

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

In the Matter of the Application of	)	
Union Electric Company for Authority	)	
To Continue the Transfer of	)	Case No. EO-2011-0128
Functional Control of Its Transmission	)	
System to the Midwest Independent	)	
Transmission System Operator, Inc.	)	

**AMEREN MISSOURI’S SUGGESTIONS IN OPPOSITION TO  
OPC’S MOTION TO COMPEL**

COME NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”), by and through counsel, and hereby files these suggestions in opposition to the Motion to Compel filed by the Office of the Public Counsel (“OPC”) on November 4, 2011. In this regard, Ameren Missouri states as follows:

1. This case was initiated on November 1, 2010. OPC has participated in this case from the beginning, including in early January 2011 when the Commission held an early prehearing conference.
2. On August 26, 2011 and on August 30, 2011, OPC served Ameren Missouri with the data requests that are the subject of OPC’s Motion to Compel. Ameren Missouri timely objected to the data requests on September 2 and 6, 2011.
3. On September 27, 2011 at the end of post-prehearing conference discussions in another case at the Commission, Public Counsel handed the undersigned counsel a document proposing certain revisions to OPC’s initial requests. OPC took no steps to follow-up on the data requests or to otherwise communicate with Ameren Missouri about them until the afternoon of Thursday, November 3, 2011, which at that time was less than three weeks before the evidentiary hearings scheduled in this case. OPC filed its Motion to Compel late the next day, Friday, November 4, 2011.<sup>1</sup>

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<sup>1</sup> OPC requested a waiver of 4 CSR 240-2.090(8)(A). Ameren Missouri does not oppose OPC’s waiver request because the undersigned counsel was not available within the 24-hour timeframe OPC sought for a conference with the regulatory law judge because of other pre-existing commitments, including but not limited to a Court of Appeals deadline for filing an

4. Three business days later, on Wednesday, November 9, 2011, the undersigned counsel communicated with OPC and proposed a resolution of the objections Ameren Missouri had made to nine of the ten data requests that are the subject of OPC's Motion. Those objections have been resolved, leaving just one data request, No. 2025, at issue.

5. The objection to No. 2025 is on the ground that the phrase "request for input" is vague and, depending on what OPC meant by it, the data request may be unduly burdensome and overly broad.

6. The problem with No. 2025 is that no matter how one construes "request for input," to even begin to attempt to respond to the data request would require Ameren Missouri to inquire of 50 to 75 different people, and for them to access and review their files (paper and electronic) over the past two years. This would undoubtedly require the review of tens of thousands of documents, not only by those 50 to 75 people, but by counsel for Ameren Missouri to ensure that none of the documents were privileged and that they were otherwise responsive to the request.

7. As a general rule, "in ruling on objections to discovery request, 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. *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 643 (Mo. App. E.D. 1997). Missouri courts have held further that "where annoyance, oppression, and undue burden and expense outweigh the need for discovery," a protective order should issue. *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002).

8. Given OPC's testimony in this case, it appears clear that the "point" OPC seeks to make (or at least learn more about through discovery so it can make its point more forcefully) is tied into its hypothesis that Ameren Services Company ("AMS") employees do not sufficiently obtain input from

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appellate brief that, when OPC contacted the undersigned and requested a conference with the regulatory law judge, was just two business days away.

Ameren Missouri employees when those AMS employees represent Ameren Missouri on the approximately 30 stakeholder groups at the Midwest ISO. This in turn ties back to OPC witness Ryan Kind's "recommendation" that the Commission impose a condition that requires that there be an Ameren Missouri employee acting as Ameren Missouri's representative at the Midwest ISO when those groups meet. But Mr. Kind has conceded in his deposition that it would be "hard to make [his recommended condition] work"—perhaps, impossible—given the voting structure in place at the Midwest ISO.<sup>2</sup> Mr. Kind also conceded that the issue he is raising regarding Ameren Missouri needing (in his view) to have its own representative at the Midwest ISO is "probably something to be considered in your choice of RTOs as to what – what the voting structure is."<sup>3</sup>

9. Mr. Kind's deposition also indicates that OPC is not suggesting that Ameren Missouri's Midwest ISO participation should not be extended according to the terms outlined in Ameren Missouri witness Ajay Arora's surrebuttal testimony (most notably, for a term through May 31, 2016, and as long thereafter as would practically be necessary if Ameren Missouri were required to withdraw at that time).<sup>4</sup> This means that this issue (whether Ameren Missouri is giving enough input, or whether Ameren Missouri needs to have a direct seat at the table as opposed to Ameren Services occupying that chair for Ameren Missouri) – which is an issue that OPC itself says is something to be considered in Ameren Missouri's choice of RTOs – isn't an issue *in this case*. It is not an issue in this case (or is at best a marginal one) because no one, including OPC, is suggesting that Ameren Missouri – *at this time* – ought to be considering participation in a different RTO.

10. Moreover, there was nothing stopping OPC from serving Ameren Missouri with No. 2025 at any time from November 2010 to late August 2011 when the data request was served. There

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<sup>2</sup> Kind Deposition, November 8, 2011, p. 90, ll. 10-18; p. 91, ll. 19-92:2.

<sup>3</sup> *Id.* p. 90, ll. 22-23.

<sup>4</sup> Ameren Missouri acknowledges that Mr. Kind does oppose the deferred accounting treatment for the costs of a future cost-benefit study.

was nothing stopping OPC from talking to Ameren Missouri when Ameren Missouri objected to the data request on September 6, 2011, from then having a conference with the regulatory law judge about the objection shortly thereafter, and from filing a motion to compel many weeks ago as opposed to barely two weeks before the evidentiary hearings in this case were scheduled to start.

11. It would be unduly burdensome under virtually any circumstances to require the Company to cause 50 to 75 people to comb through their files and read tens of thousands of documents to attempt answer a data request, but it is particularly unduly burdensome to do so now that we find ourselves one week from the evidentiary hearings in this case.<sup>5</sup> Candidly, neither the undersigned counsel, nor the one attorney in his office that is assisting with this case nor in-house counsel who is playing only a back-up role in the case are in a position to drop what must be done to prepare for a two-day evidentiary hearing where 11 witnesses are scheduled to testify (nor can others involved in that hearing drop what they are doing, both in terms of hearing preparation and in discharge of their normal job duties), to now search for documents that might be responsive to OPC's marginal data request at this late stage of this case.

12. As noted earlier, the Commission must balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it. *Wright*, 938 S.W.2d at 643. Discovery is designed to allow access to relevant, non-privileged information, "while minimizing expense and burden." *Ford Motor Company*, 71 S.W.3d at 606. Granting OPC's Motion to Compel a response to No. 2025 would fail to properly balance the dubious need for OPC to obtain a response against the tremendous burden providing a response would impose.

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<sup>5</sup> And even at the moment the Motion to Compel was filed, there were barely two weeks until the hearings, hearings which were set about four months ago.

WHEREFORE, having fully resolved nine of the ten objections at issue, and for the reasons discussed herein regarding No. 2025, Ameren Missouri prays for an order of the Commission denying OPC's Motion to Compel.

Dated: November 14, 2011.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via e-mail on counsel for the parties of record to this case, on this 14th day of November, 2011.

**/s/James B. Lowery**  
James B. Lowery