

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

In the Matter of Union Electric Company, d/b/a)
AmerenUE's Tariff to Increase Its Annual)
Revenues for Electric Service.)

Case No. ER-2011-0028
Tariff No. YE-2011-0116

**STAFF'S REPLY TO AMEREN'S RESPONSE
TO STAFF'S MOTION FOR CLARIFICATION**

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its Reply to Ameren's Response to its Motion for Clarification, states as follows:

1. Ameren first suggests, without explanation or citation to any authority, that "[t]here is a question regarding whether the Staff's interpretation of the rules governing discovery is in fact correct[.]" No, there isn't. Rule 57.03(a) provides in pertinent part, "The attendance of witnesses may be compelled by subpoena as provided in Rule 57.09. The attendance of a party is compelled by notice as provided in subdivision (b) of this Rule." That's pretty clear. Professor Devine observes, "Wise practice dictates that a subpoena issue to any non-party witness."¹ The practice materials published by the Missouri Bar concur, "A subpoena is required to compel the attendance of a nonparty deponent at depositions."²

2. Ameren next observes that Staff did not raise this point in its motion to quash and suggests, first, that Staff must have believed that Ms. Mantle's appearance was compelled by the notice and, second, that Staff has thereby waived the requirement of a subpoena. Neither point is well-taken. Staff knew that a subpoena was necessary but

¹ J.R. Devine, *Missouri Civil Pleading and Practice* 288 (1986).

² 1 *Mo. Civil Trial Practice*, § 5.35 (2nd ed., 1988).

did not mention that point because it assumed one was coming. As for waiver, Ameren again fails to refer to any authority in support of its sweeping conclusion. Staff asserts that it absolutely has not waived the requirement that Ms. Mantle be served a subpoena to compel her attendance. Staff, obviously, has not agreed to produce Ms. Mantle and, in the absence of a subpoena, she need not appear. Rule 57.03(h)(2) provides that, in such a circumstance, *Ameren* might well be required to pay fees and expenses to the other attending parties. Staff points out that it filed its *Motion for Clarification* partly as a courtesy to advise Ameren and all interested parties that Ameren had not taken the necessary steps to compel Ms. Mantle's attendance at the deposition.

3. Ameren next observes that the general practice in these cases is to produce witnesses for deposition as requested by the inquiring party, without the need for a subpoena. That's absolutely true and, in the experience of the undersigned, at least, is also a widespread practice in civil litigation generally. But where a party is not inclined to produce a witness, perhaps because the inquiring party now seeks a second deposition, the rules say that a subpoena is required.

4. Ameren next accuses Staff of petulance. That accusation is hardly fair in the circumstances. Ameren has noticed up second depositions of several Staff witnesses, including Roberta Grissum, David Murray and John Rogers in addition to Ms. Mantle. Staff objected only in the case of Ms. Mantle; the other witnesses will be produced as requested, without the necessity of a subpoena, because Staff acknowledges that a second deposition is warranted with respect to those other witnesses.

5. Staff will indeed produce Ms. Mantle for deposition should the Commission so direct.

6. Speaking of petulance, Ameren next threatens to issue new notice to Ms. Mantle and to serve her with a subpoena and fees requiring her attendance “at a time and place suitable for the Company.” Staff can only point to Rule 57.09(c), which provides that “[a] party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena.” The Commission, like a trial court, may quash an unreasonable or oppressive subpoena.

WHEREFORE, Staff joins Ameren in praying that the Commission will take up this matter on an expedited basis and will clarify its Order of April 21, 2011, as both parties have requested; and grant such other and further relief as may be just in the premises.

Respectfully submitted,

s/ Kevin A. Thompson
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **22nd day of April, 2011**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson