comply with the terms of the stipulation and agreement.” Order, ¶ 1. Ameren Missouri has fully complied with the Stipulation, including in paying the solar rebates and properly recording them to a regulatory asset.¹

4. Despite MIEC’s explicit and binding agreement not to object to Ameren Missouri’s recovery in retail rates of prudently paid solar rebates, MIEC has filed in the instant rate case the Direct Testimony and Schedules of Greg R. Meyer (“Meyer”), in which Meyer argues that the Commission should not allow Ameren Missouri to include an amortization of the solar rebates it has paid (and the applicable carrying costs) in its revenue requirement in this case on the basis that Ameren Missouri has earned above its authorized rate of return during the period the costs of the solar rebate payments were deferred. Meyer Direct Testimony, pp. 11-12. Notably, Meyer did not at any point question the prudence of the solar rebates paid by Ameren Missouri.

5. Meyer’s testimony violates the Stipulation MIEC freely entered into as well as the Commission’s Order requiring that all parties to the Stipulation comply with its terms. Consequently, his testimony is improper and inadmissible, as would be any testimony from Meyer or any other person acting on MIEC’s behalf, in opposition to the solar rebate regulatory asset amortization sought in this case.

¹ Through the true-up period in this case, Ameren Missouri has recorded \$88,133,149 of solar rebate payments to the regulatory asset, plus 10% for carrying costs, as provided for in the Stipulation.

6. In its Suggestions in Opposition to Ameren Missouri's previously filed Motion in Limine or to Strike Testimony ("Motion to Strike") of Meyer regarding Ameren Missouri's recovery of solar rebates, MIEC desperately attempts to avoid its obligations under the Stipulation by arguing that Meyer's testimony is not in breach of the Stipulation and the Order's requirement that MIEC abide by it. MIEC's argument: that it does not question whether Ameren Missouri should "recover" from ratepayers the costs of the solar rebates, but rather, that Meyer's testimony is nothing more than an assertion that those costs have "already been" fully recovered through rates. MIEC's Suggestions in Opposition to Ameren Missouri's Motion to Strike, Pg. 5 at ¶ 9.

7. Longstanding Missouri caselaw demonstrates that MIEC's argument is simply wrong. Under Missouri law, a return authorized by the Commission when it sets rates is simply a target and any earnings that are actually realized by the utility above that target are the property of the utility. *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Mo. 1950) ("When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions."). Put another way, an authorized return is not a ceiling on what a utility can earn, nor is it a floor. *Id.* ("No maximum or minimum return was determined when the rate was established.").

8. Missouri caselaw further establishes that, as a matter of law, customers do not pay a utility's costs, but rather, pay only for the service being provided. *State ex rel. Empire Dist. Electric Co. v. Public Service Com.*, 100 S.W.2d 509, 512 (Mo. 1936), quoting *Board of Public Utility Comrs. v. New York Telephone Company*, 271 U.S. 23, 70 (1926) ("The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying

taxes and operating expenses, including the expense of depreciation, is the company's compensation for the use of its property. * * * Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other [1194] operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.'").

9. Taken together, these longstanding principles of law demonstrate that a claim by MIEC, or by any other party, that because Ameren Missouri's unadjusted per-book earnings happened to reflect a rate of return in excess of its authorized rate of return means that Ameren Missouri has "already recovered" the solar rebate payments it was required by law to pay is simply wrong as a matter of law. The consequence of adopting MIEC's argument will be a write-off in 2015 of approximately \$96 million in before-tax income caused by the false premise that Ameren Missouri can be made to drastically reduce its net income in 2015 because of per-book earnings above the target return in a prior period, and under the equally false premise that customers "paid for" the solar rebates, when in fact they did no such thing. MIEC is objecting to recovery through rates of the solar rebates *Ameren Missouri* paid, and is doing so on a basis other than imprudence. The Stipulation prohibits MIEC's attempt. Meyer's testimony should not be admitted, and he should not be allowed to testify in opposition to the amortization of the solar rebates that have been paid through inclusion in the revenue requirement in this case.

Objection to Mr. Dittmer's Testimony

10. Despite its arguments in opposition to the Motion to Strike, Ameren Missouri's Motion to Strike apparently was sufficient cause for concern to motivate MIEC to secure an

alternative avenue to attempt to get this evidence in, for fear that the Commission would in fact strike or otherwise rule as inadmissible Meyer's testimony.

11. In an attempt to ensure the Commission would hear testimony arguing against Ameren Missouri's recovery of its solar rebate costs, MIEC decided to use another party-- Consumers Council of Missouri ("CCM")--as cover to get around the Stipulation. Two days prior to the date rebuttal testimony was due, MIEC's attorney independently approached Mr. James Dittmer ("Dittmer") about providing similar testimony, ostensibly as a witness for CCM. MIEC's theory, as communicated to Mr. Dittmer, was that because CCM was not a party to the Stipulation it would thus be free to object to Ameren Missouri's recovery of the solar rebates on a ground other than imprudence. After communications with both counsel for MIEC and Meyer, Dittmer was ostensibly retained by CCM and provided rebuttal testimony in which he similarly recommends -- on grounds identical to those argued by Meyer -- that the Commission reject Ameren Missouri's request to reflect a three-year amortization of deferred solar rebate costs in its revenue requirement in this case. Dittmer Rebuttal Testimony, pp. 10-11.

12. That MIEC is effectively using CCM and Dittmer to do indirectly what it cannot do directly is evidenced by admissions made by Dittmer and Meyer in their recent depositions, together with the behavior of MIEC and CCM.

13. In his recent deposition, Dittmer provided the following explanation of how his involvement in this case transpired:

Q: So Ms. Vuylsteke, on behalf of MIEC, called you on the 14th of January, right?

A: *Correct.*

Q: And she discussed with you the fact that Ameren Missouri had filed a motion to strike Greg Meyers' testimony relating to solar rebates, did she not?

A: *Definitely came in somewhere in the conversation.*

Q: And she expressed concern that the commission might strike that testimony and if that were to happen then there would be no evidence in the record, there would be no witness in this case who would be sponsoring a disallowance of the amortization of solar rebates? Did she discuss that with you?

A: *Well, I mean, I don't know exactly how the words were stated but, yeah, that message was relayed that there was now an issue that their witness on this issue – their witness on the issue was the only witness who had filed testimony on that issue and they had a concern. They thought they would win. Hopefully would win their motion to keep Mr. Meyers' testimony in but there was a concern at that point.*

Q: And so, she asked whether you would be willing to file testimony essentially adopting the same or similar position that Mr. Meyer had adopted, is that true?

A: *A version. I mean, first she was just asking—she said I—we have an issue and it's a very fast issue. She said, No. 1, do you even have the time to do it? And, No. 2, here's what the issue looks like. Is it something you would be comfortable sponsoring? So, yes, I think the answer to that question is yes. There was an indication of whether I would be willing and able to sponsor a position similar to, if not identical to Mr. Meyers.*

...

Q: What was said about CCM and at what point in this conversation was the name “Consumers Council of Missouri” or the acronym “CCM” brought up?

A: *Well, again, everything was rapid paced but it was very early on in the discussion that the Consumers Council had not signed the stipulations or whatever issues and at that point I didn't know what they were that they had with Mr. Meyer, would never be an issue for the Consumers Council and therefore the Consumers Council was in all likelihood looking for a witness for this issue....*

...

Q: Did you discuss terms and conditions of the engagement with Ms. Vuylsteke during that very first conversation?

A: *She said, as I recall, that she was, you know, that Utilitech is on board with MIEC, but it's the Consumers Council that would be retaining you if you decide to go forward on this engagement. And I think she said, if it doesn't work, you know, you can expect to be paid for the hours that you're putting in on under the MIEC but, the belief and thought was that it was going to be a Consumer Council's client.*

Deposition of James R. Dittmer, Feb. 10, 2015, 33:25-35:12; 36:15-25, 43:19-

44:5.

14. Dittmer plainly admits in his deposition that he was first contacted by MIEC's attorney and told that MIEC had concerns over whether its witness, Meyer, would get to testify

on the solar rebates issue, and asked Dittmer if he would be willing to provide testimony of the same nature on behalf of CCM, who was not a party to the Stipulation that was restraining MIEC. MIEC even agreed to compensate Dittmer for time he spent reviewing the issue, should CCM not ultimately retain him. This testimony clearly indicates that MIEC, concerned the Commission would deny admissibility of Meyer's testimony on the issue of solar rebate recovery as a breach of the Stipulation, conspired with CCM to procure a witness willing to offer testimony in line with Meyer's.

15. In his recent deposition, Meyer admitted that he had suggested Dittmer as a possible witness to replicate him, and even joined in communications with Dittmer in an attempt to educate him on the testimony required.

Q: So you had some discussion with Ms. Vuylsteke about finding a potential witness that CCM could sponsor on the solar rebate issue, right?

A: *Yes.*

...

A: *At one point Ms. Vuylsteke, myself, Mr. Dittmer, and I'm not sure, I think Mr. Coffman may have been on the phone where we actually discussed the solar rebate issue and, in particular, the interpretation that I have.*

Deposition of Greg Meyer, Feb. 17, 2015, 31:19-22, 34:13-17.

16. Immediately after taking Dittmer's deposition, counsel for Ameren Missouri sent Dittmer a data information request seeking "copies of each and every e-mail (including any attachments) by and between Ms. Vuylsteke and/or Mr. Meyer and/or any other person acting by or on behalf of Bryan Cave, MIEC, or Brubaker and Associates, and Mr. Dittmer, that was sent or received between January 14, 2015 and the present." Data Request, Feb. 10, 2015.

17. Counsel for CCM objected to this data request on the grounds that "it requests information and documents that are protected from discovery by the attorney client privilege and

by the attorney work-product doctrine.” CCM’s Objections to Data Request, Feb. 16, 2015.

This assertion of privilege further demonstrates that CCM’s so-called “engagement” of Dittmer in fact, in substance, reflects MIEC procurement of a witness to advance MIEC’s position in violation of the Stipulation.

18. That privilege could not possibly apply unless CCM and “its” witness Dittmer are in fact MIEC’s instruments in this case is demonstrated by the fact that even if, for the sake of argument, communications between Dittmer *and CCM’s attorney* alone might be privileged, under no circumstances would Missouri law support the conclusion that that communications between *MIEC’s attorney* and CCM’s witness are privileged, much less communications involving the two witnesses. The data request did not request any communications between CCM’s attorney and Dittmer alone, but only communications that involved (ostensibly) a third party – MIEC. The fact that CCM’s attorney objected to this particular data request on grounds of attorney-client privilege and work product protection demonstrates conclusively that CCM is acting on MIEC’s behalf. This indirect opposition by MIEC to the amortization of the solar rebates on a ground other than imprudence is just as much a violation of the Stipulation and the Order as is Meyer’s direct opposition.

19. Ameren Missouri concedes that, had CCM acted unilaterally, there would be no objection to Dittmer’s testimony, but under the present facts CCM and Dittmer were clearly recruited by MIEC in a last ditch effort to get around the Stipulation and Order by which MIEC is bound.

20. The Commission cannot sanction a party’s failure to abide by a Stipulation the party freely entered into, much less one with which the party was ordered to comply. Failure to

sustain these objections would allow MIEC to skirt its obligations under the Stipulation as well as those imposed by the Order, and for that reason, these objections should be sustained.

WHEREFORE, Ameren Missouri prays that the Commission make and enter its order sustaining Ameren Missouri's objection to the admissibility of testimony, both pre-filed or otherwise, from witnesses Greg R. Meyer² and James R. Dittmer addressing the recovery of solar rebates deferred by Ameren Missouri pursuant to the Commission's previous Order Approving Stipulation and Agreement.

SMITH LEWIS, LLP

/s/ James B. Lowery
James B. Lowery, #40503
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918
(573) 443-3141
(573) 442-6686 (Facsimile)
lowery@smithlewis.com

Wendy K. Tatro, #60261
Director & Assistant General Counsel
Ameren Missouri
One Ameren Plaza
1901 Chouteau Avenue
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
(314) 554-3484
(314) 554-4014
AmerenMissouriService@ameren.com

ATTORNEYS FOR UNION ELECTRIC
COMPANY d/b/a AMEREN MISSOURI

Dated: February 23, 2015

² The specific portions of Mr. Meyer's testimonies to which the objection should be sustained are listed in Exhibit A hereto. The objections should be sustained as to Mr. Dittmer's rebuttal testimony in its entirety.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 23rd day of February, 2015.

/s/James B. Lowery
James B. Lowery

Exhibit A

Portions of Direct Testimony and Schedules of Greg R. Meyer that should not be admitted:

Page 2, Lines 7-10.

Page 5, Table 1, Categories 4 and 14.

Page 11, Line 1 – Page 15, Line 6, including the graph on Page 13.

Page 24, Line 7 – the word “four” should be changed to “three.”

Page 24, line 8, starting with the word “First” and lines 8-11.

Page 28, Line 3 starting with “Highly Confidential Schedule GRM-4” through Line 6

Page 28, Line 11, strike “reductions for solar rebates and”.

Schedule GRM-3

Schedule GRM-4 – all of the Graph Index, except the description of Graph 1.

Schedule GRM-4, pages 2-5.

Portions of Surrebuttal Testimony and Schedules of Greg R. Meyer that should not be admitted:

Page 8, Line 7 to 13, Line 13.