

**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 MOTION TO PROHIBIT  
CERTAIN “CROSS-EXAMINATION”**

**COMES NOW** Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”), and for its motion to prohibit examination that is not calculated to weaken or oppose the examined witness’s case,<sup>1</sup> states as follows:

1. Ameren Missouri bears the burden of proof in this case, including both the burden of going forward with evidence supporting its proposed Surge Protection Program and the burden to persuade the Commission, based on the record evidence, that it should approve the program. Not only is there no dispute about which party bears the burden of proof, but it is also undisputed that the only other two parties to this case, the Staff and the Office of the Public Counsel (“OPC”), both oppose approval of the program and for similar reasons. In fact, an examination of both Staff’s and OPC’s pre-filed testimony and position statements reflect that they are quite closely aligned in their opposition to the program and as to their reasons for opposing it.<sup>2</sup> While the Company would of course have welcomed their support, they have a right to oppose the program, a right to file rebuttal testimony opposing it, and the right to cross-examine the Company’s witnesses about it.<sup>3</sup> What they do not have, however, is any right to examine each other’s witness

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<sup>1</sup> Practitioners and the Commission itself have from time-to-time have referred to such an examination as “friendly cross”, but the term is a misnomer because, as outlined herein, it is not cross-examination at all.

<sup>2</sup> There is little if any daylight between the pre-filed rebuttal testimony of OPC’s sole witness and of Staff’s witnesses, albeit Staff’s witnesses go into more detail on the same topics. In fact, OPC’s witness relies on a Staff analysis critical of the proposed program for one aspect of her opposing testimony.

<sup>3</sup> Section 536.070(2) affords parties the right to cross-examine witnesses, as did the Commission’s *Order Adopting Procedural Schedule* entered in this case, and the Commission’s rules (and the aforementioned Order) grants parties in their position the right to file rebuttal testimony.

in a manner that does not amount to cross-examination at all, but rather amounts to an examination that is calculated to bolster each other's clearly aligned cases in opposition to program approval. At bottom, they do not have a right to reinforce, supplement, or bolster their cases, arguments, or points with new or different or more detailed points, evidence, and argument through examination of each other's witnesses because none of those actions amount to cross-examination.

2. We know they lack any right to examine each other witnesses in a manner not calculated to weaken or oppose the examined witness's case because there is no law – no statute, no rule, no order – that gives them a right to engage in any examination other than *cross-examination*. We also know they lack any such right because such an examination would directly contravene what cross-examination is, and its purpose.

3. Indeed, the law is well-settled that the purpose of cross-examination is to elicit information favorable to the view of the examiner and *unfavorable* to the position of the party of the witness being examined. See, e.g., State ex rel. Consumers Council of Missouri v. Pub. Serv. Comm'n, 562 S.W.2d 688, 693-93 (Mo. App. St. L. 1978) (“The purpose of cross examination is to sift, modify or explain what has been said, to develop new or old facts in a view favorable to the examiner *and to test* the correctness of the information from the witness with an *eye to discrediting the accuracy or truthfulness of the witness*” (emphasis added); Lolordo v. Lacy, 88 S.W.2d 353, 355 (Mo. 1935) (“The very purpose of cross-examination is to test the correctness of the witness's story and is *in the nature of an attack upon its truth or accuracy*” (emphasis added)). *Accord* 81 Am. Jur. 2d Witnesses § 714.

4. Clearly where, as here, Staff and OPC are aligned in their opposition to Ameren Missouri's case, they are not going to ask each other's witnesses questions to test the accuracy or truthfulness of each other party's witnesses' direct (i.e., in Commission cases, “pre-filed”)

testimony. To the contrary, with perhaps limited exceptions that of course the Presiding Officer could deal with as needed, if they are asking each other's witnesses questions their examination is surely conducted to elicit facts, opinions, or other information that is *favorable* to their (aligned) positions, including, experience has shown, that amounts to a supplementation of, expansion on, or further elaboration on the pre-filed testimony of the witness being examined. However, allowing this kind of (non-cross) examination is tantamount to allowing the examined witness to supplement their pre-filed testimony, which would effectively allow the avoidance of the requirement that their rebuttal testimony provide all testimony responsive to Ameren Missouri's direct case. *Cf.* 20 CSR 4240-2.130(7)(B). It also poses serious Due Process concerns given that, as earlier noted, it is Ameren Missouri that bears the burden of proof and thus should, consistent with longstanding practice both in the courts and at the Commission, get the last word. Nor would allowing examination of the aligned party's witness to in effect rebut Ameren Missouri's surrebuttal testimony comport either with Due Process, the *Order Adopting Procedural Schedule*, or any other rule or principle of law.

5. In short, the Commission should do in this case what it used to do with some regularity, that is, prohibit "friendly cross." *See, e.g., Order Regarding Consolidation and Procedural Schedule*, File No. EO-2002-0384 (Aug 23, 2005) (Commission Condition (K): "Friendly" cross-examination shall not be permitted."). The Company filed its case and direct testimony, Staff and OPC issued a few dozen data requests, filed rebuttal testimony, and can cross-examine the Company's witnesses. The Commissioners can ask their questions and parties can, based on those questions, cross-examine – engage in proper cross-examination – of those witnesses.<sup>4</sup> The end result will be a fairly-constructed record. The case can then be briefed, and

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<sup>4</sup> The instant motion seeks to impose no limit on the Commissioners' ability to ask the questions they believe they need to ask in order to decide the case.

the Commission can decide it, all in accordance with the law governing examination of witnesses, and applicable rules, orders, and requirements of Due Process. Allowing the parties to engage in cross-examination not calculated to test the veracity or accuracy of a witnesses pre-filed testimony is at odds with those same legal principles, rules, orders, and Due Process requirements. Granting this motion will allow the evidence to be presented, and presented fairly, and the Commission can then make a reasoned decision based on the evidence and that is reflective of the Commission's policy views respecting service offerings by the utilities under its jurisdiction.

**WHEREFORE**, Ameren Missouri hereby requests that the Commission make and enter its order prohibiting parties from conducting examinations of witnesses during the evidentiary hearing in this case that are not calculated to sift, modify or explain what has been said, to develop new or old facts in a view favorable to the examiner, and to test the correctness of the information from the witness with an eye to discrediting the accuracy or truthfulness of the witness.

Respectfully submitted,

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**ATTORNEYS FOR UNION  
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AMEREN MISSOURI**

**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 8<sup>th</sup> day of April 2021, to all counsel of record.

**/s/ James B. Lowery**