BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Union Electric Company d/b/a Ameren Missouri's Tariffs to Increase its Revenues for Electric Service	))))	Case No. ER-2014-0258

MIEC'S SUGGESTIONS IN OPPOSITION TO AMEREN MISSOURI'S MOTION IN LIMINE OR TO STRIKE PART OF THE TESTIMONY OF GREG MEYER

COME NOW the Missouri Industrial Energy Consumers ("MIEC"), and for their Suggestions in Opposition to Ameren Missouri's Motion in Limine and to Strike, state as follows:

Introduction

1. MIEC witness Greg Meyer's direct testimony on revenue requirement explains in detail how Ameren Missouri has been consistently realizing profits above its Commission-authorized rate of return on equity ("overearnings" or "overearning") from August 2012 through at least September 2014.[1] That testimony explains that even without deferral of solar rebate expenses Ameren Missouri over-earned during the period the solar rebates were incurred. That means that Ameren Missouri's existing rates were high enough that it already fully recovered the costs of the solar rebates at issue.[2] Based upon those facts, Meyer stated his opinion that allowing Ameren Missouri to recover the costs of the solar rebates in future rates amounts to allowing double-recovery of these expenses and is understandably "bad regulatory policy."[3]

2. Ameren Missouri's procedural motion seeks to nip this issue in the bud, thus preventing the Commission from even considering the issue in this case. Meyer filed his Direct

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[1] *See* Table 2, p. 8; graph, p. 13; Schedule GRM-3 and Graph Index for same, for Meyer Direct.

[2] *See* Meyer Direct, p. 14, l. 9 – p. 15, l. 6.

[3] *See* Meyer Direct, p. 14, l. 9 – p. 15, l. 6.

testimony on December 5, 2014, but Ameren Missouri waited more than a month to file the subject Motion in Limine or to Strike, by filing the same on January 6, 2015. Significantly, after waiting more than a month to file its two and a half page motion, Ameren Missouri seeks an almost immediate ruling. That request for expedited treatment put this Commission and the MIEC in a difficult position. First, the Commission was forced to limit the MIEC to slightly more than three days to respond and, second, the Commission is allowed only two working days to rule if it is to expedite its ruling as Ameren Missouri requests. For the reasons that follow, this Commission should deny Ameren Missouri's Motion.

A Motion to Strike and a Motion in Limine are Improper Before This Commission

3. Historically, the Commission has held that a motion in limine should not apply to Commission proceedings. In fact, Ameren Missouri's Motion fails to cite a single instance in which the Commission has granted a motion in limine. The reason is obvious; a recent search of Commission decisions indicates that the Commission regularly denies such motions.[4]

4. The reason that motions in limine do not lie before the Commission are two-fold. First, the Commission is an expert body, including two lawyers and three former legislators. As such, unlike a lay person jury, the Commission is capable of disregarding prejudicial and irrelevant evidence when it is before the Commission (which the subject testimony is not). Second, the

[4] *See*, Case No. EU-2014-0255, *Order Denying Motions in Limine* issued on December 10, 2014 (copy attached hereto); ER-2010-0355, *Order Denying Motions in Limine, Granting, in Part, Motion to Compel, and Granting Motion to Late-File Exhibit*, issued January 12, 2011; Case Nos. SR-2010-0110 and WR-2010-0111, *Order Regarding Staff's Motion in Limine*, issued March 24, 2010; Case No. SO-2008-0289, *Order Denying Stoddard County Sewer Company, Inc.'s and R.D. Sewer Company, L.L.C.'s Motion in Limine*, issued August 12, 2008; Case No. SO-2008-0289, *Order Denying Motion in Limine (OPC)*, issued August 12, 2008; Case No. ER-2008-0093, *Order Denying Motion in Limine*, issued April 30, 2008; Case No. EM-2007-0374, *Order Denying Second Motion in Limine of Indicated Industrials*, issued April 8, 2008; Case Nos. WC-2007-0038 and SC-2007-0039, *Order Denying Motion in Limine*, issued February 15, 2007; Case No. IO-2005-0468, *Order Regarding Motion in Limine*, issued August 3, 2005; Case No. GC-2004-0216, *Order Denying Motion in Limine*, issued June 3, 2004.

Commission is unable to consider evidence until it has been offered at the hearing. For both of these reasons, motions in limine do not apply to practice before the Commission.

5. As Harold Stearley, former Regulatory Law Judge, and now Missouri Supreme Court General Counsel, pointed out:

> It is impossible for the Commission to prejudge what evidence will and will not be offered at the hearing and issue a ruling on objections that have not yet been made. The issue regarding the relevance and admissibility surrounding the information concerning availability fees will be properly taken up at the evidentiary hearing when evidence is offered and objections are registered. Staff's motion in limine will be denied.[5]

6. From a practical standpoint, it makes little sense to grant a motion in limine to exclude certain evidence. As the Missouri Supreme Court recently recognized, while the Commission may exclude certain testimony from its consideration, it still must preserve that testimony as part of an offer of proof along with any cross-examination.[6] For this reason, it is preferable for the Commission to allow all testimony and simply disregard that testimony that it deems to lack weight.

7. The Motion to Strike suffers from the same defects as the Motion in Limine. While the Meyer testimony has been pre-filed, it has not yet been offered. The appropriate time to consider any objection to his testimony is at the time it is offered. Similar to its treatment of motions in limine, the Commission routinely rejects motions to strike, especially where they involve admissible evidence relevant to the determination at issue.[7] When the Commission entertains

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[5] Case Nos. SR-2010-0110 and WR-2010-0111, *Order Regarding Staff's Motion in Limine*, issued March 24, 2010, at page 2 (emphasis added).

[6] *State ex rel. Praxair v. Public Service Commission*, 344 S.W.3d 178 (Mo. 2011).

[7] *See* Case No. EO-2012-0142, *Order Regarding Motions to Strike Testimony*, issued Nov. 12, 2014; Case No. EA-2012-0281, *Order Denying Motion to Strike Cross-Surrebuttal Testimony*, issued Oct. 3, 2013; Case No. TC-2012-0331, *Order Regarding Objections to Pre-Filed Testimony and Motions to Strike*, issued July 9, 2012; Case No. ER-2012-0166, *Order Denying Motion to Strike*, issued Sept. 24, 2012; Case No. TC-1012-0331, *Order Regarding Objections to Pre-Filed Testimony and Motions to Strike*,

motions to strike, it typically does so in cases where admission of the testimony or evidence at issue would violate other Commission rules, including those regarding the required contents of direct testimony (as opposed to rebuttal and surrebuttal testimony), or where it would violate a scheduling order.[8]

8. Moreover, Commission regulation 4 C.S.R. 240-2.130(3) provides that:

> The presiding officer shall rule on the admissibility of all evidence. Evidence to which an objection is sustained, at the request of the party seeking to introduce the same or at the instance of the commission, nevertheless may be heard and preserved in the record . . . unless it is wholly irrelevant, repetitious, privileged or unduly long."

Thus, all evidence is to be heard and preserved on the record (i.e., not stricken from the record based on a preliminary motion) unless it meets one of the criteria in § 240-2.130(3), which in this case Ameren Missouri has not even alleged. This regulation follows section 536.070(7), which sets out essentially the same standard—evidence, regardless of admissibility, along with any cross-examination with respect thereto, is to be presented in order to preserve it for the record (i.e., not stricken).

Even Were the Motion Procedurally Viable, Ameren Missouri's Objection to Meyer's Testimony in Unfounded

9. As Meyer acknowledged in his testimony, the solar rebate expenses were the subject of a Stipulation in Case No. ET-2014-0085.[9] Ameren Missouri attached that Stipulation, and the Commission Order approving it, to its Motion. Ameren Missouri argues that "Meyer's testimony … violates the terms of the Agreement [embodied in the Stipulation]" and is a collateral attack of the

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issued July 9, 2012; Case No. GR-2009-0434, *Order Denying Motion to Strike*, issued Dec. 23, 2009; Case No. ER-2007-0002, *Order Denying Staff's Motion to Strike*, issued Apr. 19, 2007.

[8] *See, e.g.*, Case No. ER-2011-0028, *Order Granting Ameren Missouri and Staff's Motions to Strike*, issued May 6, 2011; Case No. ER-2011-0028, *Order Granting Ameren Missouri's Motion to Strike*, issued April 27, 2011; Case No. ER-2012-0174, *Order Granting Motions to Strike Testimony*, issued Nov. 16, 2012.

[9] *See* Meyer Direct, p. 11, ll. 1-7.

Commission order approving the Stipulation.[10] But as the Stipulation provides, and as the Commission's Order acknowledges, the solar rebate costs at issue "shall be considered for recovery" in rates.[11] It does not provide that the costs shall be recovered. The signatories to the stipulation agreed "not to object to Ameren Missouri's recovery in retail rates of prudently paid solar rebates."[12] Neither the MIEC, nor Meyer, question whether Ameren Missouri should recover from ratepayers the costs of the solar rebates. Rather, Meyer's testimony directly addresses whether those solar rebate costs have already been recovered through rates. Nothing in the Stipulation, nor anything in the Commission Order, evidences any intent by any of the signatories or the Commission to allow Ameren Missouri a double-recovery of the solar rebate costs. If, as Meyer asserts, Ameren Missouri has fully recovered the costs of the solar rebates, the issue before this Commission is whether to allow Ameren Missouri another recovery of those costs.

10. Ameren Missouri cites footnote 7 of the Stipulation, which obviously was intended to address a situation where the solar rebate costs had not already been recovered from ratepayers. To read that footnote as Ameren Missouri does would be to forbid the signatories from objecting to recovery of the costs a third time or a fourth time in subsequent rate cases. Clearly the Stipulation as a whole contemplated the parties' understanding that Ameren Missouri would recover solar rebate costs from ratepayers once, and only once.

11. Lastly, as the Commission and judge are well aware, a number of complainants, including Noranda Aluminum, Inc., brought a complaint against Ameren Missouri in Case No. EC-2014-0223. In that case, complainants argued that Ameren Missouri's electric rates were too high and were allowing Ameren Missouri to consistently overearn. In response, among other things,

[10] Ameren Missouri Motion, paragraph 5.

[11] Stipulation, paragraph 7(d), page 5; Commission Order, page 2.

[12] Stipulation, paragraph 7(d), page 6.

Ameren Missouri argued that no rate decrease was warranted because it had incurred substantial costs of solar rebates that had been deferred and so were not reflected in its reported earnings.[13] The Commission denied rate relief to the complainants in that case. It did so in part on the fact that Ameren Missouri had paid the subject solar rebates which, had they been included in the calculation of revenue, would have lessened Ameren Missouri's overearnings.[14] It seems particularly inappropriate to deny the MIEC the opportunity to even present this issue to the Commission after Ameren Missouri has already used those solar rebate costs in part to defeat a rate decrease complaint.

WHEREFORE, the MIEC prays the Commission deny Ameren Missouri's Motion in Limine or to Strike.

Respectfully submitted,

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[13] *See* Ameren Missouri Initial Post Hearing Brief in Case No. ER-2014-0223, page 19.

[14] *See* Report & Order, paragraph 24, page 13, in Case No. ER-2014-0223.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 9th day of January, 2015, to all parties on the Commission's service list in this case.

/s/ Edward F. Downey

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Kansas City Power & Light Company for the Issuance of an Order Authorizing Construction Accounting Relating to its Electrical Operations	))))	**File No. EU-2014-0255**

ORDER DENYING MOTIONS

Issue Date: December 10, 2014 Effective Date: December 10, 2014

Kansas City Power and Light Company ("KCP&L") filed an application with the Commission seeking authorization to use construction accounting treatment through an Accounting Authority Order ("AAO"). An evidentiary hearing on KCP&L's application is set for December 17th and 18th.[1] On November 14th, Commission's Staff filed rebuttal testimony of Mark Oligschlaeger and Keith Majors. On December 3, KCP&L filed a *Motion in Limine Regarding Ratemaking Issues*.

KCP&L argues that in his rebuttal testimony, Mr. Majors improperly discusses ten ratemaking recommendations. KCP&L seeks to exclude that portion of Mr. Majors' testimony.[2] KCP&L reasons that since a Commission order granting an AAO is not determinative of the ratemaking treatment to be afforded the amounts recorded, Mr. Major's ratemaking testimony is irrelevant and should be excluded, pursuant to § 536.070(8), RSMo (Cum.Supp. 2013). KCP&L seeks to exclude and prohibit any testimony or other evidence relating to ratemaking issues. KCP&L also requests expedited treatment so the Commission may rule on the m*otion in limine* by noon on December 10, 2014.

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[1] All dates are in 2014, unless indicated otherwise.

[2] KCP&L's motion specifically seeks to exclude ten recommendations found on pages 34 through 50 of Mr. Majors' rebuttal testimony.

Staff and Midwest Energy Consumers' Group ("MECG") filed timely responses to KCP&L's motions. Staff acknowledges that when granting an AAO, the Commission is not making a ratemaking determination regarding the subject costs.[3] Staff disagrees with KCP&L's depiction of Mr. Majors' ten recommendations as a pursuit for ratemaking treatment. According to Staff, Mr. Majors' filed testimony presents recommended changes to KCP&L's calculation of the deferred amounts.

A dispute clearly exists as to the characterization of Mr. Majors' rebuttal testimony. It would be inappropriate for the Commission to rule on the disputed testimony at this time. As MECG correctly points out, the Commission is unable to consider and evaluate the substantive merits of evidence which has yet to be offered and admitted into the record. It would be inappropriate for the Commission to delve into the substantive merits of disputed evidence for a relevancy determination prior to the evidentiary hearing.

By denying KCP&L's *motion in limine,* the Commission is in no way prohibiting KCP&L from objecting to any evidence presented at hearing or restricting KCP&L from disputing Staff's position in its surrebuttal testimony. Staff's response also includes a request to consolidate this file with KCP&L's general rate case, or in the alternative, to dismiss this matter. Since the Commission previously denied Staff's requests, it will not address them now.

THE COMMISSION ORDERS THAT:

1. KCP&L's *Motion in Limine Regarding Ratemaking Issues* is denied.

2. The *Motion for Expedited Treatment* is denied as moot.

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[3] *State ex rel. Public Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806, 813 (Mo. App. 1993.)

3. This order shall be effective when issued.

BY THE COMMISSION

Morris L. Woodruff
Secretary

Kim S. Burton, Regulatory Law Judge,
by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 10th day of December, 2014.