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

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| In the Matter of the Tariff Filings of Union Electric Company d/b/a Ameren Missouri, to Increase Its Revenues for Retail Electric Service. | ) ) ) | Case No. ER-2012-0166 |

**REPLY TO THE STAFF'S RESPONSE TO AMEREN MISSOURI'S MOTIONS TO QUASH NOTICES OF DEPOSITION, TO QUASH SUBPOENA DUCES TECUM, FOR PROTECTIVE ORDER, AND FOR RECONSIDERATION OF "GOOD CAUSE" "DETERMINATION" UNDER 4 CSR 240-2.100**

COMES NOW Union Electric Company d/b/a Ameren Missouri and Ameren Corporation and hereby file this reply to the above-titled response filed by the Staff.

**THE VOSS MOTION**

1. At page 4 of its Response the Staff admits that instead of properly taking up the Company's objection by seeking an order compelling a response to DR No. 7, it chose to sit on its claimed "right to review" documents (to which a proper objection had been made) for more than six months and in lieu thereof chose to attempt to "review" these documents via a subpoena duces tecum served 19 days before the hearings in this case are scheduled to commence.

2. Staff then notes that a "records deposition . . . is a well-known and commonly-encountered discovery practice," and that is undoubtedly true. But a "records deposition" of a non-party *depends upon* the issuance of a valid subpoena duces tecum. While the Staff cites to Mo. R. Civ. P. 57.09, what Staff fails to point out (or perhaps recognize) is that Rule 57.09 does not itself grant the power to issue a subpoena duces tecum to any party. We will address that issue further, below.

3. Staff also then confuses a discovery issue about a *different* data request (DR No. 253) which was discussed at the June 21, 2012 Discovery Conference with the issue presented here. The issue regarding DR No. 253 was that Ameren Missouri did not have possession,

custody or control of the documents Staff sought. They were thus completely beyond the scope of discovery, except pursuant to a subpoena duces tecum (that the Staff still has not sought) served on Ameren Energy Generating Company, which possesses the documents. It is true that the Regulatory Law Judge mentioned the possibility of Staff seeking such a subpoena. It is not true that the Judge ruled that a subpoena could or should issue or would or would not be valid. But what was clear was that a motion to compel on those facts regarding those documents would do the Staff no good – Ameren Missouri simply didn't have the documents. Consequently, if the Staff wanted them, it would have to obtain a proper subpoena duces tecum directed to Ameren Energy Generating Company.

4. Ameren Missouri has not claimed and is not claiming it does not possess documents responsive to DR No. 7. It did not object on that basis. Ameren Missouri employees do have those Board of Directors materials because Ameren Missouri personnel are involved in those Board meetings. If they are properly discoverable then Ameren Missouri would have to produce them. The questions are first, has the Staff taken the steps it was required to take to obtain discovery (no, it has not), and second, can the Staff (or even the Commission) reach the documents (to which the answer is also "no", as the Commission recognized in the Order in Case No. EO-2008-0104, because the documents do not relate to a transaction between Ameren Corporation or any of its subsidiaries and Ameren Missouri)?

5. Staff next in effect says that since Mr. Murray waited until August 30, 2012 to inspect the documents Ameren Missouri did produce in response to DR No. 7 (Ameren Missouri's response to the DR indicating the documents were available was served on the Staff on February 29, 2012 (see Exhibit A attached) -- six months earlier) that this somehow excuses the Staff from seeking its 11th-hour subpoena duces tecum. Staff knew more than six months ago that if Mr. Murray showed up to review the documents these non-Ameren Missouri documents

would not be produced because the Company's objection told the Staff so, and Staff could have reviewed the documents that were being produced anytime starting February 29, 2012. That the Staff didn't come look at what was being made available and pursue the objection if it felt it needed to is Staff's problem; it certainly doesn't excuse the timing of the Staff's attempt to obtain a subpoena duces tecum or constitute "good cause."

6. Staff next attempts to deflect the *ex parte* nature of its *Application* for a good cause determination and waiver of 4 CSR 240-2.100(1) by claiming that "of course a party can obtain a subpoena without notice." We agree, a party can apply for a subpoena without notice, and we said as much in our Motions to Quash. But what a party cannot do is file a *motion asking the Commission to make a good cause determination and waive one of its rules* without notice to the other parties. A condition precedent to obtaining a subpoena duces tecum *on these facts* was a proper motion for a good cause determination, time for response to that motion (in fact 10 days to respond, absent an affirmative order waiving 4 CSR 240-2.080(13)), and then an actual order containing a good cause determination. A motion was filed – *ex parte*. The 10-day response time was not waived, Ameren Missouri had no opportunity to respond *before* a good cause determination was made to waive 4 CSR 240-2.100(1), and no good cause order was ever issued. That following the proper procedure may not have been convenient to the Staff given the approaching evidentiary hearing dates may be true, but it doesn't allow the rules to be discarded just because the Staff sat on its hands for the past six months. One final point on this issue. Staff is right that motions to quash subpoenas are served after the subpoena has been issued. That's not the issue. The issue is whether the Staff can file and obtain an *ex parte* waiver of the 20-day requirement in 4 CSR 240-2.100(1). It can't.

7. With respect to the "relevance" debate at issue here, there are two issues. First, that debate should have taken place in the context of a motion to compel a response filed

sometime within the past six to seven months. More importantly, the "long-ago case" Staff attempts to minimize (authored by the Chief Staff Counsel himself) not only isn't so long ago – just 8 years – but remains just as applicable today as it was then. No applicable Commission enabling statute has changed since then; no applicable Commission rule has changed since then. The Ameren Corporation Board documents do not relate or pertain to a transaction between Ameren Missouri and Ameren Corporation or any other subsidiary of Ameren Corporation. The Commission itself isn't entitled to the documents; neither is the Staff.

8. Staff next explains that Ameren Missouri has an "opportunity" to describe in detail the nature of the materials at issue. No such request has ever been made. Undoubtedly, had a motion to compel been pursued the Judge would have asked Ameren Missouri those very questions; perhaps a compromise would have been reached; perhaps the Commission would have voted to compel production or, as discussed below, would have voted – as it must before a subpoena duces tecum can be issued – to issue a subpoena duces tecum under its only source of authority to do so for Ameren Corporation – Section 536.077. We don't know what would have happened because the Staff in fact has attempted an end-run around those established discovery processes.

9. The Staff then in effect concedes that authorization to issue a subpoena duces tecum has not been given as required by law. First, the Staff suggests that Section 536.077 does not apply because the Missouri Administrative Procedure Act ("MAPA") just "fills gaps" where Chapter 386 does not already address the topic. That the MAPA is a gap-filler is true. But what the Staff did not rebut, because it can't, is the fact that nowhere in Chapter 386 does the Commission posses the power to issue a subpoena <u>duces tecum</u> to Ameren Corporation. As we explained at ¶¶ 13 to 15 of our Motion to Quash respecting the subpoena directed to Mr. Voss, there is no power to issue a subpoena duces tecum to Ameren Corporation in Section 386.320.3;

no power to issue a subpoena duces tecum at all in Section 386.440; and no power to issue a subpoena of any kind to Ameren Corporation in Section 393.140. As we indicated, there *is power* to issue a subpoena duces tecum to Ameren Corporation in Section 536.077, but *only* the Commission itself or a Commissioner can exercise that power. It's ironic that Staff argues the Section 536.077 doesn't apply because it can only fill gaps; there *exists a gap that the Staff needs filled*, and thus Section 536.077 *does* apply. Staff's problem is that the purported subpoena duces tecum wasn't properly issued under Section 536.077. Nor does 4 CSR 240-2.100(4) aid the Staff. Even if that rule is a "statutory delegation" to the Judge (and we would submit that it is not – it simply recognizes that in a given case a statutory delegation *could* be made) the statutory delegation powers the Commission possesses under Section 386.240 only extend to matters "which the commission is authorized *by this chapter* [Chapter 386] to perform." There is no power to issue a subpoena duces tecum to Ameren Corporation in "this Chapter" (Chapter 386), and Section 386.240 gives the Commission no power to delegate its Section 536.077 power to anyone.

**THE HOYT MOTION**

10. With respect to the Notice of Deposition directed at paralegal Mary Hoyt, the Staff has now confirmed precisely what we suspected – the Staff wants to question Ms. Hoyt about the Company's attorneys' instructions as to what documents (or parts thereof) to withhold or redact. To the extent Ms. Hoyt withheld documents, or redacted portions of them, it was because a Company attorney reviewed the material and flagged/marked a document as one that was within the scope of the proper objection that had been made and instructed her to remove the document or redact the material. Asking her questions about what the Company's attorneys instructed her to do is patently not a "proper discovery objective."

11. Staff all but concedes this when it discusses only to the "trial preparation materials" portion of Rule 56.01(b)(3) and *completely ignores* that part of the rule (as recognized by the courts and this Commission) that absolutely protects intangible, opinion work product – i.e., what documents or parts thereof were flagged by the Company's attorneys based upon their mental impressions, conclusions, opinion, or legal theories that such documents or parts thereof were objectionable. The Staff claims that the protection given opinion work product is "secondary" to the work product protection that is afforded trial preparation materials. The Staff cites no authority for its unilateral imposition of its claimed hierarchy on the two types of work product addressed in Rule 56.01(b)(3). Indeed, the Staff has the law just backwards, as is evidenced by the terms of the Rule itself and the cases we cited in our original Motion to Quash respecting Ms. Hoyt's deposition. Opinion work product is *absolutely privileged.* Trial preparation materials are not absolutely privileged, as the Rule itself recognizes by creating an exception to the work product doctrine for trial preparation materials only if the movant can show that the movant would endure undue hardship to obtain the substantial equivalent by other means. If Ms. Hoyt were to describe what she redacted or withheld, then she will necessarily reveal what the Company's attorneys determined fell within the Company's objection – it would be tantamount to asking the Company's attorneys the same questions.

12. The learned counsel for the Staff is right on one point; the undersigned has defended many depositions and certainly can (and will) instruct Ms. Hoyt not to answer the questions the Staff counsel obviously intends to pose if a deposition were to proceed. That this is true makes the Motion to Quash no less proper. At the risk of repeating ourselves yet again: the proper avenue to resolve the dispute about these documents would have been a motion to compel. The Staff might have requested and the Commission might have entertained a request to review the materials *in camera* so that the Judge could evaluate the propriety of the objection.

The Judge could then assess the relevance and just as importantly the issue of whether the Commission itself (and certainly the Staff) has any right to "pry into the affairs" of Ameren Corporation or its non-Ameren Missouri subsidiaries. Posing improper questions to Ms. Hoyt that the Company's attorneys are not going to allow her to answer is the wrong way to go about this.

13. Finally, it must be asked: what purpose does taking Ms. Hoyt's deposition in order to learn "more about the documents she removed" serve if, as the Staff so stridently claims, the Staff has obtained the issuance of a valid subpoena duces tecum that would require Ameren Corporation to give Staff the documents *themselves?* What purpose would it serve for Ms. Hoyt to try to recall what was in the documents that the Staff, if the Staff has a valid subpoena as it claims, will get to look at the next day? The answer: it serves no purpose other than to annoy, harass, and create undue burden and expense for Ameren Corporation and Ms. Hoyt. Indeed, the deposition of Ms. Hoyt under these circumstances constitutes *per se* undue burden, annoyance, oppression, and expense because it would serve no valid purpose. Mo. R. Civ P. 56.01(c). The Notice should be quashed. A protective order should issue.

WHEREFORE, Ameren Missouri and Ameren Corporation pray that the Commission sustain the Motions it filed on September 10, 2012, and for such other and further relief as is just and proper under the circumstances.

Dated: September 11, 2012

Respectfully submitted,

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**Attorneys for Ameren Corporation and Union Electric Company d/b/a Ameren Missouri**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 11th day of September, 2012.

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

**Ameren Missouri**
**Response to MPSC Data Request**
**MPSC Case No. ER-2012-0166**
**In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariffs to Increase Its Revenues for Electric Service**

Data Request No.: MPSC 0007 - Lisa Ferguson

1. Please provide all copies of or make available for review all Ameren and Ameren Missouri Board of Director's meeting minutes, Board of Director Committee meeting minutes, all related reports, documents and all accompanying materials or handouts presented or distributed (whether electronic presentations or materials in hardcopy format) during the period covering October 1, 2010 updated through July 31, 2012 .
2. Please provide all copies of or make available for review all Ameren and Ameren Missouri Senior and Upper Management meeting minutes, Senior and Upper Management Committee meeting minutes, all related reports, documents and all accompanying materials or handouts presented or distributed (whether electronic presentations or materials in hardcopy format) during the period covering October 1, 2010 updated through July 31, 2012.

**RESPONSE**

**Prepared By: Gerald L. Waters; Lou Brislane; Marlene Wade**
**Title: Assistant Secretary; Assistant Secretary; Executive Secretary**
**Date: February 29, 2012**

**HIGHLY CONFIDENTIAL**

Subject to the Company's objections:

Copies of the requested Board of Directors' meeting minutes, including related reports and handouts, for the period October 1, 2010 through July 31, 2012 (when available) are available for inspection in Ameren Corporation's Secretary's Department.

Board of Director Committee Meeting minutes and related information will be made available for review by contacting Mary Hoyt at 314-554-3611 or mhoyt@ameren.com.

Copies of the requested Executive Leadership Team material will be available for review on site at Ameren.



EXHIBIT A