

**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                    )     File No. EO-2012-0142  
Furtherance of Energy Efficiency as Allowed by MEEIA.                    )

**RESPONSE IN OPPOSITION TO PUBLIC COUNSEL'S MOTION IN LIMINE OR TO  
EXCLUDE PORTIONS OF THE TESTIMONY OF STAFF WITNESS  
JOHN ROGERS AND AMEREN MISSOURI WITNESS RICHARD VOYTAS**

In accordance with the Commission's December 31, 2014, *Order Establishing Time to Respond to Pretrial Motions*, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "the Company") hereby responds in opposition to *Public Counsel's Motion in Limine or to Exclude Portions of the Testimony of Staff Witness John Rogers and Ameren Missouri Witness Richard Voytas*. Public Counsel's motion lacks merit and should be denied because it mischaracterizes, misrepresents, or fundamentally misunderstands testimony filed in this case by Staff and Ameren Missouri.

1. This is Public Counsel's second attempt to strike portions of the filed testimonies of Staff witness Rogers and Ameren Missouri witness Voytas. Public Counsel filed a similar motion on October 29, 2014. In its November 12, 2014, *Order Regarding Motions to Strike Testimony* ("November 12th Order"), the Commission denied that motion, stating "the Commission has an obligation to get it right, and can do so only by considering all the evidence."<sup>1</sup> The Commission's obligation to "get it right" continues, so for that reason alone Public Counsel's current motion to exclude portions of Messrs. Rogers' and Voytas' testimony also should be denied.

2. But beyond the desire to allow the parties to present as much relevant evidence as they deem necessary to prove their respective cases so the Commission can "get it right," Public Counsel's motion also should be denied because it mischaracterizes, misrepresents, or fundamentally misunderstands direct, rebuttal, and surrebuttal testimony by Staff's witness Rogers and the Company's witness Voytas regarding the *Non-Unanimous Stipulation and Agreement Settling the Program Year*

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<sup>1</sup> November 12<sup>th</sup> Order, p. 5.

2013 Change Requests (“2014 Stipulation”), which the parties entered into and filed September 19, 2014. As the Commission noted in its November 12th Order, under 4 CSR 240-2.115(2)(D) “non-unanimous stipulations and agreements to which an objection is raised become merely a non-binding joint position of the signatory parties.”<sup>2</sup> That means although the Commission no longer can approve the 2014 Stipulation *per se*, Staff and Ameren Missouri can still adopt some or all the stipulation’s terms as their joint position, and can present testimony and other evidence showing why the joint position is reasonable and in the public interest. The November 12<sup>th</sup> Order confirmed the accuracy of the preceding sentence when it stated:

As the Commission has explained several times, once an objection is made to [a non-unanimous] stipulation and agreement, the Commission cannot approve it. It is merely a revised position of the signatory parties, to which they are not bound. However, the signatory parties may offer testimony and other evidence to explain why their revised positions are appropriate.<sup>3</sup>

Explaining why the joint position is appropriate is precisely what Mr. Rogers and Mr. Voytas did in the direct, rebuttal, and surrebuttal testimony Public Counsel challenges in its motion. And contrary to Public Counsel’s mischaracterizations of that testimony, neither witness expressly or implicitly argues the Commission should adopt the 2014 Stipulation. Instead, each witness clearly and unambiguously supports the terms of that stipulation as their joint position, and argues the Commission should adopt that joint position as part of the final order in this case.

3. One need not search far into the testimony of either Mr. Rogers or Mr. Voytas to verify the accuracy of the preceding statement. For example, at page 1 of his direct testimony, beginning at line 22, Mr. Rogers states:

The purpose of my testimony is to provide a record of competent and substantial evidence to support Commission approval of the terms of the joint settlement position (hereinafter the “joint position”) contained in the *Non-unanimous Stipulation and Agreement Settling the Program Year 2013 Change Requests* (“Stipulation”) filed on September 19, 2014, by Staff of the Missouri Public Service Commission (“Staff”) and Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Company”) to resolve the competing change requests filed by Ameren Missouri and Staff related to the evaluation, measurement and verification (“EM&V”) of Ameren Missouri’s eleven (11)

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<sup>2</sup> *Id.*, p. 2.

<sup>3</sup> *Id.*, p. 5.

demand-side management (“DSM”) programs for program year 2013 (PY2013).  
(emphasis original)

Mr. Voytas expresses a similar purpose at page 2 of his direct testimony, which states, beginning at line 1:

My testimony will support the reasonableness of the Evaluation, Measurement and Verification (“EM&V”) results agreed upon by the Commission Staff (“Staff”) and the Company, and supported by the Division of Energy. The Stipulation and Agreement (“*Stipulation*”) that now reflects the Staff’s and Ameren Missouri’s changed positions represents a reasonable resolution of the change requests at issue in the case relating to the inclusion of market effects and the quantification of market efforts towards 2013 energy efficiency program load reductions actually achieved, as well as the calculation of net benefits to customers as a result of those load reductions. (emphasis original)

The preceding excerpts show each witness intends his testimony to be nothing more than an endorsement of the *joint position* of Staff and Ameren Missouri. Neither witness argues the Commission should adopt the 2014 Stipulation, and neither suggests the status of that stipulation is anything more than it currently is – the joint position of Staff and the Company.

4. Paragraph 6 of Public Counsel’s motion alleges portions of Mr. Rogers’ and Mr. Voytas’ filed testimony “refer to and provide support for the black-box proposal filed by Staff and Ameren Missouri . . .” Paragraph 16 of the motion further alleges “[i]gnoring the clear guidance from the Commission that the black-box proposal is not a factual issue in this case, both Staff’s and Ameren Missouri’s witnesses repeatedly refer to and discuss the proposal in their respective direct, rebuttal, and surrebuttal testimony.” But, again, the facts show Public Counsel’s allegations are completely without merit. In all excerpts from his direct, rebuttal, and surrebuttal testimonies identified in paragraphs 7, 8, and 9 of Public Counsel’s motion, Mr. Rogers uses the phrase “black-box” just once – a passing reference to the “black-box settlement of the annual energy savings and net benefits for PY2013”<sup>4</sup> that is included in the 2014 Stipulation. Read in context, this single reference merely describes certain terms and features of that stipulation. At no time does Mr. Rogers in any way argue or advocate for adoption of the stipulation itself. Mr. Rogers’ intent is underscored by the fact that throughout the remainder of his testimony he consistently refers to the agreements embodied in the 2014 Stipulation as the “joint

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<sup>4</sup> Direct Testimony of John A. Rogers, p. 2, lines 19-20.

position” of Staff and Ameren Missouri. The portions of Mr. Voytas’ testimony identified in paragraphs 10 and 11 of Public Counsel’s motion also reference the concept of a “black-box” settlement only once. In response to a question about whether Public Counsel’s characterization of the 2014 Stipulation as a “black-box settlement” is accurate, Mr. Voytas discusses the many potential meanings of that phrase.<sup>5</sup> And although he occasionally refers to the 2014 Stipulation elsewhere in his direct testimony,<sup>6</sup> it is clear for the context of his testimony that Mr. Voytas’ references are explanatory (i.e., he explains the terms of the stipulation or how and why they were agreed to) and were not intended to characterize the terms of that stipulation as anything other than the joint position of Staff and the Company.

5. As noted earlier in this response, the Commission’s November 12<sup>th</sup> Order explicitly recognizes that when a timely objection to a non-unanimous stipulation is filed the stipulating parties retain the right to offer testimony and other evidence explaining why the terms of their agreement are appropriate. Indeed, because all orders of the Commission must be supported by competent and substantial evidence, unless the stipulating parties offer evidence supporting the terms of their agreement and explaining why those terms should be approved, the Commission cannot lawfully adopt some or all of the joint position as part of its final order. The purpose of Messrs. Rogers’ and Voytas’ filed testimony is to provide evidence explaining and supporting the parties’ joint position. And although the 2014 Stipulation was the genesis of that joint position, neither witness argues the Commission should adopt the stipulation *per se*. Instead, both Mr. Rogers and Mr. Voytas acknowledge the evolution of the 2014 Stipulation into Staff and Ameren Missouri’s joint position, and argue for the adoption of its terms on that basis alone. Their testimony is appropriate under both the rules of evidence and the Commission’s rules governing non-unanimous stipulations. Public Counsel’s attempt to characterize the testimony as inappropriate and outside the bounds of those rules is completely unfounded, and should be rejected.

WHEREFORE, for the reasons stated in this response, the Commission should deny Public Counsel’s motion and should refuse to issue the order Public Counsel requests striking the portions of the

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<sup>5</sup> Direct Testimony of Richard A. Voytas, p. 4, line 20 through p. 5, line 17.

<sup>6</sup> See, e.g., *Id.*, p. 6, lines 1-22; p. 51, line 21 through p. 52, line 5.

direct, rebuttal, and surrebuttal testimonies of Mr. Rogers and Mr. Voytas, which are identified in paragraphs 7-11 of that motion.

Respectfully submitted,

/s/ L. Russell Mitten

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**ATTORNEYS FOR UNION ELECTRIC  
COMPANY d/b/a AMEREN MISSOURI**

**CERTIFICATE OF SERVICE**

I hereby certify that on January 2, 2015, a copy of the foregoing was served via e-mail on all parties of record in File No. EO-2012-0142.

**/s/ L. Russell Mitten**  
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