

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

In the Matter of Union Electric Company d/b/a) Case No. ER-2019-0335
Ameren Missouri’s Tariffs to Decrease Its Revenues)
for Electric Service.)

**AMEREN MISSOURI’S RESPONSE SIERRA CLUB’S
FEBRUARY 4, 2020 STATEMENT
OF DISCOVERY DISAGREEMENT OR CONCERN**

COMES NOW Union Electric Company d/b/a Ameren Missouri (the “Company” or “Ameren Missouri”) and for its response to the Sierra Club’s (“SC”) February 4, 2020 Statement of Discovery Disagreement or Concern, states as follows:

1. In addition to a Statement of Discovery Disagreement or Concern filed by SC on January 31, 2020, which was taken up and addressed at the February 5, 2020 Discovery Conference, SC filed a second Statement of Discovery Disagreement or Concern on February 4, 2010.
2. With respect to the January 31 Statement and as discussed on-the-record during the Discovery Conference, all of the data requests (“DRs”) due by the extended due date were timely responded to, and a privilege log for SC DR No. 8.20 has also now been provided. The Company is therefore unaware of any remaining issue regarding the January 31 Statement.
3. With respect to the February 4 Statement, supplemental DR responses have been provided for SC DR Nos. 1.24 and 3.12, such that the example documentation SC sought under DR No. 1.24 has now been provided, as have copies of the fuel contracts for the Company’s coal units sought under DR No. 3.12.¹

¹ The coal contracts are being overnighted to Sierra Club’s Oakland, California office.

4. That leaves SC's arguments regarding SC DR No. 6.3, for which objection was timely made on December 17, 2019, as follows:

The Company also objects to DR No. 6.3 on the grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, is vague, and is overly broad and unduly burdensome. While an objection is not required, the DR also likely seeks information protected by the attorney-client and work product privileges insofar as work respecting an upcoming triennial resource plan filing involves confidential communications with counsel respecting the content of the ultimate filing, and all such work is done in anticipation of litigating the triennial filing itself.

5. SC DR No. 6.3 requested the following:

As part of Ameren's 2020 IRP, produce an unredacted copy of all documents created to date.

6. Sierra Club's February 4 Statement contends that "these documents should be produced immediately to allow for a reasonable opportunity to depose and then cross examine witness Michels." As grounds for apparently deciding to take up the Company's timely objection, SC claims that the Company is now "relying on the 2020 IRP as a basis to rebut the recommendations of [SC] witness Allison" (SC's emphasis, citing to Mr. Michels' rebuttal testimony). For two reasons, SC's contention that the Commission should order production of such documents should fail. First, the IRP documents created to date are all protected from disclosure as work product because they constitute materials prepared in anticipation of litigating the 2020 IRP docket. See Mo. R. Civ. P. 56.01(b)(3). Second, it is not true that Mr. Michels relies on the 2020 IRP.

7. While SC may not prefer the structure of the Commission's IRP rules as compared to some states where IRP's result in pre-approval of specific plans, there is no question but that IRP dockets in Missouri constitute litigation. There is similarly no question but that the Company's IRP preparations are all in anticipation of that litigation. One docket preparatory to the main IRP

docket has already been established, File No. EE-2020-0007. In that docket, the Company sought certain variances from the IRP rules, which were granted (one of which sets the filing due date to October 1, 2020).

8. The Company will be filing the required 60-day notice as the first step in establishing the 2020 IRP docket and will, by October 1, 2020, file the IRP on which it is currently working. Consistent with past practice and the Commission's IRP rules, the Commission will direct notice and establish an intervention deadline. It is a virtual certainty that applications to intervene will be filed, in all likelihood from the SC itself, as well as other parties. It is highly likely that some parties – and SC is a likely candidate here as well – will claim that the filing is deficient and not in compliance with the IRP rules. Given SC's filings in the Commission's pending "must run" docket, its pre-filed testimony in this case, and its concerted effort to drum up local public hearing testimony (See the attachment to this filing), it is a virtual certainty that the IRP filing will be hotly contested. The Company has certainly expected that to be the case given SC's significant activity across the country in similar dockets, rate cases, and other forums, all of which are directed toward establishing that all coal-fired resources should be eliminated.

9. SC may claim that IRP dockets are not "contested cases" within the meaning of the Missouri Administrative Procedure Act, but that certainly doesn't mean they are not litigation. The Commission's rules allow discovery and discovery has taken place in IRP dockets. The IRP rules specifically contemplate that evidentiary hearings may be held, that the Commission may find that the utility has failed to comply with the IRP rules, and also contemplate the possibility that the Commission may issue orders that require that found deficiencies be corrected. See 20 CSR 4240-22.080(10) (the Commission may order hearings and establish procedural schedules) and 20 CSR 4240-22.080(16) (the Commission can find compliance or non-compliance with its

rules,² can approve or disapprove agreed upon resolutions of claimed deficiencies, can require evidentiary hearings and establish a procedural schedule testimony, and can require correction of deficiencies). Contested evidentiary hearings in an IRP docket are not theoretical. See, e.g., File No. EO-2011-0271, where evidentiary hearings were scheduled, a procedural schedule was adopted, and two days of evidentiary hearings were held, etc. (including with the participation of SC, who had witnesses in the case).

10. At this juncture Company personnel, including Company attorneys, are working on the IRP filing, considering what the Company's position on its IRP will be, and considering what resource plans will be prepared and filed. Certainly paramount among those considerations is to develop a resource plan that meets the planning objectives of the IRP rules and that ultimately reflects an appropriate portfolio of resources for serving the Company's customers, but an important consideration is also how to protect itself – and its customers – from claims parties may make in the docket because of such parties' parochial viewpoints on what kind of generation is the "right" or "preferred" generation. SC may indicate that its positions would of course be based on sound resource planning principles and reasonable assumptions, but at bottom SC can't deny that it is on a campaign to eliminate all coal generation in this Country. As SC itself says, its Beyond Coal campaign's "main objective is to replace dirty coal with clean energy"³ And the campaign's goals include "trying to close all the coal plants in the U.S."⁴ There is little doubt that the Company's 2020 IRP docket will litigate SC's claims and

² While the Company does not suggest that it is at all likely that a complaint would be sustained for violation of the IRP rules, if one were filed, the Company would be subject to fines or other remedies as provided for by Section 386.570, but as literally written, the Commission's complaint statutes and statutory provisions for violation of Commission rules could be invoked.

³ <https://content-sierraclub.org/coal/about-the-campaign> (accessed February 1, 2020).

⁴ *Id.*

contentions respecting the Company's coal plants. The in-process IRP documents are being prepared in anticipation of that upcoming litigation and are protected from disclosure.⁵

11. With respect to SC's second contention – which is moot given that the materials are protected from disclosure – Mr. Michels is not relying on the 2020 IRP documents in any way in his rebuttal testimony. The main points of SC witness Allison's rebuttal testimony related to this issue are (a) that the Company's 2017 was flawed and thus didn't provide a sound basis for the Company to continue to invest in its coal units in the test year; (b) that an after-the-fact cash flow analysis suggests (but Mr. Allison is careful to state does not itself show) that the coal units are uneconomic and perhaps ought to be retired sooner than the Company has been assuming; and (c) that because of (a) and (b), the Commission should not allow test year capital investments to be included in rate base at least until the kind of economic analyses Mr. Allison says ought to be done is completed and filed. What was Mr. Michel's response? The Company "will be evaluating" the kinds of things Mr. Allison says should be evaluated in its 2020 IRP. Mr. Michels did not state that work on the 2020 IRP to-date supports the Company's current coal plant retirement dates, he did not state that the work on the 2020 IRP to-date shows the plants are economic, and in fact he made no claims at all about what the work to date on the 2020 IRP shows or doesn't show, and he made no claims as to what the 2020 IRP when it is final and filed will show. He does not "rely on" the 2020 IRP. He merely stated that if one is going to make resource decisions, IRP-like analyses are required and by October 1, 2020 *an* IRP will be filed. He also defended the 2017 IRP. Other Company witnesses defended the capital investments that have been made and defended other aspects of SC's arguments in this case.

⁵ Failure to respect the work product doctrine in this context would have a chilling effect on utility efforts to engage in the preparatory resource planning work needed to prepare and litigate an IRP docket.

12. SC doesn't need in-process 2020 IRP documents (and they aren't relevant) to claim that the Company's decisions to proceed with capital investments in reliance on what SC claims was a flawed 2017 IRP may not have been prudent, and it doesn't need in-process 2020 IRP dockets to show, using Mr. Allison's approach, what accounting cash flows were from 2016-2018. And if it had the filed 2020 IRP right now, all it would show is that prospectively, based on information developed *after* those capital investment decisions were made, the resource planning answer may be different than it was three years ago. However, the Commission does not judge prudence using hindsight based on after-the-fact evidence; such information would not be relevant or even admissible on the prudence question SC raises.

13. Regardless, the documents are protected as materials prepared in anticipation of litigation. SC is not entitled to them.

WHEREFORE, the Company submits this response; SC's demand for the documents in question should be denied.

/s/ James B. Lowery
James B. Lowery, Mo. Bar #40503
SMITH LEWIS, LLP
P.O. Box 918
Columbia, MO 65205-0918
(T) 573-443-3141 (F) 573-442-6686
lowery@smithlewis.com

Wendy K. Tatro, #60261
Director and Assistant General Counsel
Ameren Missouri
1901 Chouteau Avenue
St. Louis, MO 63103
Telephone (314) 554-3484
Facsimile (314) 554-4014
E-Mail: AmerenMOService@ameren.com

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail on counsel for the parties of record in this case on the 7th day of February, 2020.

/s/ James B. Lowery_____

James B. Lowery

From: "Michael Berg, Missouri Sierra Club" <reply@emails.sierraclub.org>

Date: January 12, 2020 at 2:02:58 PM CST

Subject: Attend a Hearing in St. Louis area: Ameren's Dirty Coal Costing Customers Millions

Reply-To: "Michael Berg, Missouri Sierra Club" <reply-fe9116737c640d7f70-418_HTML-292753672-7225565-21@emails.sierraclub.org>

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SIERRA CLUB
MISSOURI CHAPTER

The Missouri Public Service Commission (PSC) is holding public hearings on Ameren's latest rate case. We need you to testify against a new proposed customer charge and Ameren's reliance on coal over cleaner and cheaper options.

PLEASE ATTEND ONE OF TWO HEARINGS IN THE ST. LOUIS AREA THURSDAY, JANUARY 16.

[Click here to RSVP for the hearing at 12 pm in Sunset Hills](#)

[Click here to RSVP for the 6 pm hearing in Downtown St. Louis](#)

Dear ,

A Sierra Club analysis shows that from 2016 to 2018, Ameren's coal plants lost \$347 million more, when compared to market energy prices.

After years of violating the Clean Air Act, in September 2019 a federal court ordered Ameren to install pollution controls at its Rush Island and Labadie coal plants. An expert from the Harvard School of Public Health estimates that between 2007 and 2016, the violating emissions from the Rush Island coal plant contributed to as many

as 800 premature deaths.

In addition, Ameren wants to raise your monthly "customer charge" by \$2, from \$9 to \$11 per month. This hurts fixed and low income ratepayers hardest because you pay this fee no matter how much electricity you use - even if you use very little! Ameren has stated it wants to eventually raise the customer charge to almost \$25 per month.

On Thursday, January 16 tell the PSC that you oppose these unfair charges and Ameren's reliance on dirty, expensive coal.

[Click here to attend RSVP for the hearing at the Sunset Hills City Hall at 12 pm.](#)

[Click here to RSVP for the hearing at the Wainwright State Office Building Gallery.](#)

Please tell the Public Service Commission, which is in charge of approving or denying Ameren's rate case, to:

1. Require Ameren to study the retirement of its coal plants before future costs at those plants are passed on to customers.
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2. Reject Ameren's \$2 increase in the monthly customer charge. This increase hurts low income ratepayers the most and discourages energy conservation because customers pay it no matter how little electricity they use. Ameren should instead be required to offer customers rates that incentivize energy efficiency and shift usage away from the most expensive times of day.

What: Ameren Rate Case Hearing before the Missouri Public Service Commission

When: Thursday, January 16 at two times and two locations

Where for the 12 pm Hearing: Sunset Hills City Hall Council Chambers - 3939 Lindbergh Boulevard, Saint Louis, MO 63127 [RSVP HERE!](#)

Where for the 6 pm Hearing: Wainwright State Office Building Gallery, 11 N. 7th Street, Saint Louis, MO 63130 [RSVP HERE!](#)

Thank you!

Michael Berg
Sierra Club Missouri Chapter Organizer



[Sierra Club Missouri Chapter](#)