

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of)	
Union Electric Company d/b/a)	Case No. ET-2021-0082
Ameren Missouri for Approval of)	Tracking No. YE-2021-0081
Its Surge Protection Program.)	

**AMEREN MISSOURI’S REPLY TO STAFF RESPONSE TO MOTION TO PROHIBIT
CERTAIN CROSS-EXAMINATION**

COMES NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”), and for Reply to Staff’s above-referenced response, states as follows:

1. Staff does not rebut the clear law cited in the Company’s Motion as to what is – and is not – cross-examination. Staff does not rebut that under 20 CSR 4240-2.130(7)(B), it and Public Counsel (“OPC”) are not allowed to supplement their cases, certainly not via questions from each other to elicit information favorable to each of their positions; as noted, the Motion seeks no limit on the questions of any Commissioner. With respect to the points Staff does make, none of them hold up to scrutiny.

2. First, Staff complains about the timing of the motion. There was nothing stopping the Company from simply sitting on its concerns and lodging objections to improper witness examinations during the hearing, which would consume hearing time and burden the record with objections and arguments that can be much more efficiently and effectively dealt with by the Presiding Officer now. No rule – including the rule cited by Staff – has ever prohibited filing a motion in limine, which is what the Company’s motion is, less than 10 days before a hearing. Indeed, by filing it in advance the Company was upfront and transparent *for the benefit of the parties and the Commission*. Staff provided a response nearly as long as the motion itself about one-half day later; Staff had no problem responding.

3. Second, Staff's claim that the Joint List of Issues somehow entitles a party to examine witnesses through something other than *cross*-examination is simply incorrect. Staff in fact misses the entire point: examination of a witness other than for the purpose of testing the witness's credibility or the accuracy of the witness's testimony is simply *not cross-examination at all*. The only agreement among the parties reflected in the Joint list of Issues is that all parties can conduct cross-examination. The motion seeks no limit in that regard.

4. Third, there is no "dangerous precedent" at issue. Indeed, as pointed out in the Motion, such a ruling was typical at the Commission until for whatever reason those orders were no longer entered. The settled law in Missouri – the real precedent – is that what is casually referred to as "friendly cross" is not cross-examination at all. Staff's similar claim that this is an "unprecedented suggestion" is also plainly wrong for the same reasons.

5. Staff's attempt to waive Due Process around is similarly unpersuasive. Sure, Due Process may require allowing a party to *cross*-examine other witnesses. The cases certainly do not support the proposition that Due Process or any other principle of law grants a right to merely examine other witnesses. Indeed, in this context Due Process means the process that is due – what does procedural Due Process require? As Staff points out as did the Company, §536.070, RSMo. establishes the process that is due respecting examining other witnesses: parties have a right to *cross*-examine witnesses on any matter relevant. There is no right to merely "examine" them.

6. Staff's citation to § 386.410 also misses the mark – what does, and does not, constitute cross-examination is fundamental to our adversary system. If this is not a fundamental rule, then the Company is not sure what is.

7. Finally, Staff's long litany of claimed terrible consequences in paragraph 3 of its response completely misstates the relief requested. It is absolutely possible that a witness of a party aligned with the position of another party – e.g., OPC and Staff -- could, during the hearing, be asked a question by a Commissioner that may then call for them to cross-examine the other party's witness, even if they are generally aligned. If parties are only partially aligned, then asking questions to test the credibility/accuracy of the other party's witness's testimony on points for which there is not alignment would constitute proper cross-examination. Indeed, the Company specifically acknowledged in its Motion that there could be instances – which the Presiding Officer is fully capable of dealing with – where there would be a need for Staff to cross-examine an OPC witness or vice-versa. The Motion does not seek to prohibit any such cross-examination. And any more complex issues that could arise in a *different* case with many parties who may be aligned in part but not aligned overall of course can be addressed in *that* case. This is not that case. It involves three parties, two of which are completely aligned against the other. These are not difficult issues, unless the intention is to engage in examination that is not cross-examination in the first place.

Respectfully submitted,

/s/ James B. Lowery

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**ATTORNEYS FOR UNION
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 12th day of April 2021, to all counsel of record.

/s/ James B. Lowery