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.	)))	File No. ER-2022-0337

MOTION TO STRIKE PORTIONS OF SURREBUTTAL TESTIMONY OF CLAIRE M. EUBANKS AND KEITH MAJORS, AND ALTERNATIVE MOTION FOR LEAVE TO FILE SUR-SURREBUTTAL TESTIMONY, AND MOTION FOR EXPEDITED TREATMENT

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri") and hereby moves for an order from the Commission striking a portion of the surrebuttal testimony of Staff witnesses Claire M. Eubanks and Keith Majors relating to justifications raised for the first time in surrebuttal testimonies that improperly attempt to bolster and change the basis for Staff's recommended rate base disallowance for the Company's investment in the Rush Island Energy Center ("Rush Island") and, alternatively, moves for an order granting the Company leave to file sur-surrebuttal testimony to respond to this new justification, and moves for expedited treatment of its motions. In support of its motions, the Company states as follows:

MOTION TO STRIKE

1. On January 10, 2023, as contemplated by the procedural schedule filed by the parties and adopted by the Commission, the Staff filed its direct testimony which includes approximately 5 pages of Rush Island-related testimony from Staff witness Eubanks. The substance of witness Eubank's direct testimony was that due to "the reduced level of usage of Rush Island [due to its status as a system support resource], it is [not] just and reasonable for the

Commission to include the entire rate base of Rush Island in rates in this case."[1] Witness Eubanks went on to suggest that the Company had not fully complied with the Commission's order in File No. EO-2022-0215 to "'include an explanation of how its decisions resulting in the present circumstance were prudent'",[2] indicating that Staff "will address Ameren Missouri's assertion of prudence in its rebuttal testimony and other cases as appropriate."[3] Witness Eubanks then, directly and unequivocally, stated that Staff is *not* recommending a prudence disallowance in this case and "will address any prudency concerns in a future case where appropriate."[4] Finally, witness Eubanks explained Staff's recommended used and useful[5] adjustment as resting simply on a comparison of what Staff indicated would be "normal" generation from Rush Island compared to reduced generation (with Rush Island operating as a system support resource) and then taking the percentage reduction, applying that percentage to Rush Island's rate base, and recommending disallowance of the resulting product. As noted, there was no allegation that the disallowance was based on or justified by any claim that the Company had acted imprudently in causing the reduced generation and, indeed, Staff disavowed that the disallowance was based on any such allegation.

2. In response to Staff's direct testimony, the Company filed rebuttal testimony from two witnesses (John Reed and Andrew Meyer) that addressed the only adjustment – and the only basis for the adjustment – recommended by Staff relating to Rush Island. As Staff later stated explicitly in its own rebuttal testimony, Staff's justification for the adjustment Staff recommended in its direct testimony was that Rush Island is not used and useful due to its

[1] Eubanks Direct, p. 11, l. 16-18.
[2] *Id.*, p. 12, ll. 15 – 16 (citing the Commission's order from File No. EO-2022-0215.
[3] Eubanks Direct, p. 12, l. 19-22.
[4] *Id.*, p. 13, l. 1-4.
[5] Eubanks did not use this phrase in direct testimony but confirmed that this is the basis of the proposed adjustment in rebuttal testimony. Eubanks Rebuttal, p. 20, ll. 6 -9.

reduced generation.[6] That is the issue the Company's rebuttal testimony addressed. The Company did not address Staff's cryptic claims about whether the Company had complied with the above-referenced order in File No. EO-2022-0215 given that Staff explicitly had indicated that it (a) would address its concerns in its rebuttal testimony, and (b) then more explicitly indicated it would address prudence *in a future case.*

3. Staff then filed rebuttal testimony largely consisting of an extended and detailed discussion of the proceedings in the United States District Court for the Eastern District of Missouri in the New Source Review case which, ultimately, led to Ameren Missouri's decision to retire Rush Island rather than installing expensive pollution control equipment at this time. Staff's rebuttal testimony did express disagreement with the Company's direct testimony, which contends that the Company has acted prudently with respect to its decisions relating to Rush Island. However, and of critical importance, witness Eubanks testified as follows:

> Q. Does the Commission need to make a prudence determination in this case in order to adopt Staff's Rush Island rate base adjustment?
>
> A. No. At this time Ameren Missouri is not seeking recovery of the transmission projects (i.e., Statcoms) associated with early retirement of Rush Island. Further, Ameren Missouri intends to seek securitization in a future case. It is Staff's position that that case would be the most appropriate case for the Commission to consider the prudency of Ameren Missouri's decision-making and ultimate recovery of the stranded asset.[7]

The "stranded asset" is of course Ameren Missouri's remaining undepreciated investment in Rush Island.

4. In response to the Company's rebuttal testimony on Rush Island Staff, for the first time in surrebuttal testimony, improperly and explicitly expanded that basis and justification for its adjustment (lower production as a system support resource) so that it now rests, for the first

[6] *Id.*
[7] Eubanks Rebuttal, p. 19, l. 20 – p. 21, l. 2.

time, on claims that the adjustment should be made because of Staff's claims that the Company imprudently caused Rush Island to retire prematurely. Adding a new justification for its position – arguing now that its Rush Island disallowance is justified not simply because of a difference in production but also because of imprudence – is improper as a matter of Due Process, as a matter of compliance with the Commission's procedural schedule adopted in this case, and under the Commission's governing rules.

5. Under basic Due Process principles, the Company is entitled to the process provided for by the Commission's rules and the procedural schedule the Commission adopted. Under those rules and that schedule, Staff was required to file rebuttal testimony by February 15, 2023, and its rebuttal testimony was required to "include *all* testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's [Ameren Missouri's] direct case." 20 CSR 4240-2.130(7)(C) (emphasis added). The Company's direct case both outlined in detail Ameren Missouri's viewpoint and evidence relating to its contention that it acted prudently with respect to Rush Island and included the full undepreciated balance for Rush Island in its rate base used to establish the revenue requirement underlying its filed rates. Not only did Staff not include claim imprudence as reason to disagree with the Company's position that the entire investment in Rush Island should be included in rate base, but Staff indeed *disavowed* that it was basing its disagreement with the Company's direct case on imprudence. If a basis of its disagreement with the Company's position was imprudence; if that was one of the reasons that supported its adjustment, then it was required by law to so state in its rebuttal testimony. It didn't do so. It indeed denied that imprudence was a justification for its adjustment.

6. Nor is Staff's attempt, for the first time in its surrebuttal testimony, to justify its disallowance on the basis of imprudence "responsive to matters raised in another party's rebuttal testimony." The Company's rebuttal testimony in response to Staff's proposed Rush Island adjustment did not address the question of prudence but instead, addressed why Staff's position that a mere reduction in generation as compared to Staff's claimed "normal" did not render Rush Island (or some part of it) not used and useful. Why did the Company rebut that argument? Because that was *the singular basis* for Staff's adjustment, remaining so even after Staff filed rebuttal testimony.

7. Indeed, Staff made it so clear in its rebuttal, as outlined above, that it was not claiming that imprudence justified its adjustment and indeed was not asking the Commission to make any ruling on any prudence question, that the Company only filed limited surrebuttal in response to Staff's rebuttal. As Company Director of Regulatory Affairs Steve Wills' surrebuttal testimony explained, the Staff's Rush Island adjustment "is not based on an allegation of imprudence"[8] and consequently, the Company filed a "limited response to Staff's allegations in this case in order to clarify the record on these issues."[9] The Company did not rebut any claim that there should not be a disallowance of Rush Island rate base grounded on a claim that imprudence justified the disallowance and that imprudence had harmed customers *because no such claim was being made*. Instead, the Company filed surrebuttal solely to take issue with Staff's *characterization* of the record before the U.S. District Court and to put the isolated parts of that record cited by Staff in context. The impact of any claimed imprudence was, as Staff itself indicated, to be left for the later securitization case.

[8] Wills Surrebuttal, p. 2, l. 7 - 20.
[9] *Id.*, p. 2, l. 21 – p. 3, l. 1.

8. Any fair reading of Staff's testimony demonstrates that it has now improperly added a new reason to support its disallowance:

> **Eubanks Surrebuttal, p. 9, ll. 5 – 11**: "However, if the utility made decisions after the facility was already included in rates that caused costs to be *imprudent,* then those decisions have to be reviewed to ensure that they were not detrimental to ratepayers. The regulatory compact does not work if the game is 'heads the utility wins, tails the ratepayers lose'. Every and all decisions that the utility management makes must be subject to scrutiny . . . Under Mr. Reed's argument, the utility will *always be shielded* from its decisions" (emphasis added).

Any fair reading of those statements is that Eubanks is now claiming that Staff's disallowance is supported by imprudence, both because Eubanks uses that term explicitly and because what Eubanks said is patently untrue unless the basis for the disallowance is imprudence, because clearly utilities are not always shielded from its decisions *if they act imprudently.* Clearly Staff became concerned, in the face of witness Reed's rebuttal testimony, that merely resting its disallowance on a used and useful theory may not be enough for the Commission, prompting Staff to add another dimension, that is, that the disallowance is justified by imprudence, a claim Staff had previously disavowed that is, until surrebuttal, when the Company would have no opportunity to respond.

Majors Surrebuttal, p. 9, l. 8 – p. 12, l. 26.[10]

Witness Majors, attempting to anchor three pages of his surrebuttal testimony on the *Rush Island* issue, based on a general discussion of prudence *only* relied upon by Company witness Reed for his rebuttal on the *High Prairie* issue, is obviously attempting to bolster

[10] Not only is this testimony in support of Staff's new justification that if it were to be made should have been included in its rebuttal testimony, but Majors' testimony on these pages is not responsive to any rebuttal testimony *on the Rush Island issue* and, thus, is improper surrebuttal under 20 CSR 4240-2.130(7)(D)

Eubank's surrebuttal statements that adds imprudence to the list of justifications proffered in support of Staff's Rush Island adjustment.

> **Majors Surrebuttal, p. 15, l. 12 – 18**. "Q. You claim that Ameren Missouri's actions or inactions were imprudent. What evidence do you have of this imprudence? A. In examination of the 195 page [sic] opinion of the District Court, it is clear to me that Ameren Missouri chose not to consider the increase in availability and therefore increase in emissions caused by the improvements at Rush Island. This line of decision making led to the Notice of Violation from the EPA, the years of litigation of the violations, and *ultimately the premature retirement* of Rush Island 15 years prior to its 2039 retirement date" (emphasis added).

Given that the "premature retirement" is the sole reason for the system support resource status of the plant, and thus the sole reason for the lower production on which Staff rested its adjustment in its direct and rebuttal cases, there can be no doubt that the purpose of Majors' question and answer, a question and answer focused *solely on the prudence question*, is to justify Staff's disallowance on the claimed imprudence, a basis that as earlier noted, Staff disavowed in both its direct and rebuttal testimonies.

9. The bottom line is that the Staff has violated the Company's Due Process rights and the Commission's orders and rules that required Staff to state *all* its reasons in support of its adjustment no later than in its rebuttal testimony, and not for the first time in surrebuttal testimony when the Company would have no opportunity to respond.

10. For the foregoing reasons, the passages cited in paragraph 8 of this Motion should be stricken, and Staff should be prohibited from claiming via cross-examination, redirect, or argument, that its Rush Island rate base adjustment is, in whole or in part, justified by any claimed imprudence on the Company's part.

ALTERNATIVE MOTION FOR LEAVE TO FILE SUR-SURREBUTTAL TESTIMONY

11. If, however, the Commission declines to grant Ameren Missouri's motion to strike, Ameren Missouri should be given a full and fair opportunity, consistent with fundamental notions of fair play and Due Process and as a means redressing the prejudice caused by Staff's failure to follow the Commission's orders and rules, to respond to the cited provisions of Staff's surrebuttal testimony by granting it leave to file sur-surrebuttal testimony.

MOTION FOR EXPEDITED TREATMENT

12. The Commission should act on the motions made herein as soon as possible, insofar as the hearings in this case commence just 14 days from now, and depending on the Commission's rulings, the Company may need to prepare and file additional sur-surrebuttal testimony within a very short timeframe.

13. The harm that will be avoided includes the impact on the Company's (and other parties') ability to compile an issues list, witness schedule, and position statements for the case, to complete discovery, and to properly prepare for hearing. Granting the Company's motion to strike will also avoid the harm inherent in sanctioning parties' failure to adhere to the Commission's rules and order and to otherwise present their cases consistent with basic Due Process principles.

15. The surrebuttal testimony at issue was filed just six business days ago. These motions are being filed as soon as this pleading could reasonably have been prepared given the extensiveness of the testimony filed on the Rush Island issue. The Company would also note that Staff's proposed adjustment, if adopted, would not only lower the Company's revenue requirement (annually) by approximately $40 million but would **

_____ **. The Commission should not be deciding whether an adjustment should be made due to alleged imprudence when the Staff not only did not support the proposed adjustment based on an imprudence argument, but indeed explicitly stated that it *was not doing so*, and certainly should not be doing so without the Company that is affected having a full and fair opportunity to respond. *Cf.*, *Order Regarding Motion to Strike Testimony and Motion to File Supplemental Surrebuttal Testimony*, Case No. ER-2007-002 (Mar. 8, 2007) ("By attempting to substantively change their previous positions by offering corrections in their surrebuttal testimony, AmerenUE and Staff have inserted a new issue into this case. The Commission is not willing to try to resolve that $60 million issue on the record before it." The Commission then allowed the supplemental testimony).

WHEREFORE, the Company prays that the Commission make and enter its order granting the Company's motion to strike the above-cited portions of the surrebuttal testimonies of Staff witnesses Claire M. Eubanks and Keith Majors, and that it prohibit Staff from claiming via cross-examination, redirect, or argument, that its Rush Island rate base adjustment is, in whole or in part, justified by any claimed imprudence on the Company's part or, alternatively, granting the Company leave to file sur-surrebuttal testimony in response to said portions of their testimony in advance of the evidentiary hearing on the Rush Island issue, and for such other and further relief as is just and proper under the circumstances.

Dated: March 20, 2023

Respectfully submitted,

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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 20th day of March, 2023.

/s/James B. Lowery
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