BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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-2011-0028

RESPONSE TO STAFF'S MOTION TO QUASH DEPOSITION

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"), by and through counsel, and hereby responds to the above-referenced Motion filed by the Staff on April 18. For the reasons outlined below, the Staff's Motion should be denied.

1. On February 4, 2004, the Staff filed its Cost of Service Report, including therein a section authored by Staff witness Lena Mantle regarding the Company's fuel adjustment clause ("FAC"). In particular, Ms. Mantle suggested that the sharing percentage in the Company's FAC be changed from 95%/5% to 85%/15%. Ms. Mantle indicated that five factors were considered in making that recommendation, and that four of those influenced her decision to make this recommendation in this case. Ms. Mantle also provided certain bases or justifications relating to those four factors.

2. Ms. Mantle was deposed for approximately 90 minutes on April 13, 2011 at the Commission's offices. During that deposition she was asked about these bases and justifications, and essentially repeated the limited bases and justifications that were reflected in the Staff Report. However, in her surrebuttal testimony she has made new allegations relating to facts that underlie her opinions that could have been made in the Staff's Report, and that at a minimum should have been disclosed in her earlier deposition. Among those are accusations that the Company has acted in a manner that is "unlawful," has "repeatedly misrepresented information

to Staff," has "failed to inform the Staff that it had incorrect assumptions," and has, in effect, failed (in Staff's view) to comply with 4 CSR 240-3.190(1)(C). While the Company strongly disagrees with these serious allegations, they now form, in part, the basis for Ms. Mantle's opinions and the Company is entitled to question her about them, without having to do it for the first time on the witness stand at the evidentiary hearing.

3. As another example of her evolving position, after indicating in her earlier deposition that the basis for her testimony in the FAC prudence docket (Case No. EO-2010-0255) was that the Company was "imprudent" for not including the revenues from the AEP and Wabash contracts as off-system sales in the FAC, her surrebuttal testimony contains an additional allegation, that the Company's actions in this regard were "unlawful." The Company is entitled to discover why her position seems to be evolving.

4. Moreover, after indicating in her deposition that she had not done any research regarding other states' practices regarding sharing mechanisms, she now has attached decisions from two other state commissions involving sharing in energy cost adjustment mechanisms and purports to use them as support for her 85%/15% proposal. Aside from the fact that these decisions constitute inadmissible hearsay, which we will address as appropriate, the Company is entitled to discover the scope of her new "research," including her understanding of its results.

5. The foregoing are but a few examples of the legitimate reasons the Company has to depose Ms. Mantle again based on her surrebuttal testimony.

6. The purpose of a deposition is to allow the deposing party to discover the facts on which an opposing witness bases her opinions. *See, e.g., Bailey v. Norfolk Western Ry. Co.,* 942 S.W.2d 404, 414 (Mo. App. E.D. 1997). Moreover, depositions are taken to assist in hearing preparation, and to eliminate, as far as possible, concealment and surprise in hearings. *See, e.g.,*

State v. Carlisle, 955 S.W.2d 518, 521 (Mo. App. E.D. 1999); *Bailey*, 942 S.W.2d at 415. These purposes are particularly circumvented when a witness files direct testimony (here, Ms. Mantle's portion of the Staff Report), fails to disclose all of the facts underlying her opinion, is deposed about those opinions and facts and still fails to disclose all of them, and waits until surrebuttal testimony to inject new "facts" (we contend, unsupported allegations) to bolster her opinions at a time when the Company has no opportunity to respond.

7. Parties are entitled to any discovery which is reasonably calculated to lead to the discovery of admissible evidence. Rule 56.01(b)(1) (cited by the Commission in the context of denying KCP&L's Motion to Quash in Case No. EM-2007-0374).[1] Evidence which tends to test the basis and validity of the opinions of a witness such as Ms. Mantle is relevant and admissible. Depositions are one of the devices by which discovery is allowed. Indeed, depositions are one of the more effective means of discovery, in that unlike data requests, the party posing the questions can immediately follow-up and obtain additional information or clarification of the responding party's answers. Moreover, depositions allow parties to properly focus their examination of witnesses at the hearing on matters that are most informative and relevant to the issues at hand. The Company is well-aware of concerns expressed by some Commissioners about what has appeared, in prior cases, to be the conduct of discovery depositions during an evidentiary hearing. While it is not possible to eliminate all questions of this nature at evidentiary hearings, proper use of depositions before the hearings promotes the efficiency of the hearing process, provides an opportunity for parties to avoid unfair surprise, and aids the Commission in obtaining the best information on the issue that is available, which includes being able to make a fair assessment of the credibility and basis for positions taken by the parties.

[1] *In re: Great Plains Energy Inc. et. al.*, 2008 WL 1794972 (Mo. P.S.C. 2008).

8. Staff makes the bare allegation that a second deposition of Ms. Mantle is "unnecessary, oppressive, harassing and will obstruct and impede Staff's preparation for the evidentiary hearing in this matter that begins the following day." To the contrary, we have demonstrated that the deposition is necessary. Moreover, we categorically reject Staff's claims of harassment or oppression. The purpose of the deposition is clear, legitimate and fair. And while the precise length of the deposition cannot be predicted with certainty, the deposition is far from unduly burdensome. While it cannot be predicted precisely how long it will last, it is certainly expected to last less than one-half day (it is scheduled for 1 p.m.), and indeed, the undersigned counsel would expect it to last a couple of hours, most likely less. While the Company was entitled to notice the deposition anywhere in the state of Missouri, it is scheduled at the Commission's office, requiring counsel to travel to Jefferson City. The issue the deposition pertains to – the FAC – will likely not be heard by the Commission until 8 days after the deposition is taken. The Staff attorney who defended Ms. Mantle during the first deposition is not, to the undersigned counsel's knowledge, the lead attorney on the case or on any of the issues likely to be taken up during the first few days of the hearings and thus should be available to defend the deposition.

9. Staff also suggests that the Company should have scheduled Ms. Mantle's first deposition "later in the case preparation sequence." The date of the first deposition, April 13 – 13 days before the hearings – is we think quite late in the "case preparation sequence" as it is. Staff's suggestion appears to be that the Company has to wait until the 11 day period (6 business days) between surrebuttal and the hearing to depose its witnesses. Of course, that wouldn't be necessary if the Staff's direct case were fully supported, and if its witnesses would refrain from bringing up new support for their opinions for the first time in surrebuttal testimony.

10. It is the Staff's burden to establish the propriety of a protective order.[2] *State ex rel. Ford Motor Co. v.* Messina, 71 S.W.3d 602, 607 (Mo. banc 2002). The bare allegations in the Staff's Motion fail to meet the Staff's burden, and the facts recited above demonstrate the impropriety of depriving the Company of its legitimate right to conduct further discovery on these issues via deposition of a witness whose position, if adopted, would have resulted in additional losses of approximately $15 million dollars in the past year alone.

The Staff's Motion to Quash should be DENIED.

Respectfully submitted,

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[2] While Staff denominates is Motion as a "Motion to Quash," under Rule 56.01(c) the proper motion is a motion for a protective order.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was served via e-mail on counsel of record for all parties of record in this case, on this 20th day of April, 2011.

/s/James B. Lowery
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