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, A PORTION OF THE PREPARED SURREBUTTAL TESTIMONY OF LENA MANTLE

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, a portion of the prepared surrebuttal testimony of Staff Witness Lena M. Mantle, which was filed in this case on April 15, 2011. As shown herein, a portion of Ms. Mantle's surrebuttal testimony and all of Schedules LMM-S2 and LMM-S3 to that surrebuttal testimony constitute nothing more than inadmissible hearsay which is otherwise irrelevant to this action.

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

1. Ms. Mantle has filed both direct[1] and surrebuttal testimony on the issue of the sharing percentage in the Company's Fuel Adjustment Clause (FAC).

2. In her direct testimony, Ms. Mantle did not even suggest—let alone directly testify—that in forming her opinion that the sharing percentage should be changed from 95%/5% to 85%/15%, she relied upon the actions of other jurisdictions with regard to sharing under an FAC. Indeed, she explains why in her April 13, 2011 deposition. After indicating that there her sharing proposal was based on a "judgment call," she specifically denied that she looked at what other states have done and, in fact, rejected the notion that such an inquiry was even relevant to the issue:

[1] See Staff Cost of Service Report.

Q: Do you think what other jurisdictions do in terms of their fuel adjustment clauses and in terms of their sharing percentages, do you think that's a relevant consideration for the Commission to take into account when deciding how to treat fuel adjustment clauses in Missouri?
A: So the question is whether I think the Commission should take that into consideration?
Q: Yes.
A: I don't know.
Q: Would it matter to you if, in terms of your recommendation regarding the sharing percentage, if no other jurisdiction in the country had any sharing of fuel costs in their fuel adjustment clauses? Would that make a difference to you?
A: No. The statute in Missouri says there can be incentive mechanisms and that's what I use as my basis, is the Missouri statute, not what other states do.

April 13, 2011 Depo. of Lena Mantle at 28:15-29:8.

3. In her April 15, 2011 surrebuttal testimony, Ms. Mantle maintained that she still had not "conducted a search for decisions of other Commissions" related to this issue; however, she further testified that she had "become aware" of "two recent orders issued by the Wyoming and Utah Public Service Commissions regarding sharing mechanisms" and attached these decisions to her surrebuttal testimony. Surrebuttal Testimony of Lena M. Mantle at 15:22-16:8. Still, at no place in her surrebuttal testimony does Ms. Mantle indicate that she relied upon the decisions from Utah or Wyoming in making her recommendation in this rate case.

4. When further questioned in a second deposition regarding these two decisions, Ms. Mantle did not contend that her opinion in this rate case was based in any way on these two decisions; instead, she simply explained that she had been given these decisions by Mr. Brubaker and had attached them to her surrebuttal testimony because she thought the Commission might want to know what other jurisdictions had done in terms of cost sharing:

Q. Okay. The two decisions that you attached to your surrebuttal testimony, one from Wyoming and one from Utah, why did you attach those?
A. Those have been provided to me, and I know the Commission is always asking what other jurisdictions, other commissions have done, and so I -- that's why I provided those.

Q. How were they provided to you? How did you come to learn of those?
A. Mr. Brubaker provided those to me.

* * *

Q. Was the reason that you attached them to show that Rocky Mountain Power in Wyoming and in Utah now have a sharing mechanism that has a 70/30 percent split in their energy cost adjustment? Is that the reason you attached them?
A. Yes.

April 25, 2011 Depo. of Lena Mantle at 190:2-11; 190:23-191:3 (emphasis added).

5. Ms. Mantle further explained that she had only read these two decisions on the day she was finalizing her surrebuttal testimony and that, although she knew the decisions showed that Rocky Mountain Power had a 70/30 sharing mechanism in Wyoming and Utah, she had no idea how the cost sharing mechanisms worked in either state:

Q. Can you tell me how the, I think they call it an ECAM -- energy cost adjustment mechanism I suspect is what that stands for. Can you tell me how the ECAM for Rocky Mountain Power works in Wyoming?
A. No.
Q. Did you read these orders before you attached them to your surrebuttal testimony?
A. I read them when I attached them, as I was attaching.
Q. You mean literally the first time you read them was the day you were finalizing your surrebuttal testimony?
A. Well, I wanted to read them before I finalized my testimony, but yes, I had been too busy prior to that to look at anything other than doing a search to find out where the mechanism was in these orders.
Q. Okay. Had you already decided before you read them that you were going to attach them?
A. If I had found anything when I read them that would lead -- I wouldn't -- that would lead me to think that I should not attach them, I wouldn't have.
Q. Now, forgive me if I asked this question already. Can you tell me how the ECAM for Rocky Mountain Power works in either one of those two states?
A. No.
Q. How those utilities are the same or different or similar or not similar to Ameren Missouri?
A. No.

April 25, 2011 Depo. of Lena Mantle at 191:4-192:6 (April 25, 2011).

6. Ms. Mantle's reason for including these two decisions in her surrebuttal testimony

could not be more clear: she is offering these out-of-court statements for the truth of the matter asserted—that other jurisdictions have different cost-sharing proportions; consequently, there can be no dispute that the two decisions and her testimony about them constitute inadmissible hearsay. *See, e.g., Lauck v. Price*, 289 S.W.3d 694, 698 (Mo. App. E.D. 2009) (reciting the general principle that hearsay is an out-of-court statement offered to prove the truth of the matter asserted and, to be admissible, must meet the requirements of an exception to that rule).

7. Missouri law provides that an expert, **in forming her opinion**, may rely on otherwise inadmissible testimony—including hearsay—if it is of a type reasonably relied upon by other experts in the field. Section 490.065, RSMo.; *Re: NOS Communications, Inc.*, 1996 WL 144343 at *2 (Mo. P.S.C. January 24, 1996) (allowing an expert's opinion testimony based, in part, upon his discussion with other Staff analysts was admissible where these sources served as a background for the expert's opinion and were not being offered as independent, substantive evidence). These two commission decisions and the testimony about them, however, are not admissible on this ground: as shown above, Ms. Mantle never claimed to rely in any way on these two decisions in forming her opinion; in fact, she claimed that what other states did was **irrelevant** to her opinion.

8. Because she did not rely in any way on the two decisions in forming her opinion on the cost sharing mechanism in this case, Ms. Mantle simply cannot offer testimony about these two decisions or the decisions themselves as evidence in this rate case because it is inadmissible hearsay testimony. *Leake v. Burlington Northern R.R. Co.*, 892 S.W.2d 359, 364 (Mo. App. E.D. 1995) (upholding exclusion of hearsay evidence through testimony of expert because "an expert may not, under the guise of giving opinions, provide testimony consisting of

incompetent evidence.") (*citing Stallings v. Washington Univ.*, 794 S.W.2d 264, 271 (Mo. App. E.D. 1990)).[2]

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 Lena M. Mantle, page 15, line 22 through page 16, line 8, and the two commission decisions denominated as Schedules LMM-S2 and LMM-S3 to Ms. Mantle's surrebuttal testimony, and that prevents Staff witness Mantle, or any other witness, from presenting that testimony or otherwise entering it into evidence in this case.

Respectfully submitted,

/s/ James B. Lowery
James B. Lowery, #40503
Michael R. Tripp, #41535
SMITH LEWIS, LLP
Suite 200
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
(573) 443-3141 (telephone)
(573) 442-6686 (facsimile)
lowery@smithlewis.com
tripp@smithlewis.com

Thomas M. Byrne, #33340
Managing Assoc. General Counsel
Ameren Services Company

[2] There are other reasons these hearsay statements are inadmissible, incompetent evidence in this case. Ms. Mantle admits that she doesn't know how the mechanisms discussed in the lengthy orders she attached to her surrebuttal testimony work. She has no knowledge about the context in which they were adopted. She only read them for the first time literally as she was finalizing her surrebuttal testimony. They appear to reflect the "cherry picking" of two orders among dozens if not hundreds of orders that could have been properly surveyed across the more than 30 non-restructured states in the country. In summary, in addition to being inadmissible hearsay and irrelevant to Ms. Mantle's opinion, these orders should not be admitted because they do not and cannot possibly form the basis for Ms. Mantle's opinion, and she can't intelligently be crossed examined about them because she knows nothing about them.

1901 Chouteau Avenue, MC-1310
P.O. Box 66149
St. Louis, MO 63101-6149
(314) 554-3484 (telephone)
(314) 554-4014 (facsimile)
tbyrne@ameren.com

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 3rd day of May, 2011.

/s/ James B. Lowery
James B. Lowery