

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

In the Matter of Union Electric Company d/b/a)
Ameren Missouri’s Filing to Implement Regulatory)
Changes in Furtherance of Energy Efficiency as) **Case No. EO-2012-0142**
Allowed by MEEIA.)

**PUBLIC COUNSEL’S RESPONSE TO STAFF’S SUGGESTIONS, AMEREN
MISSOURI’S RESPONSE, DIVISION OF ENERGY’S RESPONSE TO CHANGE
REQUESTS AND AMEREN MISSOURI’S RESPONSE TO CHANGE REQUESTS**

COMES NOW the Office of the Public Counsel (“Public Counsel”) in response to the Staff of the Missouri Public Service Commission (“Staff”), Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”), and the Division of Energy, and states:

Impact of the Nonunanimous “Black Box” Stipulation and Agreement

1. In this case, the primary issues are: 1) what are the PY2013 Evaluation, Measurement, and Verification (“EM&V”) annual energy savings to be credited to Ameren Missouri?, and 2) what are the PY2013 net benefits amount to be credited?

2. Pursuant to the 2012 *Unanimous Stipulation and Agreement Resolving Ameren Missouri’s MEEIA Filing*, the evidentiary record needed to determine those issues consists of EM&V Reports completed by the utility’s evaluators, EM&V Reports completed by the Commission’s auditor, any change requests submitted by the parties, and stakeholder responses to those change requests.¹ Here, the record consists of multiple EM&V Reports completed by Ameren Missouri’s evaluators, multiple EM&V Reports completed by the Commission’s auditor, change requests from both Ameren Missouri and Staff, and a response to those change requests filed by the Office of the Public Counsel. This is all the Commission needs to decide this case.

¹ *Unanimous Stipulation and Agreement Resolving Ameren Missouri’s MEEIA Filing*, File No. EO-2012-0142.

3. The stipulating parties, Staff and Ameren Missouri, now suggest otherwise. Staff and Ameren propose adding several elements to the procedural schedule in this case for the sole and transparent purpose of bolstering their unsupported “black box” stipulation and agreement.

4. Commission Rule 4 CSR 240-2.115, states in pertinent part:

(A) The parties may at any time file stipulation and agreement as a proposed resolution of all or any part of a contested case.

(2)(D) A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.

5. The stipulating parties have attempted to portray the resolution of their “black box” non-unanimous stipulation and agreement as an issue that must be resolved by the Commission. Staff states, “[t]his Stipulation presents issues of first impression to the Commission.”² Separately, Ameren Missouri states, “discussions have resulted in a non-unanimous stipulation being filed and subsequently objected to, and thus it follows that going forward, the schedule should address the salient matters before the Commission (i.e., the stipulation and objection).”³ The Company concludes, “[a]ccordingly, the schedule adopted should provide for the resolution of the stipulation and the objection.”⁴

6. Of course the Commission should consider the stipulating parties’ change of position. Public Counsel in no way suggests otherwise. To suggest the opposite is, quite plainly, a straw man argument intended to distract the Commission from a weak attempt to manipulate the procedural schedule in this case. Under Public Counsel’s proposed schedule, the

² *Staff’s Suggestions in Support of Proposed Procedural Schedule and Response to Public Counsel’s Comments Regarding Proposed Procedural Schedules.*

³ *Ameren Missouri’s Response to the Office of the Public Counsel’s Proposed Procedural Schedule*

⁴ *Id.*

Commission should and will have every opportunity to consider the stipulating parties' changed position at the hearing in this case.

7. What the stipulating parties suggest is that their agreement creates new issues in this case and that those issues require discovery. But there is no basis in the Commission's rules for a stipulation to create a new fact issue. In fact, the opposite is true; stipulations are intended to resolve issues. This conclusion is supported by the language of the rule which emphasizes that the stipulation will be a "proposed resolution," and is further supported later in the rule by the statement that a non-unanimous stipulation "shall be considered to be merely a position of the signatory parties...." 4 CSR 240-2.115(A), (2)(D).

8. Stipulations should resolve issues, they do not create new ones, and they certainly do not give rise to a right to discovery to resolve those new issues. The record in a case either does or does not support the resolution to a case offered by a stipulation and agreement. Where the record might not support the stipulation's proposed resolution, the procedural schedule should not be manipulated to facilitate that end.

9. Twice in this case the Commission has entered a procedural schedule.⁵ In neither instance did any party request, nor did the Commission order, additional events to occur beyond the filing of change requests and stakeholder responses to change requests. These procedural schedules were entirely consistent with the unanimous stipulation and agreement the parties entered into in 2012. To be clear, ordering a procedural schedule that includes direct, rebuttal, and surrebuttal on a new position statement is to give the stipulating parties a second bite at the evidentiary apple rather than to resolve any issue in this case.

⁵ *Order Modifying Procedural Schedule To Consider Change Requests; Order Establishing Procedural Schedule To Consider Change Requests.*

10. The stipulating parties negotiated a settlement without the involvement of the other parties in this case. When the stipulating parties choose to operate in this manner, they bore the risk that one of the non-stipulating parties would object to the conclusion they reached. Where the settlement is a “black box” stipulation, the risk of objection is magnified. This is a risk the stipulating parties took knowingly, and they should continue to be subject to its attendant consequences as the Commission proceeds to decide this case.

11. In any event, and most importantly, with the filing of stakeholder responses to the respective change requests, the record before the Commission now contains a complete and adequate evidentiary basis on which the Commission can rule on the issues and on which it can decide to follow or reject the stipulation. There is no need for the stipulating parties to get another bite at this apple; they will be able to present fully and fairly to the Commission their position with respect to the “black box” stipulation at the hearing in this matter.⁶

Hearing dates

12. Public Counsel certainly understands the importance of scheduling to accommodate the schedules of the parties involved and, as stated in its October 2, 2014 filing, Public Counsel remains flexible to accommodate alternative dates to those proposed in Public Counsel’s proposed procedural schedule. However, Public Counsel believes these dates should preserve the events of the original procedural schedule, not expand them, and comport with the outline of the 2012 *Unanimous Stipulation and Agreement Resolving Ameren Missouri’s MEEIA Filing*.

⁶ If any party finds its new position indefensible, perhaps it may serve as caution that “black box” stipulations should stem from negotiations involving input from all parties, and present a resolution to which all parties will agree, or at least, not object. The purpose of a “black box” agreement is to reach a resolution that is acceptable the all parties when they may disagree on their underlying rationale for settling the issues.

WHEREFORE, the Office of the Public Counsel submits this *Response* for the Commission's consideration.

Respectfully,

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CERTIFICATE OF SERVICE

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