

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

In the Matter of Union Electric Company)
d/b/a Ameren Missouri's Tariffs to)
Increase Its Revenues for Electric Service.)

Case No. ER-2012-0166

**RESPONSE OF UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI
IN OPPOSITION TO MOTION TO COMPEL**

Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") hereby files its response in opposition to the Motion to Compel Responses to Data Requests that was filed by the Office of the Public Counsel ("OPC") on May 7, 2012.

1. OPC's motion to compel is confusing insofar as it relates to OPC Data Requests ("DRs") 1008 and 1010 because Ameren Missouri already has provided OPC with responses to those data requests. As an e-mail message addressed to OPC dated April 5, 2011, which is attached to this response as Exhibit A, clearly states, the Company's responses to DRs 1008 and 1010 were posted that date to Ameren Missouri's Caseworks Extranet site, which made the responses available to OPC. Moreover, although Ameren Missouri raised certain limited objections to those DRs, nowhere in its motion does OPC claim that the responses the Company provided were inadequate.

2. OPC's motion is similarly confusing insofar as it relates to DR 1013, but for a different reason: Ameren Missouri's response to that data request is not yet due. A letter dated April 19, 2012, from Ameren Missouri to OPC, a copy of which is attached to this response as Exhibit B, clearly states that, subject to the objections stated in the letter, the Company will provide a response to DR 1013 on May 21, 2012. Irrespective of that letter, on May 7, 2012, OPC filed its motion to compel a response to DR 1013 – a full two weeks before Ameren

Missouri's response is due. No basis therefore exists for a motion to compel a response to DR 1013.

3. In addition, the Commission's rule governing discovery disputes, 4 CSR 240-2.090(8), favors informal resolution of discovery disputes, and specifically states that the Commission will not entertain discovery motions until an aggrieved party satisfies certain requirements listed in the rule. The first of those requirements is that counsel for the aggrieved party must have "in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion."¹ With respect to DRs 1005, 1006, 1008, 1010, and 1013, Ameren Missouri does not believe that the half-hearted attempts by OPC's counsel to contact the Company's counsel satisfies either the letter or the spirit of the Commission's rule.

4. Although in paragraph 3 of its motion OPC states that its counsel called twice to discuss DRs 1005, 1006, 1008, and 1010 with Ameren Missouri's counsel and left a voicemail message each time asking for a call-back, OPC's counsel apparently took no further action when he didn't receive an immediate response. The Commission's rule specifically states that "[m]erely writing a demand letter is not sufficient" to satisfy the requirement that a good faith effort be made to resolve disputes before a discovery motion is filed, and the two voicemail messages that OPC claims its counsel left don't even rise to that level of effort. Therefore, with respect to DRs 1005, 1006, 1008, and 1010, OPC's motion is premature because it fails to establish that OPC complied with the requirement of 4 CSR 240-2.090(8)(A), which obligates an aggrieved party to make a good faith effort to informally resolve discovery disputes before that party is entitled to file motion to compel.

¹ 4 CSR 240-2.090(8)(A).

5. OPC's motion also fails to establish that OPC complied with the requirement found in 4 CSR 240-2.090(8)(B), which requires an aggrieved party to also attempt to informally resolve discovery disputes through a teleconference involving opposing counsel and the Regulatory Law Judge. The Commission's procedural order in this case specifically provides for such conferences on a monthly, recurring basis, but rather than wait for the first of those conferences – which was scheduled to be held on May 10, 2012 – OPC went ahead and filed a formal motion to compel on May 7th, three days before the date of that conference. OPC's filing thus circumvents the opportunity for informal resolution with the assistance of the Regulatory Law Judge that is built into the procedural schedule in this case, and also flouts the similar requirement that is found in the Commission's rule. So, again, OPC's motion is premature because it fails to establish that OPC complied with the requirement of 4 CSR 240-2.090(8)(B), which obligates an aggrieved party to confer with opposing counsel and the Regulatory Law Judge before that party is entitled to file a motion to compel.

6. Notwithstanding OPC's failure to attempt to make a good faith effort to informally resolve its discovery disputes, as required by the Commission's rules and the procedural order in this case, OPC's motion to compel with respect to DRs 1005 and 1006 also should fail because Ameren Missouri's objections to those discovery requests are both timely and meritorious. Each of those discovery requests seeks the following information for either employees of Ameren Missouri (DR 1005) or employees of any affiliate that allocates time or costs to Ameren Missouri (DR 1006): the name of each employee with a college/university degree, the employee's current job title, years of employment, the degree held and major field of study, the name of the college/university from which the degree was earned, and a listing of any advanced professional designations held by the employee. Ameren objected to each of those data

requests on grounds that they are overly broad and burdensome, irrelevant, and that they are not reasonably calculated to lead to the discovery of admissible evidence. Based on the legal standards that govern both the appropriate scope of discovery requests and the fair balance of the discovery burden between interrogator and respondent, each of those objections is valid and should be sustained.

7. Missouri courts have held that the discovery rules that apply to civil actions in this state “were not designed or intended for untrammelled use as a factual dragnet or for unlimited employment of far-flung fishing expeditions.” *State ex rel. Kroger Co. v. Craig*, 329 S.W.2d 804, 806 (Mo App. 1959). And although they also have held that determining the propriety of a particular discovery request is a matter largely left to the trial judge, that discretion is not unlimited.

Determination of the appropriate boundaries of discovery requests involves “the pragmatic task of weighing the conflicting interests of the interrogator and the respondent.” [citation omitted] Therefore, in ruling on objections to discovery requests, trial judges must consider not only questions of privilege, work product, relevance and tendency to lead to the discovery of admissible evidence, but they should also balance the need of the interrogator to obtain the information against the respondent’s burden in furnishing it . . . Thus, even though the information sought is properly discoverable, upon objection the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome or less expensive than that designated by the requesting party.

State ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo App. 1985). Based on these legal standards applicable to discovery in Missouri’s trial courts,² DRs 1005 and 1006 are, as Ameren Missouri contends in its objections, overly broad and burdensome, irrelevant, or not reasonably calculated to lead to the discovery of admissible evidence. Based on these standards, OPC’s

² Under 4 CSR 240-2.090(1), discovery in Commission proceedings may be obtained “by the same means and under the same conditions as in civil actions in the circuit court.”

motion to compel with respect to DRs 1005 and 1006 should be dismissed on grounds that they both constitute an abuse of the discovery process.

8. Alternatively, OPC should, at a minimum, be required to significantly scale-back the scope of the two data requests. In paragraph 4 of its motion, OPC indicates that the purpose of these two data requests is to identify in-house personnel who are qualified to do some or all of the work in Ameren Missouri's pending rate case that the Company has assigned to outside experts. The pleading goes on to state that in order to accomplish this purpose OPC requires detailed information about the education, experience, and capabilities of the in-house personnel of Ameren Missouri and its affiliates. Assuming that OPC's objectives are appropriate, neither OPC DRs 1005 nor 1006 has been crafted in a manner that will both (1) provide the kind of information necessary to allow OPC to achieve its objective and (2) not overburden the Company with the type and amount of information it is required to provide in its responses. This is particularly clear when OPC's data requests are considered in context.

9. In its case in chief Ameren Missouri is relying on the testimony of only three outside experts. John J. Reed, who serves as Chairman and Chief Executive Officer of Concentric Energy Advisors, Inc., and CE Capital Advisors, Inc., and whose educational background is in finance and economics, filed direct testimony that is limited to the issues of regulatory and economic policy. Robert B. Hevert, who serves as the Managing Partner of Sussex Economic Advisors, LLC, and as an Executive Advisor to Concentric Energy Advisors, Inc., and whose educational background is in finance and business administration, filed direct testimony that is limited to the issue of the appropriate rate of return on equity for Ameren Missouri. And Michael J. Adams, a Senior Vice President with Concentric Energy Advisors, Inc., whose educational background is in finance and accounting, filed direct testimony that is

limited to the development of the cash working capital component of the Company's revenue requirement. Because the educational backgrounds of all of these witnesses is limited to the disciplines of finance, economics, business administration, or accounting, OPC's objective in propounding DRs 1005 and 1006 will not be furthered by requiring Ameren Missouri to survey records for each of its more than 9,000 employees and to provide information regarding college/university degrees held by those employees in every conceivable academic discipline. To fulfill its stated objective, OPC does not require information regarding employees whose job responsibilities and work experience fall outside the subjects that are addressed in the testimonies of the outside experts the Company has retained in this case. Data requests that ask for more information than is reasonably necessary are, by definition, overbroad, and the excess information that is sought by such data requests is, also by definition, irrelevant or not reasonably designed to lead to the discovery of admissible evidence. Yet DRs 1005 and 1006 ask Ameren Missouri to produce just such information – and more.

10. The scope of DRs 1005 and 1006 is so broad that the overwhelming majority of the information they ask the Company to produce is either irrelevant to the purpose for which the request was made or is not reasonably calculated to lead to the discovery of admissible evidence. Consequently, DRs 1005 and 1006 impose burdens on Ameren Missouri that greatly exceed OPC's need to obtain necessary and relevant information to support its hypothesis that the Company or its affiliates have in-house personnel who could perform the same tasks as the outside experts who have filed testimony in this case. OPC's data request are, therefore, perfect examples of the types of "factual dragnet" and "far-flung fishing expedition" that Missouri's discovery rules do not sanction or permit. If OPC is to pursue its objective of obtaining

information to support its hypothesis, it must be required to do so with discovery requests that are appropriately limited to that purpose.

WHEREFORE, for the reasons stated in this response, OPC's motion to compel should be denied. With respect to all of the data requests referenced in its motion, OPC has failed to comply with the letter and spirit of 4 CSR 240-2.090(8), as well as the procedural order in this case, each of which favors informal resolution of discovery dispute and requires an aggrieved party to satisfy certain prerequisites before it can file a discovery motion. OPC has satisfied none of those prerequisites. In addition, 1) OPC's motion to compel regarding DRs 1008 and 1010 should be denied because responses to those data requests have already been provided and OPC's motion does argue that those responses are inadequate; 2) OPC's motion to compel regarding DR 1013 should be denied because at the time the motion was filed – and continuing through the date of this responsive pleading – Ameren Missouri's response to that data request was not yet due; and 3) OPC's motion regarding DRs 1005 and 1006 should be denied because each of those data requests is so overbroad as to constitute the type of "factual dragnet" or "fishing expedition" that is not permitted under recognized rules regarding discovery in civil actions.

Respectfully submitted,

/s/ L. Russell Mitten
L. Russell Mitten, #27881
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
(573) 635-7166 (telephone)
(573) 634-7431 (facsimile)
rmitten@brydonlaw.com

Thomas M. Byrne, #33340
Managing Associate General Counsel
1901 Chouteau Avenue, MC-1310
P.O. Box 66149, MC-13-
St. Louis, MO 63101-6149
(314) 554-2514 (telephone)
(314) 554-4014 (facsimile)
amerenmoservice@ameren.com

ATTORNEYS FOR
UNION ELECTRIC COMPANY, d/b/a
AMEREN MISSOURI

Russ Mitten

From: Hoyt, Mary L [MHoyt@ameren.com]
Sent: Thursday, April 05, 2012 3:56 PM
To: 'opcservice@ded.mo.gov'; Lewis Mills; 'Lafferty, Shawn (shawn.lafferty@ded.mo.gov)';
'Buckman, Jere (jere.buckman@ded.mo.gov)'; 'kevin.thompson@psc.mo.gov';
'gencounsel@psc.mo.gov'
Cc: 'Cheryl Lobb'
Subject: ER-2012-0166; Ameren Response to DRs OPC 1007, 1008, 1010, 1011 and 1012

Ameren Missouri's response to the Office of the Public Counsel Data Request Nos. OPC 1007, 1008, 1010, 1011 and 1012 have been posted to Ameren's Caseworks Extranet site. If you have any questions, let me know.

Thank You,

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Mary Hoyt
Regulatory Paralegal
Missouri Regulatory Team
T 314-554-3611
F 314-554-4014
E mhoyt@ameren.com

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Ameren Services
P.O. Box 66149, MC1310
St. Louis, MO 63166
www.AmerenMissouri.com

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BRUCE H. BECKETT
WILLIAM JAY POWELL
JOHN L. ROARK
COLLY J. DURLEY
JAMES B. LOWERY
MICHAEL R. TRIPP
PHEBE LA MAR
SARAH E. GIBONEY

RAYMOND C. LEWIS, JR. (1926-2004)

SMITH LEWIS, LLP
ATTORNEYS AT LAW

P.O. BOX 918
COLUMBIA, MISSOURI 65205-0918

...
CITY CENTRE
111 SOUTH NINTH STREET, SUITE 200
COLUMBIA, MISSOURI 65201-4891

(573) 443-3141 • Fax (573) 442-6686

AMANDA ALLEN MILLER
DANIEL G. BECKETT
BETHANY R. FINDLEY

OF COUNSEL
ROBERT C. SMITH

PARALEGAL
CHERYL L. LOBB

April 19, 2012

Mr. Lewis Mills
Public Counsel
P.O. Box 7800
200 Madison St., Ste. 640
Jefferson City, MO 65102

Re: ER-2012-0166 – Data Request (DR) No. 1013

Dear Lewis:

The Company objects to this DR on the grounds that it is not relevant or reasonably calculated to lead to the discovery of admissible evidence, and because it is overbroad, oppressive, and unduly burdensome. Subject to the foregoing objections, the Company will provide a response.

Because of the scope and breadth of the DR and the large number of departments and personnel who must be contacted to provide a response, coupled with the large amount of information that may need to be reviewed in order to provide a response, the Company will require up to an additional two weeks (through May 21, 2012) to respond.

Sincerely,

/s/ **James B. Lowery**

James B. Lowery

Cc: Tom Byrne, Wendy Tatro, Gary Weiss, Mary Hoyt, Julie Donohue, Cheryl Lobb

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, on the following parties on the 16th day of May, 2012:

Kevin Thompson
Missouri Public Service
Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360
Kevin.thompson@psc.mo.gov
GenCounsel@psc.mo.gov

Lewis R. Mills
Missouri Office of Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230
Lewis.mills@ded.mo.gov
opcservice@ded.mo.gov

Lisa C. Langeneckert
Sandberg Phoenix & von Gontard
P.C.
600 Washington Avenue - 15th
Floor
St. Louis, MO 63101-1313
llangeneckert@sandbergphoenix.com

John B. Coffman
John B. Coffman, LLC
871 Tuxedo Blvd.
St. Louis, MO 63119-2044
john@johncoffman.net

James B. Lowery
P.O. Box 918
Columbia, MO 65205
lowery@smithlewis.com

Henry B. Robertson
Great Rivers Environmental Law
Center
705 Olive Street, Suite 614
St. Louis, MO 63101
hrobertson@greatriverslaw.org

Mary Ann Young
Counsel
Missouri Department of Natural
Resources
P.O. Box 176
Jefferson City, MO 65102
[Marvann.young\(g\).dnr.mo.gov](mailto:Marvann.young(g).dnr.mo.gov)

Sherrie A. Schroder
Michael A. Evans
HAMMOND AND SHINNERS, PC.
7730 Carondelet Avenue, Suite 200
St. Louis, MO 63105
[saschroder\(g\).hammondshinners.com](mailto:saschroder(g).hammondshinners.com)
mevans@hammondshinners.com

Jennifer S. Frazier Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
jennv.frazier@ago.mo.gov

Jim Fischer
Fischer & Dority
101 Madison Suite 400
Jefferson City, MO 65101
jfischerpc@aol.com

Roger Steiner
Kansas City Power & Light
P.O. Box 418679
Kansas City, MO 64105-9679
Roger.steiner@kcpl.com

David Woodsmall
Midwest Energy Consumers Group
Jefferson City, MO 65101
David.woodsmall@woodsmalllaw.com