

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

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| In the Matter of Union Electric Company d/b/a |) | |
| Ameren Missouri's 2 nd Filing to Implement |) | File No. EO-2015-0055 |
| Regulatory Changes in Furtherance of Energy |) | |
| Efficiency as Allowed by MEEIA |) | |

**RESPONSE IN OPPOSITION TO PUBLIC COUNSEL'S MOTION
FOR PROTECTIVE ORDER AND MOTION FOR EXPEDITED TREATMENT**

Under authority of, and in accordance with, 4 CSR 240-2.080, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "the Company") responds in opposition to the Office of the Public Counsel's ("OPC") motion for protective order. OPC's motion is based on language in Rule 56.01(c), Missouri Rules of Civil Procedure, that allows a person from whom discovery is sought to seek a protective order to prevent "annoyance, embarrassment, oppression, or undue burden or expense." But before such a motion can be granted, the rule requires the movant to show good cause for the relief requested. Because Ameren Missouri's request for discovery is reasonable under the circumstances and will not result in annoyance, embarrassment, oppression, or undue burden or expense, OPC cannot establish good cause why its motion should be granted. Therefore, the request for a protective order should be denied.

1. To enable it to better understand portions of the *Amended Non-Unanimous Stipulation and Agreement Regarding Ameren Missouri's MEEIA Cycle 2* ("Non-Utility Stipulation") and certain testimony filed in support of that stipulation, Ameren Missouri issued notice on July 10, 2015, that it would take the deposition of OPC's witness, Dr. Geoff Marke, on Friday, July 17, 2015. A copy of the deposition notice is attached to this response as Exhibit A. That notice was issued less than forty-eight hours after Dr. Marke filed his testimony in support

of the Non-Utility Stipulation, and would have been issued sooner had OPC's counsel returned two telephone calls – one placed before Dr. Marke filed his testimony and the other soon thereafter – seeking a mutually convenient date for the deposition. Because OPC's counsel failed to respond to the Company's requests, Ameren Missouri was forced to file its notice on July 10, because that was the last day a notice could be filed that both complied with the seven-day notice requirement of Rule 57.03(b)(1), Missouri Rules of Civil Procedure, and allowed Dr. Marke's deposition to be completed prior to the commencement of evidentiary hearings in this case

2. Even though OPC's counsel failed to acknowledge or respond to Ameren Missouri's requests for discussions regarding a mutually convenient date for Dr. Marke's deposition, in an e-mail message sent July 10, 2015, the Company's counsel again expressed willingness to adjust the deposition date. A copy of that e-mail message is attached to this response as Exhibit B. As of the date of this response, OPC's counsel similarly failed to respond to that offer.

3. As to the purpose of the deposition and its limited scope, those were explained to OPC's counsel during two telephone conversations the afternoon of July 10. During each of those conversations, Ameren Missouri's counsel verbally represented that the scope of the deposition would be limited to the Non-Utility Stipulation and the testimony Dr. Marke filed in support of that stipulation. To formally confirm those representations, the Company's counsel sent an e-mail message stating, "I want to again confirm that the deposition of Geoff Marke scheduled for July 17 will be limited to the following two areas: the non-unanimous non-utility stipulation and Dr. Marie's [sic.] supplemental testimony in support of that stipulation." A copy of that e-mail message, and OPC's counsel's reply, are attached to this response as Exhibit C.

4. OPC's motion correctly states the July 17 deposition would be Ameren Missouri's second deposition of Dr. Marke in this case. What it fails to state, however, is the previous deposition, taken May 19, 2015, was limited to rebuttal testimony Dr. Marke filed on March 20, 2015, and surrebuttal testimony he filed on April 27, 2015. Because the Non-Utility Stipulation and Dr. Marke's supporting testimony did not exist until almost two months after the earlier deposition, and also because it sets forth a cost recovery mechanism that had never been discussed in either his rebuttal or surrebuttal testimonies, it is nonsense for OPC to argue the first deposition provided an adequate opportunity – or any opportunity at all – for the Company to conduct discovery on the subsequent filings that make the July 17 deposition necessary.

5. OPC's motion suggests the need for discovery is less in Commission proceedings because testimony in those proceedings is pre-filed. However, contradicting that suggestion the motion also acknowledges the Commission's rules provide for liberal discovery "to find out the basis for the conclusions and recommendations of an expert witness prior to an evidentiary hearing." The purpose of the July 17 deposition is for exactly that purpose: to determine the basis for certain provisions of the Non-Utility Stipulation and Dr. Marke's testimony in support of those provisions. The July 17 deposition is necessary to allow Ameren Missouri discover additional information it needs to prepare for the upcoming evidentiary hearings – information that cannot be reasonably obtained by other means.

6. Although OPC's motion seems to suggest data requests would have been more appropriate, Ameren Missouri's counsel concluded a deposition – wherein the witness provides narrative answers and counsel can seek clarification of those answers through additional questions – was the discovery vehicle that would best allow the Company to obtain from Dr. Marke the information it needs to prepare for hearing. Moreover, OPC's suggestions regarding

data requests ignores the fact the Commission's rules allow parties twenty days to respond. Therefore, had Ameren Missouri served OPC with written data requests the day Dr. Marke filed his testimony in support of the Non-Utility Stipulation, responses to those requests would not have been due until August 4, 2015 – almost two weeks after the close of evidentiary hearings. Admittedly, the Commission's rules allow parties to agree to expedite responses. But there is no reason to believe OPC's counsel would have been more responsive to entreaties regarding data requests than he was to Ameren Missouri's requests for alternate dates for Dr. Marke's deposition.

7. It is unclear why OPC believes the scheduled deposition would subject Dr. Marke to annoyance, embarrassment, oppression, or undue burden or expense. A deposition for the limited purpose of gaining information regarding the Non-Utility Stipulation and Dr. Marke's supporting testimony is not annoying, embarrassing, or oppressive. And because the deposition will be taken in a location less than two blocks from OPC's office, no credible claim can be made the deposition will cause undue burden or expense. The fact the deposition will be taken on the last regular workday prior to the commencement of evidentiary hearings is not optimal for anyone involved, but because Dr. Marke did not file his testimony until July 8, and also because OPC's counsel failed to respond to multiple requests for discussions about an alternate date, July 17 is the only date that would satisfy both the rule governing notice and the procedural schedule in this case.

8. In *Ratcliff v. Sprint Missouri, Inc.*, 261 S.E.3d 534 (2008), the Missouri Court of Appeals stated, “[t]he trial court has broad discretion in administering the rules of discovery . . . It abuses its discretion ‘if its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration.’” *Id.* at 551. Granting OPC's

motion would be against the logic of the circumstances and would constitute an arbitrary and unreasonable abuse of the Commission's discretion to administer discovery.

WHEREFORE, for all the reasons stated in this response, the Commission should deny OPC's motion for a protective order and allow the deposition of Dr. Marke to proceed according to the timely filed notice. The Commission also should deny OPC's request for an alternative protective order limiting the scope of the deposition. As expressed in this response, Ameren Missouri's counsel has clearly stated his intent to limit the scope of his deposition to the Non-Uniform Stipulation and Dr. Marke's July 8 testimony in support. Should the Company's counsel attempt to expand the scope of the deposition, OPC's counsel can make an appropriate objection, and the Commission can deal with that objection if Ameren Missouri attempts to admit into evidence or otherwise use during the hearing the portion of Dr. Marke's deposition that exceeds the previously represented limitations.

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 a copy of the foregoing filing was served via e-mail on counsel for all parties of record on this 14th day of July, 2015.

/s/ L. Russell Mitten

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

In the Matter of Union Electric Company d/b/a)
Ameren Missouri's 2nd Filing to Implement) File No. EO-2015-0055
Regulatory Changes in Furtherance of Energy)
Efficiency as Allowed by MEEIA)

DEPOSITION NOTICE

To Parties of Record:

The undersigned counsel for Union Electric Company, d/b/a Ameren Missouri, will take Dr. Geoff Marke's deposition on Friday, July 17, 2015, at the offices of Brydon, Swearingen & England, P.C., Jefferson City, Missouri, beginning at 9:00 a.m., CDST, and continuing until completed or as the parties otherwise agree. Any party wishing to participate in the deposition telephonically should so advise the undersigned counsel no later than 5:00 p.m., CDST, on Wednesday, July 15, 2015, so arrangements can be made for a call-in bridge.

/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 a copy of the foregoing filing was served via e-mail on counsel for all parties of record on this 10th day of July, 2015.

/s/ L. Russell Mitten

Russ Mitten

From: Russ Mitten
Sent: Friday, July 10, 2015 2:05 PM
To: 'Opitz, Timothy'
Subject: Deposition Notice for Geoff Marke
Attachments: Deposition Notice - Geoff Marke - Supp Direct.pdf

THE COMMUNICATIONS IN THIS MESSAGE ARE PRIVILEGED AND CONFIDENTIAL AND ARE INTENDED ONLY FOR THE USE OF THE ADDRESSEE.

IF YOU RECEIVE THIS MESSAGE IN ERROR, PLEASE CONTACT ME IMMEDIATELY BY TELEPHONE AT 573-635-7166.

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Tim: I have attached a deposition notice for Geoff Marke. Per the notice, Geoff's deposition is scheduled for next Friday, beginning at 9:00 a.m. As I indicated in my previous voicemail message, I will be happy to discuss with you moving the deposition to a time that's more convenient for Geoff.

*Russ Mitten
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(573) 635-7166*

Russ Mitten

From: Opitz, Timothy [timothy.opitz@ded.mo.gov]
Sent: Friday, July 10, 2015 6:20 PM
To: Russ Mitten
Subject: RE: Deposition of Goeff Marke

Confirmed, thanks

-----Original Message-----

From: Russ Mitten [<mailto:rmitten@brydonlaw.com>]
Sent: Friday, July 10, 2015 5:22 PM
To: Opitz, Timothy
Subject: Deposition of Goeff Marke

Tim: I want to again confirm that the deposition of Goeff Marke scheduled for July 17 will be limited to the following two areas: the non-unanimous non-utility stipulation and Dr. Marie's July 9 supplemental testimony in support of that stipulation.

Russ Mitten

Sent from Russ Mitten's iPhone