

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

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

Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “the Company”) responds in opposition to the Office of the Public Counsel’s (“Public Counsel”) *Motion to Exclude Portions of the Testimony of Staff Witness John Rogers and Ameren Missouri Witness Richard Voytas* (“Motion”). Public Counsel’s Motion is without merit and should be denied because it misinterprets and misrepresents both the Commission’s October 29, 2014, *Order Establishing Time to Respond to Public Counsel’s Motion to Exclude Portions of Staff’s and Ameren Missouri’s Direct Testimony* and the current status of the *Non-Unanimous Stipulation and Agreement Settling the Program Year 2013 Change Requests* (“Stipulation”) between the Company and Staff. Public Counsel’s Motion also misapplies the law governing direct testimony filed October 22, 2014, in accordance with the Commission’s *Order Establishing Procedural Schedule to Consider Change Requests* (“Procedural Order”).

1. Under 4 CSR 240-2.115(2)(D), a non-unanimous stipulation to which a timely objection has been filed “shall be considered to be merely a position of the signatory parties to the stipulation, except that no party shall be bound by it.” The rule goes on to state that all issues sought to be resolved through a non-unanimous stipulation to which a timely objection has been made “shall remain for determination after hearing.”

2. Public Counsel's timely objection to the Stipulation changed its status from a settlement, which the Commission could adopt or reject, to a statement of position the signatory parties could, at their option, jointly support. The Procedural Order acknowledges this changed status when it states at page 3 "the Commission cannot 'approve' the non-unanimous stipulation and agreement as, by rule, it ceased to exist when a timely objection to it was filed." But the fact the Commission can no longer approve the Stipulation as a settlement does not mean evidence supporting the Stipulation is no longer relevant.

3. The Procedural Order also states "Staff and Ameren Missouri may continue to support that joint position, and the Commission can adopt that position if it is supported by competent and substantial evidence in the record."<sup>1</sup> Those parties elected to adopt the substantive agreements contained in the Stipulation as their joint position on the change requests at issue in this case, and filed the direct testimonies of Messrs. John A. Rogers and Richard A. Voytas in support of the joint position. So not only are the direct testimonies of Staff's and Ameren Missouri's witnesses relevant to the key question confronting the Commission – "whether any change request should be adopted"<sup>2</sup> – those testimonies are *material* to that question, because without competent and substantial evidence in the record the Commission cannot lawfully adopt Staff's and Ameren Missouri's joint position on the change requests at issue in this case. Granting Public Counsel's Motion would deny both Staff and Ameren Missouri their fundamental due process rights to present evidence in support of that position.

4. The section of Public Counsel's motion to strike entitled "Analysis" suggests Public Counsel believes the purpose of the direct testimony filed by Staff and Ameren Missouri was to promote adoption of the "black-box" settlement proposal contained in the Stipulation.

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<sup>1</sup> Procedural Order, p. 3.

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

Nothing could be further from the truth. The opportunity to settle this case, at least according to the terms of the Stipulation, ended when Public Counsel filed its timely objection, and both Staff and the Company agree it would be a waste of time to file testimony asking the Commission to adopt a proposed settlement everyone acknowledges no longer exists. Instead, Messrs. Rogers and Voytas filed their respective direct testimonies for a very different purpose: to explain and provide evidentiary support for Staff's and Ameren Missouri's joint position for resolving issues regarding proposed change requests. If it finds that evidence persuasive, the Commission can adopt the joint position in its final order, not in order to approve a settlement but instead to rule upon the change requests in the manner advocated by the Staff and Ameren Missouri *based upon competent and substantial evidence of record*. If it is not persuaded, the Commission can resolve those issues in any alternative way it believes is reasonable in accordance with the evidence. But regardless how the Commission ultimately decides the remaining issues regarding proposed change requests, the testimonies of Staff's and Ameren Missouri's witnesses only provide facts and opinion evidence directly or indirectly supporting the parties' joint position on those issues. Neither witness's testimony advocates or supports adoption of any settlement – “black-box” or otherwise – as Public Counsel's motion erroneously suggests.

5. Under Missouri law, relevancy is the key criterion for admission of evidence by courts and administrative agencies, *Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38, 43 (Mo. App. 2007), and, as Public Counsel notes in its motion, one of the tests for relevancy is whether evidence “tends to prove or disprove a fact in issue or corroborates other relevant evidence.” *Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005)(citing *Koontz v. Ferber*, 870 S.W.2d 885, 891 (Mo. App. 1993). The direct testimonies of both Mr. Rogers and Mr. Voytas are relevant because they each tend to prove, through fact and opinion evidence, the validity of the

parties' joint position. Their testimony is further relevant because each witness also offers testimony that tends to disprove the validity of evidence offered by Public Counsel's witness, whose position is adverse to Staff's and the Company's joint position.

6. Messrs. Rogers' and Voytas' direct testimonies also are fully consistent with the Procedural Order, which authorizes parties to file direct testimony in support of their positions on the key remaining issue in this case. Because Ameren Missouri and Staff have abandoned their individual change request positions in favor of a joint position, each of those parties is entitled to file testimony in support of that joint position. So not only was it appropriate for those parties to file direct testimony specifically addressing and supporting their joint position, it was imperative for them to do so because without such testimony the record would not include competent and substantial evidence necessary for the Commission to resolve the pending change requests in a manner consistent with the joint position if it chooses to do so. Moreover, as noted earlier in this pleading, denying Staff and Ameren Missouri the right to present such evidence would be a violation of those parties' fundamental due process rights.

7. Public Counsel's claim that excluding portions of Messrs. Rogers' and Voytas' direct testimonies is warranted by considerations of judicial economy also is without merit. As this response demonstrates, questions regarding the reasonableness of Staff's and Ameren Missouri's joint position on proposed change requests is an issue in this case, and the Procedural Order gives parties the right to support their positions on such issues through evidence presented in filed direct testimony. Parties also have the right to rebut contravening evidence through rebuttal and surrebuttal testimony, and to test the validity of that evidence through discovery and cross-examination. No party is required to do any of those things to further its interests, but it would be inappropriate and unwarranted to take away from any party the right to engage in any

or all of the actions authorized by the Procedural Order. In addition, granting Public Counsel's motion would elevate considerations of judicial economy over more important interests, such as the due process rights of Staff and the Company. Such a result is not in the Commission's best interests or in the best interests of any party to this case.

WHEREFORE, for the reasons stated above, Ameren Missouri asks the Commission to deny Public Counsel's motion to exclude portions of the direct testimony of Staff and the Company.

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 November 5, 2014, 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** \_\_\_\_\_

L. Russell Mitten