

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

**AMEREN MISSOURI'S RESPONSE
TO THE OFFICE OF THE PUBLIC COUNSEL'S
PROPOSED PROCEDURAL SCHEDULE**

COMES NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), and in Response to the Office of the Public Counsel's Proposed Procedural Schedule states as follows:

1. The procedural schedule submitted by the Office of the Public Counsel (“OPC”) is simply unworkable from both a legal and pragmatic standpoint. By attempting to rapidly bring the case before the Missouri Public Service Commission (“Commission”) before a record can be developed, the schedule crams the entire evidentiary phase of the case into what remains of October, requires parties to hastily brief the issues right before Thanksgiving, and dictates an Order on the merits by early December. OPC's proposal fails to provide an opportunity for due process to the parties to this proceeding by cutting off the debate before it even starts. While OPC's schedule affords it the opportunity to reveal the basis for its objection on the record, it allows no opportunity for the parties to respond.

2. While OPC may believe that testimony in this case is a "waste of time¹," the Commission relies upon the debate of adverse parties to make decisions and set policy, and that debate occurs in rounds of prepared testimony later admitted at hearing. After admission and cross-examination at hearing, party testimony also provides a substantial and competent record

¹ See OPC Comments Regarding Proposed Procedural Schedules, p. 3.

to support a decision. Any reasonable schedule should accommodate such ends, and OPC's schedule is accordingly inadequate.²

3. It is not clear what OPC intends to do with its opportunity to file a "Response to Change Requests," but it is anticipated that OPC will be on record for the first time with respect to the basis of its objection. However, OPC's proposed schedule does not go on to provide an opportunity for other parties to respond. It is inimical to the adjudicative process upon which the Commission relies to preclude any opportunity for parties to offer record evidence in support of their position and in rebuttal of their opposition. From a legal standpoint, the Commission cannot make a decision on a controverted issue in this case (or any case) without substantial competent evidence. State ex. rel. Praxair v. Missouri Public Service Commission, 344 S.W.3d 178, 184 (Mo Sup. Ct. 2011). Thus, the Commission allows adverse parties to submit prepared testimony to be introduced at hearing in order to establish a record upon which the Commission can make a decision. *See* 4 CSR 240-2.130(6). In this case, OPC opposes the stipulation for reasons presently unstated, and asks the Commission to cut off the debate by truncating the procedural schedule prior to any record being developed through the filing of prepared testimony. If it is the objective of OPC to prevent the Commission approval of the position advocated in the non-unanimous stipulation by curtailing the development of a record, such an inventive maneuver, while creative, is fundamentally unfair and should not be permitted.

4. OPC suggests that its Proposed Procedural Schedule is a continuation of "the events" alluded to in the prior procedural schedule approved in this case. OPC Proposed Procedural Schedule, p. 1. This rationale simply makes no sense as the "events" were previously advanced prior to the filing of a non-unanimous stipulation and objection thereto. The initial

² Prepared testimony becomes part of the record after it is adopted by a live witness at hearing under oath, and it is admitted only after opportunity for cross examination has been afforded. Accordingly, a schedule with a hearing at the Commission typically provides for submission dates for prepared testimony prior to that hearing.

schedule followed the expedited procedure set forth in the Stipulation and Agreement approved on August 11, 2012. That schedule provided for an expedited process to vet competing Change Requests filed with the Commission pertaining to the Evaluation, Measurement, and Verification ("EM&V") results filed with the Commission. It must be noted that OPC did not file a Change Request. Of the two Change Requests that were filed (Staff and Company), both parties have now resolved, through stipulation, their difference with respect to those requests. The procedural schedule that was originally established in this proceeding was indefinitely suspended upon the granting of a motion in order to allow for discovery and settlement discussions. *See Order Staying Procedural Schedule dated August 20, 2014.* Those discussions have resulted in a non-unanimous stipulation being filed and subsequently objected to, and thus it follows that going forward, the schedule should address the salient matters before the Commission (i.e., the stipulation and objection). OPC's schedule, however, makes no mention of either. Pursuant to a non-unanimous stipulation being filed and objected to, the Commission's rules require that "[a]ll issues shall remain for determination after hearing." 4 CSR 240-2.115 (2)(d).

5. Any meaningful hearing on the proposed resolution outlined in the non-unanimous stipulation will necessitate relevant evidence for consideration. While OPC may not agree with the stipulation, it cannot pretend it does not exist. Ameren Missouri is not opposed to OPC responding to the Change Requests filed in this proceeding³, however, the schedule must address the pertinent issues raised by the filing of a non-unanimous stipulation. Further, OPC bears the burden of substantiating its objection, and the parties have a right to respond to that objection prior to a ruling. Accordingly, the schedule adopted should provide for the resolution of the stipulation and the objection. OPC's proposal does neither and should not be approved.

³ OPC's Objection filed in this case does not provide any argument or explanation. Ameren Missouri is supportive of OPC stating on the administrative record its basis for objection.

6. OPC's schedule does not require that prepared testimony be filed with the Commission. Ameren Missouri has a tangible interest in the outcome of this proceeding, and it is a fundamental tenant of due process that the Company be allowed to confront a witness that is against its interest at hearing. *See Pettus v. Casey*, 358 S.W.2d 41, 44 (Mo.1962). To date, the only prepared testimony in this case is that of Mr. Rick Voytas in support of Ameren Missouri's Change Request, which is now mooted⁴. OPC argues in its Response that Company and Staff are asking to *bolster* the stipulation they have filed. *Public Counsel's Comments Regarding Proposed Procedural Schedules*, p. 2. Staff and the Company are not asking to bolster anything, but instead are requesting a reasonable procedure be established for submission of informed testimony and rebuttal. The Company and Staff are simply asking the Commission for an opportunity to provide an explanation of the stipulation through testimony in light of the objection, and are also making the reasonable request that OPC be obligated to support its objection with a witness through pre-filed testimony.

7. The constitutional principle of due process and its applicability to Commission proceedings is well recognized. *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919-21 (Mo App W.D. 2003). Ameren Missouri cannot accept a procedural schedule that fails to provide it a due process opportunity to contest the OPC Objection filed in this proceeding, and accordingly, asks that the Commission establish a schedule that affords a fair opportunity to present and rebut evidence.

8. Finally, without explanation, OPC asks that the parties and the Commission rapidly expedite this case. There is no compelling justification for such extraordinary scheduling in the present case. Currently, the regulatory professionals that work on energy efficiency

⁴ Staff has submitted a verified memo that could be adapted to, or substituted for, Prepared Testimony, but similar to the Ameren Missouri testimony, the memo is in support of the pre-stipulation Change Request Staff originally filed.

matters for Staff, Ameren Missouri, the Division of Energy, and other stakeholders are very busy working on a number of important regulatory projects and initiatives, including the potential continuation of MEEIA programming that would otherwise conclude after next year, along with other pressing matters that also require attention prior to the end of the year. In the present case, discussions with Staff have made clear that they have very limited availability in October. Yet OPC's proposal would require the parties to conclude the evidentiary phase of this case before the end of *this month*. With respect to OPC's briefing and decision scheduling proposals, no consideration is given for the typical end-of-year business and holiday-related vacations that impact availability. While there are certain situations of exigency that call for extraordinary efforts to bring a docket to rapid conclusion, this is not one of them. There is simply no reason to make Herculean efforts and blow through holiday-related leave, busy work schedules, and other priority matters to conclude this docket in early December. The only rationale offered by OPC as to why an extremely-expedited schedule is needed is as follows:

Following Public Counsel's Proposed Procedural Schedule ensures that the Commission is presented with a complete and adequate evidentiary basis to determine, for purposes of the Ameren Missouri 2013 – 2015 performance incentive award amount in 2016, the PY2013 EM&V annual energy savings and the PY2013 net benefits amount. *Public Counsel's Comments Regarding Proposed Procedural Schedules, p. 3.*

However, the dots remain unconnected with respect to why the determination of a performance incentive award in 2016 necessitates the conclusion of this case before the end of 2014. As OPC points out, the performance incentive generated by virtue of EM&V results does not become final until 2016. Even if we are to accept an expedited schedule to satisfy some yet to be provided rationale, there would still need to be time to conduct discovery, prepare a response, and prepare for hearing. OPC provides for the Response to Change Requests, Issues List,

Position Statements, and Hearings to occur all within a 17 day period in the present month of October. A hastened briefing schedule also does not offer parties reasonable time to brief the complicated issues associated with the novel subject matter involved in this case, given this is the first case to consider Ameren Missouri's MEEIA EM&V results.

9. There is no justification or utility in approving a schedule that does not afford parties a reasonable opportunity to offer informed advocacy to the Commission.

WHEREFORE, Ameren Missouri respectfully suggests that the OPC Proposed Schedule be rejected and the Proposed Procedural Schedule advanced by Staff and the Company be adopted.

Respectfully submitted,

UNION ELECTRIC COMPANY,
d/b/a Ameren Missouri

/s/ Matthew R. Tomc

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 3rd day of October, 2014, to counsel for all parties on the Commission's service list in this case.

/s/ Matthew R. Tomc