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 TO STRIKE CROSS-SURREBUTTAL TESTIMONY OF CHARLES H. NORRIS, P.G. AND MOTION FOR EXPEDITED TREATMENT

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri"), and moves the Public Service Commission ("Commission") to strike the cross-surrebuttal testimony of witness Charles H. Norris and, pursuant to 4 CSR 240-2.080(14), moves for expedited treatment of said motion. To support its motions, Ameren Missouri states:

Background

1. The Commission's March 19, 2013 *Order Adopting Procedural Schedule* required that Non-Ameren Missouri parties file rebuttal testimony by May 31, 2013.

2. Although Labadie Environmental Organization ("LEO") and Sierra Club (collectively, "Intervenors") had filed the Certification of Charles H. Norris back on April 26, 2013, which indicated that Mr. Norris was an expert working for Intervenors, they did not file rebuttal testimony from Mr. Norris or, for that matter, from any witness.

3. Instead, when the undersigned counsel for Ameren Missouri pointed out that Intervenors, who obviously oppose the relief sought by the Company, completely failed to file rebuttal testimony explaining that opposition as the Commission's rules require, their counsel indicated that they had deliberately chosen not to file rebuttal testimony and instead "decided they were going to attack it by other than filing prefiled [rebuttal] testimony." While Intervenors

have attempted to claim otherwise, it is obvious that this attack, initially, consisted of them using the local public hearings as their "opportunity to get their concerns out." And that is what they did.[1]

4. Because Intervenors deliberately chose not to file rebuttal testimony, "there was nothing for Ameren Missouri to address through surrebuttal testimony" due on June 28, 2013. *August 14, 2013 Order Revising Procedural Schedule* at 1. The Commission, however, recognizing that "additional issues were injected into this case through testimony offered by members of the public at the local public hearings," issued its order allowing the parties to file surrebuttal testimony because it was "interested in compiling a full and complete record before making a decision in this case." *August 14, 2013 Order* at 2.

5. After Ameren Missouri moved the Commission for clarification of its August 14, 2013 Order on the ground that Intervenors should not be allowed to improperly use surrebuttal testimony to add or bolster their obvious opposition to Ameren Missouri's Application or to otherwise circumvent the Commission's rule requiring that an opponent fully explain their opposition to an application in rebuttal testimony,[2] the Commission explicitly stated that its August 14, 2013 Order was not intended to allow a party to bolster or add to their own case:

> The Commission will clarify that its order **did not waive or modify** the requirements of the Commission's rule regarding the filing of surrebuttal testimony. The Commission's rule allows each party to file surrebuttal testimony that is responsive to matters raised in another party's rebuttal testimony. **That does not permit any party to submit surrebuttal testimony for the purpose of bolstering or adding to their own case.** The Commission will not otherwise

[1] Intervenors' later protestations to the contrary, a review of the local public hearing transcripts reveal that many of these neighbors were members of LEO– often officers or board members – who obviously coordinated the "attack."

[2] 4 CSR 240-2.130(7)(C) requires that rebuttal testimony be filed that "explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case."

> restrict the filing of surrebuttal or cross-surrebuttal testimony by any party. As always, if any party files testimony that does not comply with the Commission's rules any other party may challenge that testimony by appropriate means.

August 28, 2013 Order Clarifying Order Revising Procedural Schedule at 2 (emphasis added).[3]

6. Given that Intervenors had already ignored this Commission's rule requiring that they make their case in opposition to Ameren Missouri's Application in rebuttal by instead attacking Ameren Missouri's application for a CCN at two local public hearings, it was no surprise when on September 13, 2013, Intervenors finally filed what in substance amounted to the rebuttal testimony of their expert, Mr. Norris, attacking Ameren Missouri's request for a CCN.

Why Mr. Norris's Testimony Violates the Commission's Rules, Including its August 14, 2013 Order

7. The sum and substance of Mr. Norris's "cross-surrebuttal" testimony is not to rebut Staff's testimony; rather, Intervenors use Mr. Norris to lodge a belated attack on Ameren Missouri's CCN request by having Mr. Norris explain why they oppose Ameren Missouri's request and also by having Mr. Norris throw-out alternatives. Mr. Norris's testimony is clearly calculated to "bolster" and "add" to the case they put on during the local public hearings.

8. If the Commission's rule mandating that a party who opposes an applicant's direct case (or wants to propose an alternative to it) explain why *in that party's rebuttal testimony* is to mean anything, parties cannot be allowed to file "cross-surrebuttal" testimony that does just that under the guise of "rebutting" another party's rebuttal. This is not a rate case where all parties file direct testimony, with parties then rebutting that direct and, perhaps, filing cross-surrebuttal

[3] And while the August 14 Order addressed the deadline for surrebuttal testimony, it also did not purport to repeal the Commission's rule regarding rebuttal testimony.

in response to a point raised for the first time in another party's rebuttal about which the cross-surrebutting party had no previous opportunity to respond.[4]

9. But that is obviously not the case here. While not acknowledging that this is what he is doing, Mr. Norris rebuts Ameren Missouri witness Craig Giesmann's discussion of the alternatives Ameren Missouri studied, including Mr. Giesmann's contention that the proposed Utility Waste Landfill ("UWL") at the Labadie Energy Center is the best alternative. *Giesmann Direct*, pp. 3-4. Mr. Giesmann contends in his direct testimony that the proposed site minimizes environmental and land use impacts. *Id.* Mr. Norris disagrees. Mr. Giesmann indicates that the site is geologically and topographically suitable for the proposed UWL (*Id.*) – Mr. Norris again disagrees.

10. The bottom line is that there was absolutely nothing that prevented Mr. Norris from making every single allegation he makes in his "cross-surrebuttal" testimony in rebuttal testimony that should have been filed by May 29, 2013. Indeed, Mr. Norris offers no reason of his own for the delayed filing. Moreover, when Ameren Missouri sought permission to file surrebuttal testimony in response to the new issues raised by witnesses at the two local public hearings, Intervenors did not even hint that they desired to file additional testimony in any filing

[4] The classic example occurs in a rate case where the Staff files its direct testimony which proposes a different revenue requirement. The Staff then files rebuttal to the utility's direct case where it might oppose a particular proposal (e.g. a tracker) or propose a modified proposal to the one the utility had made. The Office of the Public Counsel ("OPC") might then cross-surrebut the Staff by either disagreeing with the Staff or proposing an alternative to the Staff's proposal. In that case, OPC had no prior opportunity to rebut the Staff's position.

prior to the Commission first extending the deadline for filing surrebuttal in its August 14, 2013 Order.[5]

11. Rather than let Ameren Missouri have the "last word"[6] on the opposition to its CCN request, Intervenors filed the testimony of their expert rebutting that request almost four months after they had identified him—under the guise of rebuttal to the testimony of Staff witnesses John Cassidy and Claire Eubanks. References to Staff's testimony by Mr. Norris, however, amount to nothing more than pretext for Intervenors to advance what should have been their rebuttal case opposing Ameren Missouri's CCN request.

12. In his testimony on the economic feasibility of Ameren Missouri's proposed UWL, Mr. Norris's purported rebuttal of Mr. Cassidy's testimony that Ameren Missouri had sufficiently evaluated the costs of the project does not constitute proper cross-surrebuttal. Why? Because this testimony is actually offered to contradict or nullify Ameren Missouri's evidence that it has evaluated the costs of the UWL and found it both minimized costs and environmental impacts, as Mr. Giesmann himself had already testified on direct, as cited above. Even more revealing of the true nature of Mr. Norris's testimony is the fact that he is actually rebutting information provided by Ameren Missouri in its data request responses; he does not point to any

[5] The Commission's August 14, 2013 Order notes this fact when it observed that there was no agreement among the parties "on whether provision should be made for filing of additional surrebuttal testimony." *August 14, 2013 Order* at 2.

[6] As it should since Ameren Missouri is the Applicant in this proceeding, bears the burden of proof, and under the procedural schedule ordered by the Commission in this case, rightly was to have the right to open and close, as Missouri courts have routinely recognized. *See Motion for Clarification or, Alternatively, Motion for Reconsideration of August 14, 2013 Order Revising Procedural Schedule, pp. 5-6 (discussing this very issue).*

technical papers or data request responses from the Staff.[7] The information Mr. Norris is responding to is not new information from Mr. Cassidy's rebuttal, either; these data request responses were provided to Intervenors' counsel on April 18, 2013, and presumably to Mr. Norris soon after he certified that he would comply with the Commission's rules in reviewing data. If it looks like rebuttal testimony, smells like rebuttal testimony and walks like rebuttal testimony, the only fair conclusion is that it *is* rebuttal testimony.[8]

13. It is not until page 8 of Mr. Norris's testimony that he again remembers to reference Staff rebuttal testimony. Here, he points to the testimony of Ms. Eubanks regarding Ameren Missouri's operation of a UWL at the Sioux power plant to refute Ameren Missouri's qualifications to operate the proposed UWL. Again, the substance of his testimony rebuts Ameren Missouri's ability to operate the proposed UWL by relying on what he characterizes as Ameren Missouri's failure to respond to data requests.[9] But this is only the first breath of a rather long argument. Mr. Norris then launches into several pages attacking Ameren Missouri's handling of the coal ash ponds at Labadie before moving to Intervenors' broader argument that

[7] Indeed, Mr. Norris cannot because Intervenors submitted no data requests to Staff or any other party for that matter.

[8] And thus Intervenors have violated the Commission's rule regarding rebuttal testimony; hence the instant motion. "As always, if any party files testimony that does not comply with the Commission's rules any other party may challenge that testimony by appropriate means." *Order Clarifying Order Revising Procedural Schedule*, p. 2 (August 28, 2013).

[9] Intervenors also did not submit a single data request of Ameren Missouri. They didn't need to. The Company's Preliminary Site Investigation and Detailed Site Investigation, and Construction Permit Application, were all submitted to MDNR (and were a matter of public record) well before Ameren Missouri filed direct testimony and obviously before Intervenors should have filed rebuttal testimony. They have had most of the information before Ameren Missouri even filed this case, as evidenced by a 25-page letter from Ms. Lipeles to MDNR dated March 14, 2011, that contains allegation after allegation about their view of the inadequacies of the proposed site and the Detailed Site Investigation, including a number of very specific allegations. In the letter, Ms. Lipeles claims Mr. Norris assisted her with the letter. Mr. Norris repeats, but in only general terms, some of those criticisms in his cross-surrebuttal testimony.

coal ash will contaminate the groundwater. And, for good measure, Mr. Norris tosses in as his parting shot at the end of this section of testimony very general references to the violation notices issued to an affiliate of Ameren Missouri in Illinois. These arguments have been and are the substance of Intervenors' opposition to the proposed UWL. As such, they should have been made in their pre-filed *rebuttal* testimony and not at local public hearings or in testimony dressed up as cross-surrebuttal.

14. Little did Ms. Eubanks know her rebuttal testimony that the proposed UWL promotes the public interest and is an improvement over the existing ash ponds would—for the "first" time—raise concerns by Intervenors that the UWL should not be placed in a floodplain or seismic zone, that the ash ponds won't be closed, that the liner design of the UWL did not comply with EPA regulation, or that the natural water table was not properly determined in the Detailed Site Investigation. These arguments against Ameren Missouri's CCN request are not new. Back in December 2010, Mr. Norris, who stated that he was "here tonight from Denver Colorado at the request of LEO,"[10] appeared before the Franklin County Commission (unprovoked by Ms. Eubanks) and made similar arguments: that coal ash is toxic and will pollute the groundwater, that all landfills—even with synthetic liners and clay berms—will leak, and that landfills should not be placed in floodplains or seismic zones. Mr. Norris's testimony is nothing other than Intervenors' re-hashed opposition (i.e. rebuttal) to Ameren Missouri's Application; it is not proper cross-surrebuttal.

[10] Tr., Franklin County Public Hearing, December 14, 2010.

15. Even where Intervenors purportedly respond to the Commission's request that the parties address whether Ameren Missouri had fully studied alternative locations,[11] Mr. Norris's testimony focuses on information in possession of Intervenors well before the deadline for filing rebuttal testimony that should have explained their opposition to Ameren Missouri's CCN request. The focus of Mr. Norris's belated testimony on this point consists of nothing more than very general criticisms and equally general "proposals" for placing the UWL in a non-seismic zone and in a non-floodplain area—again, arguments advanced by Mr. Norris well before any testimony was filed in this case. Repeating allegations they made before the Franklin County Commission and the arguments they have made to MDNR as expert testimony at this stage of the litigation amounts to nothing more than an attempt by Intervenors to deprive Ameren Missouri of the ability to rebut many of the key reasons they "reject… disagree… or propose… an alternative to the moving party's direct case."[12] Had they filed Mr. Norris's testimony as rebuttal on May 29 as the procedural schedule and the Commission's rules require, Ameren Missouri would have been able to file surrebuttal on June 29 addressing it. Intervenors' deliberate disregard of the Commission's orders and rules should not be rewarded.

Why This Improper Testimony Should be Stricken

16. Ameren Missouri recognizes that "[t]he Commission is interested in compiling a full and complete record before making a decision in this case."[13] By waiting to file expert testimony rebutting Ameren Missouri's case at a point when the current procedural schedule does not reflect a further opportunity for *any* party to file testimony in this case, Intervenors threaten to prevent this Commission from having a full and complete record upon which to

[11] *August 14, 2013 Order* at 2.
[12] 4 CSR 240-2.130(7)(C).
[13] *August 14, 2013 Order* at 2.

decide this case. Mr. Norris—though not for the first time but, indeed, the first time in this case—raises several new issues, and he does so in quite broad terms. For example, Mr. Norris suggests that other locations more appropriate for a UWL exist; in fact, locating such sites is "straightforward and easily accomplished"—but he doesn't identify even a single landfill location to support his claim.[14] Yet another example is Mr. Norris's assertion that the cost of the proposed UWL is misleading as it fails to include costs to repair damage to the UWL caused by "known and quantifiable hazards specific to this site."[15] These are just a few of the generalized criticisms that Mr. Norris lodges against the proposed UWL—criticisms to which the existing procedural schedule affords Ameren Missouri no opportunity to respond. As a result, the Commission does *not* have a complete record on which to make a decision, and the party with the burden of proof – Ameren Missouri – is faced with new, broad allegations that should have been raised more than three months ago. The prejudice to Ameren Missouri as the applicant is clear.

17. Consequently, the impact of what appears to be Intervenors' "ends-justifies-the-means" approach amounts to far more than a mere violation of meaningless procedural rules that set merely administrative or technical deadlines—entirely justified by Intervenors' lofty goal of protecting the public from untold environmental harm.[16] All parties coming before this

[14] *Cross-surrebuttal Testimony of Charles H. Norris, P.G.* (September 13, 2013) at 23-24.

[15] *Norris Cross-surrebuttal Testimony* at 5.

[16] While there may be some temptation to allow Mr. Norris's testimony on the ground that it sounds the alarm bell of impending environmental catastrophe, the Commission should first consider the extremely general nature of Mr. Norris's allegations, as well as the fact that Mr. Norris has sounded the same alarm bell before the Franklin County Commission and MDNR—the first actually having the responsibility to examine these very issues in determining whether to, in Franklin County's case, allow development of the UWL, and the second having the

Commission—private customers, industrial customers, small utilities, large utilities, and environmental groups—should expect to follow the rules of practice set up by the Commission which insure not only that a complete record is developed, but that it is developed through a fair and orderly process ultimately culminating in a fair evidentiary hearing. Had Intervenors properly filed the testimony of Mr. Norris (working with Intervenors as far back as 2010 and whose testimony is almost entirely based on information in Intervenors' possession long before the May 31, 2013 rebuttal testimony deadline) as rebuttal testimony, Ameren Missouri would have had real reason to file surrebuttal on June 28, 2013, and the Commission would then have had a full and complete record upon which to make its decision. Intervenors would have also have had nearly three months thereafter to prepare for hearing, conduct discovery, etc., if they so desired. But now, with less than two weeks before issues lists and position statements are due and less than a month before evidentiary hearings are to begin, we are dealing with a new expert on the scene, engaged by Intervenors for many months or even years, proferring testimony that should have been filed months ago.[17]

18. If Intervenors are allowed to file expert testimony making their rebuttal case as surrebuttal testimony even after they were cautioned that the Commission intended to enforce its rules, and to do so in contravention of the Commission's rules regarding rebuttal testimony, then what will prevent other parties from acting similarly in future cases before the Commission? Such a precedent will have a significant adverse effect on the Commission's ability to process

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responsibility to determine whether to issue Ameren Missouri a construction permit under MDNR's Utility Waste Landfill regulations.

[17] This severely compresses other parties' ability to prepare for hearing, conduct discovery, etc., whereas timely rebuttal would have afforded ample time for such activities before the evidentiary hearings were scheduled to occur.

cases in a fair and orderly fashion if parties think they can get away with sandbagging their opposition in the way that Intervenors have attempted to do in this case. As our Supreme Court has recognized, it is "essential" that the orderly introduction of evidence occur as a means to prevent "injurious surprises, and annoying delays in the administration of justice." *Meyers v. Drake*, 24 S.W.2d 116, 121 (Mo. 1930). To accomplish this, 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. But because of Intervenors' deliberate decision to skip filing rebuttal testimony in a timely manner, this case has experienced such surprises, delays, and confusion.

Request for Expedited Treatment

19. Given that there are just over three weeks until the evidentiary hearings are scheduled to commence, the issue of whether Mr. Norris's "cross-surrebuttal" testimony will be allowed should be resolved promptly so that the parties can take appropriate steps in light of the Commission's ruling on that issue.[18] Allowing the default period of 10 days to respond to the above-motion would impair a prompt resolution of the issue. Consequently, Ameren Missouri requests that the Commission set a deadline of September 24, 2013, for responses to this Motion and also requests that the Commission rule on the Motion by September 27, 2013.

20. This motion was filed as soon as it could have been (just four business days after Mr. Norris's testimony was filed) under the circumstances. The benefit of a prompt ruling is that it will allow the parties prepare for the scheduled hearings in a more orderly fashion. There will be no harm to Ameren Missouri's customers or other parties, particularly since Ameren Missouri

[18] As referenced below, those appropriate steps would include filing additional testimony in rebuttal to Mr. Norris's "cross-surrebuttal," and engaging in discovery regarding the basis for his opinions, which his testimony largely fails to reveal.

had previously raised the impropriety that would occur if Intervenors attempted to rebut Ameren Missouri's case through "cross-surrebuttal" instead of rebuttal testimony.

Relief Sought

Ameren Missouri respectfully requests that the Commission first set a deadline of September 24, 2013, for the filing of any responses to this motion and enter its order by September 27, 2013, striking the Cross-Surrebuttal Testimony of Charles H. Norris in its entirety. If, despite what the Company believes are clear violations of the Commission's rules, the Commission decides to deny the instant motion, the Company requests that the Commission grant it leave to file additional testimony to rebut Mr. Norris's opinions regarding the alleged shortcomings in Ameren Missouri's Application, which Mr. Norris expressed for the first time in his cross-surrebuttal testimony filed September 13, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served via e-mail to the following on September 19, 2013:

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