

In the Matter of Ameren Missouri's 2017 Utility Resource Filing Pursuant to 4 CSR 240 – Chapter 22)
) File No. EO-2018-0038

COMES NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), and in response to the applications for intervention filed by the National Association for the Advancement of Colored People (“NAACP”), Renew Missouri Advocates (“Renew Missouri”), Sierra Club, Natural Resources Defense Council (“NRDC”), Missouri Coalition for the Environment (“MCE”), Wind on the Wires (“WOW”), Missouri Joint Municipal Electrical Utility Commission (“MJMUEC”), the Missouri Industrial Energy Consumers (“MIEC”), and the Midwest Energy Consumers Group (“MECG”), and for its request that the Commission order the parties to this docket to utilize the form of certification respecting compliance with 4 CSR 240-2.135 attached hereto as Exhibit 1, states as follows:

1. Subsection (6) of 4 CSR 240-2.135 provides that confidential information¹ may only be disclosed to a party's attorneys, employees of a party who are working as subject matter experts for a party or who intend to file testimony, or to outside experts designated as such. All such persons must comply with the certification requirements of subsection (7) of the same rule.

2. The Company's Triennial Resource Plan Filing (i.e., its "IRP") which is the subject of this case contains certain confidential information, as do the work papers that underlie the IRP. Some of the information produced in discovery may also be confidential.

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3. All but one of the above-identified applicants for intervention are domestic or foreign not-for-profit corporations.² Most of them have members. Three (Renew Missouri, MIEC, and MIECG) do not have members.

4. Under the recently-adopted version of the subject rule, information that was formerly split between “highly confidential” and “proprietary” is now treated in one category: confidential. Consequently, there is no longer a limitation on the persons with whom highly confidential information can be shared, and all confidential information is subject to the same restrictions. This change in the rule creates the potential for a concern that did not exist under the prior version of the rule because it increases the potential for dissemination of some confidential information to a broader class of persons.

5. The concern would arise when there is a party to a Commission case that could gain some kind of competitive advantage or otherwise put a utility to a disadvantage through its access to certain confidential information. For example, the IRP contains Ameren Missouri’s view of fuel costs in the future. A wind developer (or other generation owner or developer) could utilize that information in responding to requests for proposal or otherwise negotiating with the Company to supply energy or capacity. That advantage to the developer could create a disadvantage for the Company and, ultimately, its customers whose rates would reflect the costs. One can also imagine estimated costs to construct facilities providing an advantage to contractors or those associated with them in bidding on projects, also to the detriment of the utility and its customers. There could be other examples of information either in the IRP or work papers now, or which could be sought in discovery.

² NAACP and Sierra Club do not explicitly identify themselves as such, but are so classified by their filings with the Missouri Secretary of State. MJMEUC is a unique entity created by Missouri statute. MJMEUC itself has employees, as would various municipalities whose interests MJMEUC represents.

6. When only a party's attorneys or outside experts had access to such information the concern was eliminated or at least greatly mitigated. Attorneys have strict ethical rules that they must follow as a condition of maintaining their law license, and outside experts hired to aid a party on a particular issue in a specific case are accustomed to abiding by confidentiality requirements and, in general, are not engaged in advancing the party's day-to-day mission and operations.

7. The Company recognizes that subsection (13) of the rule imposes a "use restriction" on the confidential information which, in theory, is designed to prevent a party from taking the kind of advantage of confidential information described above. However, in some cases the bell simply cannot be un-rung. If a developer's employee knows the fuel costs or the expected construction costs the employee knows them. At that point, it becomes impossible for that employee, if later involved in anything having to do with that utility, from not in effect "using" the knowledge the employee has.

8. The foregoing may or may not be a concern in this case, depending on what is meant by the word "employee," which is not defined in the Commission's regulations. In particular, there will not be a problem so long as it is well-understood that only *employees* of the party (or outside experts) and not employees of the members (or employees of others whose interests a party may represent) may access confidential information. For example, the Company is aware that NRDC, Sierra Club, Renew Missouri, and NAACP have administrative organizations that employ various persons, including attorneys and experts, to advocate for their organization's positions. Those kinds of organizations are not going to end up in a situation where they are bidding to build facilities for, or sell to, the Company. Access by their employees to confidential information should not present a concern. However, they have many (some of

them, thousands) of members or even if they don't have members, they may have many constituents whose interests they "represent" who might themselves (or whose employers might) be in such a position. While less clear, the same could be true of entities like MIEC and MECG who, to the Company's knowledge, have no employees at all, but from a corporate law standpoint, may have directors or officers who work for entities that could put the Company at a disadvantage if such persons access certain confidential information. Since the latter organizations do not have employees, this should not be a concern.

9. Because of the concerns expressed above and due to the recent changes to the rule, the Company believes it important to indicate that while it has no opposition to these parties' intervention (with the exception of MJMUEC, which is the subject of a separate pleading) and isn't seeking further protection as contemplated by subsection (4) of the rule at this time, it is taking those positions with the understanding that the Commission and the parties are applying the term "employee" using its common meaning; that is, an employee is a person "in the service of [the] . . . employer" whose services are "controllable by the . . . employer." *See, e.g., Aetna Casualty & Surety Co. v. Pavlovitz*, 826 S.W.2d 362, 366 (Mo. App. E.D. 1992) (Stating that the term "employee" has a common meaning, and then stating that meaning as paraphrased above). Members of organizations with members, persons on an organization's board (unless that person is also an employee of the entity in question), employees of entities whose interests an organization represents, and others who are not employees of the intervenors themselves are not entitled to see confidential information because they are neither employees of the intervening entities nor outside experts.

10. While the Commission's rules do not prescribe a form of the certification required by subsection (7) of the rule, a form is available on the Commission's website and has typically

been used by most parties to Commission cases. The Company believes the form should be improved in light of the new rule and given the concerns expressed above. Consequently, it requests the Commission adopt the modified form attached hereto as Exhibit 1 and require that it be used in this docket.

WHEREFORE, Ameren Missouri hereby requests the Commission enter its order requiring parties to this docket to have employees or outside experts who are to be provided access to confidential information in this docket to complete and file their certification using the form attached hereto as Exhibit 1.

Respectfully submitted,

/s/ James B. Lowery

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response was served on counsel for all parties or record and for other parties seeking intervention via electronic mail (e-mail) on this 23rd day of October, 2017.

/s/ James B. Lowery

James B. Lowery

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

**NONDISCLOSURE AGREEMENT
For Case No. _____**

I, _____, have reviewed the Commission's Rule at 4 CSR 240-2.135 on the _____ day of _____, 20____.

I have requested review of the confidential information produced in Case No. _____ on behalf of _____.

I hereby certify that:

- (a) Only employees of a party that are acting as an expert for that party or that have been retained for this case as an outside expert for that party may receive confidential information;
- (b) An employee is a person in the service of his or her employer whose services are controllable by the employer.
- (c) I am an employee of _____ [state name of intervenor] acting as its expert and/or its employee who intends to file testimony in this docket, or I am an outside expert for [state name of intervenor] retained to provide expert consultation or testimony in this docket; and
- (d) I have read and agree to abide by the Commission's Rule at 4 CSR 240-2.135.

Dated this _____ day of _____, 20____.

Signature & Title

Employer

Party

Address

Telephone

E-mail Address