

**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)
Increase Its Revenues for Retail Electric Service.)

Case No. ER-2011-0028

**MOTION TO STRIKE, OR OTHERWISE DISALLOW, PORTIONS OF
THE PREPARED SURREBUTTAL TESTIMONY OF DAVID MURRAY**

Union Electric Company, d/b/a Ameren Missouri (“Ameren Missouri”), hereby moves the Missouri Public Service Commission (“Commission”) for an order striking, or otherwise disallowing, portions of the prepared surrebuttal testimony of Staff Witness David Murray, which was filed in this case on April 15, 2011. As shown herein, Mr. Murray’s surrebuttal testimony contains a new basis for a \$31 million disallowance not previously identified in the Staff’s direct case, which violates the Commission’s rules regarding pre-filed testimony, as well as the Order Adopting Procedural Schedule entered by the Commission in this case.

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

1. Early in this rate case, Ameren Missouri filed a motion specifically requesting that this Commission clarify in its order designating a procedural schedule the requirement that Staff make clear in its direct testimony the basis for its case-in-chief on the results of the construction audit of the Sioux scrubber project.
2. Staff opposed Ameren Missouri’s motion, stating that such language was unnecessary, given the requirements found in Commission rule 4 CSR 240-2.130(7). Indeed, that rule defines direct testimony to include “all testimony and exhibits asserting and explaining that party’s entire case-in-chief.” 4 CSR 240.2.130(7)(A). In addition to this rule which Staff

acknowledged it was subject to, Staff also opposed Ameren Missouri's motion based upon its own assurances that it would comply with the requirement.

3. Noting that the Staff "fully intends to make its direct case regarding the Sioux scrubbers," that the Commission rule is "quite clear" as to what must be included in direct testimony, and that the clarifying language requested by Ameren Missouri was "an unnecessary duplication of the requirement of the rule," the Commission denied Ameren Missouri's motion. Order Adopting Procedural Schedule and Establishing Test Year at 2-3.

4. Notwithstanding these statements by Staff, certain portions of the surrebuttal testimony of Mr. Murray violate the Commission rule and this Commission's procedural order.

5. On March 25, 2011, Mr. Murray filed rebuttal testimony on the issue of the Company's rate of return; he did not, however, file testimony on any issue in this rate case related to the Staff's audit of the Sioux scrubber project.

6. It was Staff auditor Roberta Grissum who conducted the construction audit of the Sioux scrubber project and who authored the audit report on that project, which was filed in Staff's direct case. In that audit report, Ms. Grissum recommended disallowance of \$31 million of the Company's investment in the scrubber project, claiming that the Company's decision to delay the Sioux scrubber project in November 2008 was imprudent. Why did she claim the decision was imprudent? Although Ameren Missouri contended that because of the severe credit crisis in the fall of 2008, it needed to improve liquidity by slowing down or deferring several construction projects (including the Sioux scrubber project) as well as operating and maintenance costs, Ms. Grissum expressed her belief that Ameren Missouri's access to \$540 million under its credit facility at the time was sufficient. *See* Staff's Construction Audit and Prudence Review of Sioux Wet Flue Gas Desulfurization Project at 42; *see also* Deposition of Roberta Grissum at

79:4-6 (“The basis of my disallowance from that paragraph is that they did have access to the credit facilities at the time the decision was made.”).

7. Although he did not offer direct or rebuttal testimony regarding the Sioux scrubber project, Mr. Murray did, however, provide some assistance to Ms. Grissum when she prepared the Staff’s February 4, 2011 audit report regarding the Sioux scrubber project. In a March 31, 2011 deposition—taken 6 days **after** Ameren Missouri filed its rebuttal testimony (including the rebuttal testimony of Mr. Jerre Birdsong), Mr. Murray described his contribution to that audit report as follows:

Q: What involvement did you have, if any, in the work that went into the Staff report? That was bad. What do you know about the scrubber issue? How is that?

A: I’m – I was asked to look at what was available as far as credit facility and capital issuances on or around the fall of `08, early `09. And, you know, that’s pretty well the extent of what my involvement was. I did not – It was just seeking my – my knowledge about what I was aware of. I do the finance cases or supervise the finance cases if somebody in the department works on it.

Deposition of David Murray at 104:8-21.

8. In fact, Mr. Murray’s portrayed his participation in the audit report as so minimal that he did not have an independent opinion that the \$31 million proposed by Ms. Grissum should be disallowed; as a consequence, he testified that he did not anticipate offering any testimony on the topic:

Q: Do you have any independent opinion about whether the \$31 million incurred during the construction delay for the Sioux scrubber should be disallowed?

A: I didn’t sponsor that disallowance so, no, I don’t have any opinion either way.

Q: Would you be offering any testimony at the hearing on that subject?

A: Not unless called, I don’t believe I will.

Q: Would you expect your testimony would be limited to the fact of that there was a debt issuance and there was an equity issuance, as reflected in the Staff report?

A: Yes.

Deposition of David Murray at 104:22-105:10.

9. Even when Mr. Murray expressed in his deposition a “concern” regarding whether Ameren Missouri was getting its “fair share” of the credit facility, he again assured Ameren Missouri’s attorney that he did not have an opinion whether Ameren Missouri’s decision to delay construction was prudent:

Q: It sounds like you are describing a general concern. I guess my question is more limited to the situation with the Sioux plant and the construction delay. **Do you have an opinion about whether Ameren Missouri acted prudently in delaying construction at the plant?**

A: **No.** Like I say, I didn’t sponsor anything regarding that.

Deposition of David Murray at 110:11-111:13 (emphasis added).

10. In spite of Staff’s assurances that it would file in its direct case the results of its audit of the Sioux project and Mr. Murray’s own assurances that he did not hold any opinions as to the \$31 million disallowance proposed by Ms. Grissum, Mr. Murray included in his surrebuttal testimony filed on April 15, 2011, testimony that contained opinions he had earlier claimed he would not have in support of the disallowance of those costs.

11. In his surrebuttal testimony, Mr. Murray offers his reason for contradicting his prior deposition testimony:

Q: Did you indicate in Ameren Missouri’s deposition of you on March 31, 2011, that you did not plan on filing testimony regarding the Sioux WFGD Project?

A: Yes, but that was before I read Mr. Birdsong’s rebuttal testimony.

Surrebuttal Testimony of David Murray at 27:12-14.

12. In his surrebuttal testimony, Mr. Murray went on to identify his “specific area of concern” about the testimony of Ameren Missouri witness Birdsong as: “Mr. Birdsong’s

testimony regarding his recollection and characterization of a conference call Ameren Missouri had with Staff on October 21, 2008.” Surrebuttal Testimony of David Murray at 27:17-19. Fair enough—Ameren Missouri does not object to Mr. Murray’s testimony regarding the conference call and will not oppose otherwise admissible testimony on that event at the hearing of this rate case.

13. Ameren Missouri does, however, strongly object to the remainder of Mr. Murray’s surrebuttal testimony in which he supports the \$31 million disallowance proposed by Ms. Grissum—but for an entirely different reason than that relied upon by Ms. Grissum. Why? Because Staff’s attempt amounts to nothing more than classic “sandbagging” and violates the rule of this Commission regarding testimony, Staff’s own assurances that it would follow this rule, and the basic notions of fairness and due process.

14. In his surrebuttal testimony, Mr. Murray returned to the “concern” he expressed in his earlier deposition—a concern that did not prompt him, at the time, despite being asked, to have an opinion one way or another about the disallowance—but now opined that “**Staff could make recommendations to disallow costs Ameren Missouri incurred due to its impaired credit quality**” because of Ameren Missouri’s sharing of a credit facility with Ameren Corporation and Ameren Corporation’s unregulated generating subsidiary, which Mr. Murray refers to as Ameren Genco. Surrebuttal Testimony of David Murray at 33:3-6¹ (emphasis added).

¹ Unsurprisingly, Mr. Murray also attempts to make this testimony relevant on the ground that it provides a rationale for the Staff’s opposition to Ameren Missouri’s request for authority to issue long-term debt in November 2008. Surrebuttal Testimony of David Murray at 33:18-21. Ameren Missouri disputes that this was the reason Staff gave in the conference call for its opposition to Ameren Missouri’s request; however, even if it were, it remains wholly unfair and in direct violation of Commission rule to allow this testimony to be offered as a new and alternative **basis** for disallowance.

15. As explained above, this was not Ms. Grissum's basis for the disallowance.

Moreover, she testified under oath that any surrebuttal filed by Mr. Murray would be irrelevant to her reason for proposing the disallowance:

Q: Regardless of what issue he [Murray] will talk about, he will talk about in his surrebuttal testimony, not information that you needed in order for you to justify the disallowance of those costs based upon your disagreement with the company's decision to delay due to the financial crisis, fair?

A: Fair.

Deposition of Roberta Grissum at 109:15-21.

16. By filing this testimony at this late date, the only conclusion that can be drawn is that Staff wants to provide the Commission with a new and alternative basis for disallowing \$31 million in costs (that Ameren Missouri's access to sufficient credit was **insufficient** because it had to share it with Ameren Missouri affiliates) just in case its original reason (that Ameren Missouri's access to credit was **sufficient**) is not accepted by the Commission. Staff is doing precisely what it promised it would not do and is doing it at a time when Ameren Missouri is not afforded the opportunity to respond.

17. Moreover, the Staff has no valid excuse for engaging in such sandbagging. First and foremost, Ameren Missouri described in its original case, through the direct testimony of Ameren Missouri witness Mark Birk, the "significant schedule change caused by the liquidity crisis in late 2008" [Direct Testimony of Mark C. Birk at 19:16-18], and the resulting increase in construction costs due to "the need to defer 2009 capital expenditures at AmerenUE due to the severe liquidity crisis in the Fall of 2008 and early 2009" [Direct Testimony of Mark C. Birk at 20:3-5]. Moreover, the Company explained in more detail its justification for the delay in response to Staff Data Request No. 139, which Ms. Grissum cited in her audit report. Consequently, Staff was not surprised by Mr. Birdsong's defense of Ameren Missouri's

justification for the project delay, nor is Mr. Murray now relying upon new evidence for his opinion—the basis for Mr. Murray’s justification lies primarily in the same 2008 10-K for Ameren that he relied upon when provided his “assistance” to Ms. Grissum as she prepared her audit report.

18. Even more perplexing is the fact that when Ms. Grissum consulted with Mr. Murray as she prepared her audit, Mr. Murray **actually wrote** that portion of the audit report that dealt with the \$31 million disallowance on the grounds given by the Staff: that Ameren Missouri’s access to credit was **sufficient** at the time:

Q: And how did you determine that Ameren Missouri had access to 540 of it?

A: I do not know where Mr. Murray came up with that number. I assume he obtained that from the annual report **like he says in his paragraph.**

* * *

Q: So it was enough that Mr. Murray verbalized that opinion to you for you to believe that the decision was imprudent?

A: My conversation with Mr. Murray led me to believe that Ameren Missouri specifically had access to the capital markets and sufficient access to its credit facilities to be able to continue their project through that period of delay without incurring an additional \$31 million that the company is seeking to recover from the rate payors [*sic*] through rates.

Q: Ms. Grissum, that attached e-mail or the e-mail attachment to your response of data request 19?

A: Yes.

Q: It looks like you initially sent him a draft of proposed language and that he gave you a response. Did he edit your response? It's hard for me to tell.

A: I believe I was referring him to my section of the construction report that I had drafted up to that date.

Q: And he says, here's what I suggest, sorry it took a while. Let me know if you have any questions or would like to discuss and then he's got a text that's inserted in there which suggests to me that he's edited or changed your initial draft in some way. Is that a fair assumption?

A: **No. The reason I was directing him to my construction audit report was that I wanted him to insert in the space that I had reserved for him and so he needed to see what was before and after where his paragraph was going to go to make sure that it was fluid with what I had written.**

Deposition of Roberta Grissum at 79:25-80:9, 91:2-92:10 (emphasis added) (the referenced e-mail is attached as Exhibit A). Incredibly, Staff's change in position, reflected in its offering a new basis for disallowance in Mr. Murray's surrebuttal testimony, is based upon opinions by Mr. Murray that are entirely different from the original basis Staff provided in its audit report—a **basis actually drafted by Mr. Murray!** In effect, Mr. Murray is changing his own position, but is waiting until surrebuttal testimony to do so.

19. Had the Staff done what it should have done—what it could have done, what it said it would do, and what the Commission's rules and procedural order required it to do—the Company would have had a full and fair opportunity to file rebuttal testimony on this issue. Instead, having had months and months to support its case, the Staff dredges up a new basis for disallowance that contradict its own audit report just 12 days before the evidentiary hearings in this case are to begin.

20. To allow Staff to place at issue this late in the proceeding an alternative basis for the disallowance of \$31 million in costs related to the Sioux Scrubber Project—in fact, a reason which Ms. Murray testified just a few weeks earlier would NOT form the basis for disallowance of those costs—demonstrates a complete and utter disregard for fairness, due process or good faith, let alone the fact that it is a violation of the Commission's rule and contradiction of the Staff's own promise to place its direct case in its rebuttal testimony. Consequently, this Commission should strike those portions of Mr. Murray's surrebuttal testimony which suggest that the disallowance of delay costs is justified because of the inability of Ameren Missouri to have access to its own credit facility.

21. If, despite these facts, the Commission determines not to strike Mr. Murray's testimony as requested herein, the Company should be given a full and fair opportunity to

respond to Mr. Murray's new opinions by allowing the Company to conduct additional direct examination of Ameren Missouri witness Jerre Birdsong when Mr. Birdsong takes the stand on this issue during the evidentiary hearing.

WHEREFORE, for all the reasons stated herein, Ameren Missouri hereby requests the Commission to enter an order that strikes or otherwise disallows the Surrebuttal Testimony of David Murray, page 29, line 13 through page 33, line 6, and page 33, lines 18-21, and that prevents Staff witness Murray, or any other witness, from presenting that testimony or otherwise entering it into evidence in this case; or from attempting to present evidence or argument in any other manner in this case consistent with or in support of the new justification and basis offered by Mr. Murray for the Staff's proposed \$31 million disallowance. If, however, the Commission denies this requested relief, the Company requests, alternatively, that it be given a full and fair opportunity to respond to Mr. Murray's new basis by allowing the Company to conduct additional direct examination of Ameren Missouri witness Jerre Birdsong when Mr. Birdsong takes the stand on this issue during the evidentiary hearing.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served via e-mail on counsel of record for all parties of record in this case, on this 21st day of April, 2011.

/s/Michael R. Tripp

Michael R. Tripp

No. : Ameren Missouri -Staff-019

Data Information Request
From Union Electric Company d/b/a Ameren Missouri
MPSC Case No. ER-2011-0028

Requested From: Missouri Public Service Commission Staff
Requested By: James B. Lowery
Date of Request: March 30, 2011

Information Requested:

In Staff's Construction Audit and Prudence Review of Sioux Wet Flue Gas Desulfurization Project, Staff references at page 42 an analysis provided by David Murray. With regard to that analysis, please provide the following information:

1. Provide any written (includes electronic) copies of Mr. Murray's analysis.
2. If no written copies of Mr. Murray's analysis exist, please describe in detail the analysis Mr. Murray provided which was relied upon by Staff in any conclusions reached or decisions made with regard to recommending disallowances based on the delay in construction due to the financial crisis.
3. Provide any written notes (includes electronic) made or otherwise recorded by Roberta Grissum documenting the analysis provided by Mr. Murray.

Response:

Provided by: Roberta Grissum, Regulatory Auditor

No written analysis exists from Mr. Murray other than the language provided below. The only written correspondence between Mr. Murray and Roberta Grissum regarding this matter is contained in an email dated 1/23/2011 which follows below. As a result of the information provided by Mr. Murray in this email, Ms. Grissum engaged in a more detailed conversation about Ameren Missouri's access to capital during that time period. Mr. Murray and Ms. Grissum discussed the debt and equity issuances that occurred in 2009, the guidelines under which Ameren or Ameren Missouri must operate in order to draw from their credit facility (e.g., use of funds guidelines, credit ratio requirements, etc.) and contractual obligation of the credit facility as well as the terms of the credit facility along with the availability of funds from the credit facility during fall 2008 and into early 2009. The overall ability for Ameren and Ameren Missouri to access the capital markets was also discussed. Ms. Grissum relied upon the financial knowledge of Mr. Murray shared during this conversation to conclude that Ameren Missouri did have access to the credit facility during the fall of 2008 and continuing into 2009.

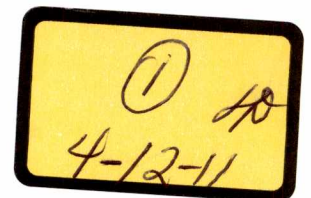


EXHIBIT A

From: Murray, David Sent: Sun 1/23/2011 1:32PM
To: Grissum, Roberta
Cc: Carle, Erin
Subject: RE: Ameren Sioux WFGD Construction Audit Report
Attachment: DRAFT 1-19-2011_Proposed Language for Audit Staff Report 1-23-2011.docx (34 MB)

Here is what I suggest. Sorry it took a while. Let me know if you have any questions or would like to discuss.

Text of Attachment:

Although Ameren and UE were limited in their access to the commercial paper market during the fall of 2008, due to both a Moody's downgrade of their short-term credit ratings in August 2008 and the credit crisis in the fall of 2008, Ameren and Union Electric had liquidity available to it through its short-term credit facilities. As of December 31, 2008, Ameren and UE had approximately \$540 million available under the credit facility dedicated to the needs of Ameren, UE and Genco. Although further draws on this facility would have reduced the capacity available for other needs, Ameren and UE demonstrated their ability to issue long-term capital to refinance short-term capital when Ameren issued \$535 million in common equity in September 2009 and UE issued \$350 million of 8.45% 30-year First Mortgage Bonds in March 2009.

From: Grissum, Roberta
Sent: Wednesday, January 19, 2011 12:17 PM
To: Murray, David
Cc: Carle, Erin
Subject: Ameren Sioux WFGD Construction Audit Report

Dave –

Could you take a look at the section of my report that addresses cost overruns on Page 7 and provide me with some language re: Ameren's access to capital markets as well as language re: Ameren's debt and equity issuances that occurred during that time frame to support my disallowance of the additional costs related to project delays and/or construction slow down? Thanks.

Erin - Please proof what I have written so far and offer any suggestions you deem appropriate for consideration. Thanks.

Roberta Grissum

Roberta Grissum

Utility Regulatory Auditor IV

Missouri Public Service Commission

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Life is all about attitude. Look for the positive and be part of the solution rather than the problem.