BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Ameren Missouri's 2020 Utility Resource Filing pursuant to 20 CSR 4240 – Chapter 22.	)))	File No. EO-2021-0021

AMEREN MISSOURI'S REPLY TO SIERRA CLUB'S RESPONSE TO MOTION FOR PROTECTIVE ORDER

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"), and pursuant to 20 CSR 4240-2.080(13), hereby files its reply to the above-referenced Sierra Club response, as follows:

1. Sierra Club's response is most notable for what it does *not* deny or dispute. Sierra Club does not deny that its overarching goal is to shutdown Ameren Missouri's (indeed all) coal-fired power plants by any means available. Sierra Club does not deny that it has pursued this goal in many instances by suing to require installation of expensive pollution control equipment at plants, and in many other instances by taking a contradictory position, intervening in rate cases and arguing that expenditures on such equipment would be imprudent and should not be included in rates. This strategy of Sierra Club's, where it acts like putting pollution controls on a plant would be an acceptable remedy for claimed emissions violations when in fact it simply wants the plant to be shut down, is one of the reasons Ameren Missouri asked the Commission for a protective order with respect to a narrow category of information given Sierra Club's participation in ongoing NSR litigation against Ameren. Sierra Club representatives involved in the NSR litigation should not be permitted to access the SCI 1.D IRP materials—which include a range of assumptions of what might potentially happen (and what would be in the best interests of Ameren Missouri customers) if the Eighth Circuit upholds the district court's decision in the NSR litigation, as well as modeling results of hypothetical scenarios based on those assumptions—otherwise

Ameren Missouri's future ability to ultimately obtain a resolution of the NSR litigation (through negotiation or otherwise) that is in the best interests of Ameren Missouri customers as compared to meeting Sierra Club's singular goal of shutting all coal plants down by 2030 would be compromised. Sierra Club should not be allowed to leverage participation in the Company's IRP docket to advance its Beyond Coal campaign's goals, which is exactly what allowing those at Sierra Club involved in the NSR litigation could do.

2. Sierra Club attempts to argue that transparency and the public interest are at stake here, and that the Commission would "set a damaging precedent" if it grants Ameren Missouri's motion. Not so; not even close. Sierra Club's argument is just misdirection. Ameren Missouri has requested a narrowly-tailored and specifically-targeted order that *allows* Sierra Club's representatives in this IRP proceeding to access the SCI 1.D IRP materials. The only Sierra Club representatives who could not access the SCI 1.D IRP materials are those involved in the NSR litigation. Motion ¶ 19. This order would not negatively impact the public interest in any way. It would not limit transparency in that every party to the case can view and make use of the information in question in this docket. And because the Sierra Club personnel who are actually involved in this proceeding would have access, Sierra Club cannot (and does not try to) show it would suffer any prejudice from this reasonably tailored protective order.

3. Ameren Missouri simply seeks heightened confidentiality protection for a narrow category of information, which would apply only to a specific subset of one party's representatives, based on unique circumstances. The reality is that once the Sierra Club representatives working on the NSR litigation learn the contents of the SCI 1.D IRP materials, they will be unable to "unlearn" or compartmentalize that information, and will necessarily use that information against Ameren Missouri in later proceedings in that case. As discussed below, numerous courts around

the country have recognized this problem and have imposed reasonable restrictions on the flow of information, just like those Ameren Missouri seeks here. The fact that Sierra Club opposes this narrowly-tailored and specifically-targeted request confirms Ameren Missouri's fears that prompted this motion in the first place: Sierra Club wants to use this Commission's proceeding to create and gain leverage in another matter, in service of Sierra Club's overarching strategy to shut down Ameren Missouri's coal-fired power plants by any means available.[1]

4. Sierra Club claims it "intends to devote its resources to evaluating Ameren Missouri's resource planning in this 2020 IRP, which involves consequential choices that will impact captive customers for years to come" and "more review of Ameren Missouri's 2020 IRP is indisputably better than less." (Response ¶ 16.) While Sierra Club may imply its alignment with Ameren Missouri's customers, Sierra Club, of course, is pursuing its own agenda. But, in any event, the bottom line is that the order Ameren Missouri has requested will not prevent or limit Sierra Club's evaluation of Ameren Missouri's resource planning in the 2020 IRP; nor will it affect in any way the review and participation of customers, other stakeholders, and the public.

[1] Sierra Club half-heartedly argues at the end of its response that Ameren Missouri's attorneys lack the "nuanced understanding" required to appreciate Sierra Club's strategies and goals. Response ¶¶ 23-24. Perhaps. On one hand, it is hard to see the "nuance" in Sierra Club's "Beyond Coal" campaign goal to "close all the coal plants in the US." Motion ¶ 8 & n.1. But on the other hand, there is no question that Sierra Club's attorneys—"the boots on the ground in the war on coal," as Sierra Club describes them (*id.*)—take nuanced positions when "nuance" is used as a euphemism for "contradictory." As Ameren Missouri showed in its motion, Sierra Club regularly takes contradictory positions, seeking to require expensive controls here, then arguing they are imprudent expenditures there, whichever position at the time serves Sierra Club's overall goal of shutting down plants. Motion ¶¶ 16-18. Sierra Club has done this throughout the country; it has already done this with respect to Labadie; and it has clearly signaled—and does not deny—that it intends to continue to do this with respect to Ameren Missouri's plants, including in connection with the control equipment sought at Rush Island and Labadie through the NSR litigation. *Id.* Sierra Club does not deny or dispute any of this. Rather, Sierra Club rationalizes it all as requiring a "nuanced understanding."

5. For these core reasons, Ameren Missouri's motion should be granted and the requested order should be entered. Peripheral points discussed in Sierra Club's response should not change that result. Nonetheless, Ameren Missouri addresses those below. Beyond exaggerating what Ameren Missouri has actually requested and the impact the requested order would have, Sierra Club essentially offers three points: (1) that Ameren Missouri has not met the standard for heightened confidentiality protection; (2) that existing rules and ethical obligations alleviate the need for heightened protection; and (3) that Sierra Club would be prejudiced by not being permitted to share information with its consultant. None of these points withstands scrutiny.

I. Ameren Missouri Has Met the Standard for Heightened Protection.

6. Sierra Club claims Ameren Missouri has failed to "meet the Commission's legal standard for granting a heightened protective order." Response ¶ 1. Sierra Club, citing to 20 CSR 4240-2.135(4), outlines a legal standard that it claims requires a party seeking a protective order to "identify a *concrete and specific harm* that creating extra protections would remedy." *Id.* (emphasis added). Having created that standard, Sierra Club then opines that Ameren Missouri has failed to meet it.

7. Not only has Ameren Missouri identified the subject harm against which the protective order is designed to protect, but Sierra Club's proposed legal standard simply is not the law. Under the language of 20 CSR 4240-2.135(4), a protective order is proper if the moving party explains (a) "what information must be protected"; (b) "the harm to the disclosing entity or the public that might result from disclosure of the information"; and (c) "how the information may be disclosed while protecting the interests of the disclosing entity and the public." 20 CSR 4240-2.135(4).

8. Ameren Missouri has satisfied all three requirements. Regarding (a), the information to be protected is the information in the IRP filing arising from SCI 1.D. Regarding (b), the harm, not just to Ameren Missouri but to the public (*i.e.*, to its 1.2 million electric customers) was specifically outlined in ¶¶ 7-9 of the motion. To summarize, the harm is that allowing Sierra Club personnel involved in the ongoing NSR litigation to learn and know of the information arising from SCI 1.D—information that once they know it cannot be "unknown"—could prejudice Ameren Missouri's ability to achieve a resolution of that litigation that minimizes financial harm to Ameren Missouri and ultimately its customers, who have and continue to benefit from the margins the generating plants at issue generate. And regarding (c), the information is available (in the words of the rule, has been "disclosed to") every single party—including Sierra Club, the Office of the Public Counsel (as representative of the public), the Commission's Staff and to all other intervenors in this case.

9. Nor is it true, as Sierra Club suggests, that the harm to be protected against must be certain (or even likely) to occur. The standard *set forth in the rule* is that a protective order is appropriate if the harm may or *might* occur: the movant must explain "what harm *may* occur if the information is made public" and "the harm to the disclosing entity or the public that *might* result from disclosure of the information." 20 CSR 4240-2.124(3)2 and (4) (emphasis added).

10. Ameren Missouri has met the standard for heightened confidentiality protection.

II. <u>Existing Rules and Ethical Obligations Do Not Substitute for Heightened Protection.</u>

11. Next, Sierra Club argues that "this Commission's confidentiality rules already preclude Sierra Club counsel from using information gleaned from this case in any other matter" and "each Sierra Club attorney, as an officer of the court, is expected to adhere to the American Bar Association's Code of Professional Responsibility and/or the ethical rules relevant to the State

Bar through which they are licensed . . . regardless of the case to which a Sierra Club attorney is assigned," so "additional safeguards" would be "superfluous." Response ¶¶ 11-12. Ameren Missouri agrees with these statements. It goes without saying that Sierra Club's attorneys' existing obligations and compliance with those obligations are vitally important. All of this is beside the point of Ameren Missouri's motion, however.

12. Two of the reasons Ameren Missouri brought the motion show why. First, as noted above, if Sierra Club representatives involved in the NSR litigation gain access to the SCI 1.D IRP materials, once they know that information it cannot be "unknown" and therefore may be used "inadvertently" in other matters. By accessing in this proceeding the range of assumptions and associated modeling results of various hypothetical scenarios, Sierra Club representatives involved in the NSR litigation could gain leverage in later negotiations in the NSR litigation, depending on the result of the pending Eighth Circuit appeal, which, in turn, would compromise Ameren Missouri's future ability to obtain a resolution of the litigation that is in the best interests of Ameren Missouri customers. Courts have consistently recognized this problem and imposed limitations to address it. "[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so." *F.T.C. v. Exxon Corp.,* 636 F.2d 1336, 1350-51 (D.C. Cir. 1980) (affirming exclusion of corporation's in-house litigation counsel from access to confidential competitively sensitive information of subsidiary and limiting access to only outside counsel). Courts therefore consider whether individuals can "lock-up" confidential information in their minds, "safe from inadvertent disclosure . . . once [they] had read the documents." *Brown Bag Software v. Symantec Corp.,* 960 F.2d 1465, 1471 (9th Cir. 1992) (affirming grant of protective order which "strikes a reasonable balance between those interests by shielding in-house counsel from personal knowledge of a

competitor's trade secrets, but allowing access to information through an independent consultant"). "The primary concern . . . is not that lawyers involved in such activities will intentionally misuse confidential information; rather, it is the risk that such information will be used or disclosed inadvertently because of the lawyer's role in the client's business decisions." *Federal Trade Commission v. Sysco Corporation*, 83 F. Supp. 3d 1, 3-4 (Dist. D.C. 2015) (citing *Brown Bag,* 960 F.2d at 1470).

13. It is for these reasons that the willingness of Sierra Club's representatives to comply with their existing obligations misses the point of Ameren Missouri's motion. As courts have emphasized, it simply is not humanly possible to segregate certain information from other information in one's mind. Once information is learned, one cannot help but use it. Courts, therefore, have ruled that the proper safeguard in these circumstances is to limit dissemination of the information. Sierra Club has not explained how it will actually be prejudiced by the reasonable limits Ameren Missouri has proposed, particularly given Ameren Missouri's willingness to allow Mr. Comings access (discussed below). Ameren Missouri has not requested an order preventing *all* Sierra Club representatives from accessing the SCI 1.D IRP materials, only those involved in the NSR litigation.[2] And Ameren Missouri has made this limited request, in part, because Sierra Club representatives involved in the NSR litigation, notwithstanding the Commission's existing

[2] For this reason, Sierra Club's reliance on *Veolia Energy Kansas City, Inc. for Authority to File Tariffs to Increase Rates*, HR-2011-0241, 2011 WL 3223527, at *1, *5 (July 18, 2011), is entirely misplaced. (Response ¶ 13.) Sierra Club's own argument recognizes that in that proceeding the protective order sought would have barred all internal counsel and expert witnesses from accessing information. In contrast, here Ameren Missouri only seeks to limit the access of Sierra Club representatives involved in the NSR litigation. *Veolia* also did not involve the same specific problem of inadvertent disclosure or use that is present here, or the track record of disregarding confidentiality obligations (even if inadvertently) that Sierra Club has here.

confidentiality rules and attorneys' ethical obligations, could not help but inadvertently use in other matters information learned from having accessed those materials in this proceeding.

14. Second, quite simply, Sierra Club has a track record of failing to uphold confidentiality obligations, including with respect to Ameren Missouri's confidential information, as explained in the motion. Motion ¶¶ 11-14. Even giving Sierra Club the benefit of the doubt and assuming that such disclosures were inadvertent, as Sierra Club contends, it only serves to prove Ameren Missouri's point that the narrowly-tailored and specifically-targeted heightened protection is warranted here to prevent even inadvertent misuse of the SCI 1.D IRP materials.

15. The Commission's existing confidentiality rules, and Sierra Club's existing ethical obligations, while important, are not a substitute for the narrowly-tailored and specifically-targeted heightened confidentiality protection that Ameren Missouri has requested to address the unique circumstances presented by the ongoing NSR litigation and the Commission's request that Ameren Missouri provide the SCI 1.D IRP materials in this proceeding.

III. <u>As a Compromise, Ameren Missouri Is Willing to Allow Access for Mr. Comings.</u>

16. Finally, Sierra Club claims it would be prejudiced by the order requested by Ameren Missouri because Sierra Club's consultant in this IRP proceeding, Tyler Comings, would fall within the scope of the order and prevented from accessing the SCI 1.D IRP materials in light of assistance he provided to EPA in the NSR litigation eight years ago in the 2012-13 timeframe. Response ¶¶ 17-18. Sierra Club claims it would have to incur additional expenses to hire a new consultant, and in any event the other person it would hire, Ezra Hausman, also worked with EPA in the NSR litigation. *Id.* Sierra Club contends that it should not have to bear such burdens.

17. Sierra Club's prejudice argument is flawed. Nonetheless, given that Mr. Comings is an outside consultant, he worked for EPA and not Sierra Club in the NSR litigation, his worked

occurred eight years ago, and Sierra Club has not retained him and has not indicated that it intends to retain him to perform work in connection with the NSR litigation now or in the future, Ameren Missouri is willing to compromise and amend its requested order to allow Mr. Comings to have access to the SCI 1.D IRP materials, subject of course to all other existing confidentiality requirements and obligations. In so compromising, Ameren Missouri relies on Sierra Club's implication that it will not utilize Mr. Comings' services in connection with the NSR litigation, as well as Sierra Club's invocation of the Commission's confidentiality rules and ethical obligations, which would preclude Sierra Club or any of its representatives, including Mr. Comings, from using information from this proceeding, including the SCI 1.D IRP materials, in any other matter. (Response ¶¶ 11-12.)

Conclusion

18. For the foregoing reasons, and those in Ameren Missouri's motion, Ameren Missouri respectfully requests that the Commission issue the protective order described in the motion, with the qualification that Mr. Comings may access the SCI 1.D IRP materials that are subject to heightened confidentiality protection with the understanding that Sierra Club will not utilize Mr. Comings' services in connection with the NSR litigation.

WHEREFORE, Ameren Missouri renews its request for a protective order as modified above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing reply has been served on counsel for Staff and OPC by electronic mail on this 19th day of October, 2020.

/s/ James B. Lowery
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