

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

Jimmie E. Small,	)	
Complainant,	)	
	)	
vs.	)	Case No: EC-2012-0050
	)	
Union Electric Company, d/b/a	)	
Ameren Missouri,	)	
Respondent.	)	

**SUGGESTIONS IN OPPOSITION TO COMPLAINANT’S  
MOTION TO COMPEL & ORDER FOR DEFAULT**

COMES NOW, Union Electric Company, d/b/a Ameren Missouri, and for its suggestions in opposition to Complainant’s Motion to Compel & Order for Default states as follows.

Introduction

1. Ameren Missouri understands from Complainant’s Motion to Compel & Order for Default (“Motion”) that Complainant has two main concerns regarding discovery; first, that Ameren Missouri has made many objections to discovery that Complainant believes is relevant, and second, that Ameren Missouri did not provide Complainant with copies of “proof of service verification” (certificates of service) related to two specific discovery responses Ameren Missouri served on Complainant. Related to these concerns, Complainant has asked the Commission to impose the extraordinary sanction of entering an order of default against Ameren Missouri. Although Complainant is certainly entitled to request a hearing on the disputed discovery, Complainant is not entitled to the other relief he seeks.

A. Ameren Missouri Has Stated Proper Objections to Complainant’s Discovery.

2. Complainant has not specified in his Motion which particular objections he wishes the Commission to overrule or which discovery he wishes the Commission to compel, and he has not filed the discovery and responses with his Motion<sup>1</sup>. Ameren Missouri has not

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<sup>1</sup> Missouri Rule of Civil Procedure 57.01(d), and parallel rules 58.01(d) and 59.01(e) allow discovery requests and responses to be filed with the court, “...contemporaneously with a motion placing the request in issue.”

included a detailed discussion of each objection in these suggestions, but rather, as an aid to the Commission, has attached as Exhibit A to these suggestions Complainant's discovery and Ameren Missouri's responses.<sup>2</sup> Ameren Missouri's responses included proper objections and the specific bases for those objections. Ameren Missouri is prepared to discuss and defend its objections at the hearing that Complainant has requested (*see* the caption to the Motion including the notation, "Oral Argument Requested").

B. "Proof of Service Verification" Issue.

3. Complainant also argues that Ameren has failed to comply with Missouri Rule of Civil Procedure<sup>3</sup> 43.01(3)(e)<sup>4</sup> regarding how to show service of pleadings and other papers that are required to be served. In fact, Ameren has complied fully with Rule 43.01(e): Ameren Missouri showed that it served Complainant with responses to his discovery by completing certificates of service that included the Complainant's name, the date of service, the method of service and the address of service. Under the Rule, service may also be shown by acknowledgment of receipt. Ameren Missouri served its responses on Complainant via certified mail, return receipt requested. Copies of the certified mail receipts that Complainant signed as well as the transmittal letters to Complainant enclosing Ameren Missouri's responses, are attached hereto as Exhibit B. In addition, at pages 8 through 11 of his Motion, Complainant has tacitly admitted that in fact he received Ameren Missouri's responses to his discovery. Both Ameren Missouri, and Complainant, have shown service of Ameren Missouri's discovery responses on Complainant.

4. Complainant suggests that Ameren Missouri violated Rule 43.01(e) and denied Complainant due process because it failed to provide certificates of service *to Complainant*. Rule 43.01(e) does not speak to when, how or to whom a party is required to provide a certificate of service regarding discovery responses—43.01(e) speaks only to the information that is to be included in the certificate. Rather, Rules 57.01(c)(6) and (d), 58.01(c)(6) and (d), and 59.01(d)(5) and (e) control. Each of those Rules requires the party responding to discovery to

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<sup>2</sup> In his Motion, Complainant makes reference to discovery requests and responses in Complainant's original complaint against Ameren Missouri, EC-2011-0247, which complaint the Commission previously dismissed without prejudice by its Order issued July 27, 2011, effective August 7, 2011.

<sup>3</sup> Hereinafter, "Rule" or the "Rules."

<sup>4</sup> At page 11 of his Motion, Complainant makes reference to Rule 41.03(e). No such rule exists. At page 12 of his Motion, Complainant makes reference to Rule 41.03(d), but instead excerpts 43.01(e). It is Ameren Missouri's understanding that in both instances Complainant is actually referring to Rule 43.01(e).

serve *the response* on the party that issued the discovery, but to *file* a certificate of service *with the court*. As discussed above, Ameren Missouri served its responses on Complainant. As this is a complaint pending before the Commission, rather than a civil court matter, Ameren Missouri filed its certificates of service *with the Commission*, via EFIS. Copies of the certificates of services filed in EFIS are attached hereto as Exhibit C.

5. Ameren Missouri has fully complied with the Rules with respect to serving its responses to Complainant's discovery on Complainant, and filing certificates of service evidencing such service, with the Commission, via EFIS.

C. Motion to Compel and Requested Discovery Sanctions are Not Warranted.

6. Complainant has styled his Motion a "Motion to Compel & Order for Default" but does not actually ask the Commission to compel Ameren Missouri to respond to any particular discovery request. Even if Complainant had done so, a motion to compel discovery would not be not warranted unless and until the hearing Complainant himself requested has been held and unless and until the Commission has overruled objections to Complainant's discovery.

7. As to sanctions, Ameren Missouri acknowledges that the court (or in this case, the Commission) has the authority under Rule 61.01(b) and (d) to make orders sanctioning a party with respect to failure to answer interrogatories and failure to produce documents, including striking pleadings or rendering a judgment by default. Such orders are only appropriate, however, in the case of interrogatories, "[i]f a party fails to answer...or file objections thereto within the time provided by law, or if objections are filed thereto which are thereafter overruled and the interrogatories are not timely answered[.]" In this Complaint, Ameren Missouri filed timely objections to certain of Complainant's interrogatories, the objections have not been overruled, and likewise no time to answer overruled objections has been set by the Commission. 61.01(b). Sanctions with respect to Ameren Missouri's responses to Complainant's interrogatories are not warranted.

8. The Rule regarding production of documents is similar, conditioning the imposition of sanctions on a party's failure to produce the documents or file objections, or to timely produce documents after objections are overruled. 61.01(d). Again, Ameren Missouri did file objections to certain of Complainant's request for production, those objections have not been overruled, and the Commission has not set any time for Ameren Missouri to produce

documents to which objections were overruled. Sanctions with respect to Ameren Missouri's responses to Complainant's request for production are not warranted.

9. Rule 61.01(c) regarding requests for admissions is somewhat similar. If a party fails to answer or file objections to the request, *then* the truth of relevant and material matters of fact contained in the request shall be admitted. Ameren Missouri *has* objected to certain of Complainant's request for admissions, however, so the Commission should not deem admitted any objected-to admission offered by Complainant. Sanctions with respect to Ameren Missouri's responses to Complainant's request for admissions are not warranted.

10. Finally, although in the proper circumstances a tribunal has discretion to impose sanctions, drastic sanctions such as an order of default are not warranted where there is no showing of contumacy or deliberate disregard for the tribunal's authority. *Spacewalker, Inc. v. American Family Mutual Ins. Co.*, 954 S.W.2d 420 (Mo. App. 1997)(order of default reversed where appeals court found no evidence of conduct that reached the level of contumacy or disregard for the trial court's authority—the defendant made proper objections to discovery and when those were overruled, the trial court abused its discretion in granting defendant only 10 days to assemble a large amount of information spanning over 10 years). Furthermore, before imposing such sanctions, the moving party must show he has actually been prejudiced. *Id.* Because the Commission may either sustain Ameren Missouri's objections (in which case Complainant is not entitled to the discovery and has not been prejudiced by the failure to respond), or overrule them and order Ameren Missouri to respond (in which case Complainant can expect to receive responses and has not been prejudiced by the prior objections), Complainant cannot show that at this point he has been prejudiced by Ameren Missouri's objections to certain of his discovery. Entering an order of default at this point goes well beyond what is necessary to enforce whatever discovery the Commission might determine is not objectionable. Imposing such a sanction at this point would constitute an abuse of discretion. *Trotter v. Distler*, 260 S.W.3d 913 (Mo. App. E.D. 2008)(imposition of a sanction that exceeded that necessary to achieve the purposes of discovery was held to be an abuse of discretion).

### Conclusion

11. Complainant is entitled to request a hearing on the discovery disputes in this Complaint. As Ameren Missouri has explained in these suggestions, however, absent a hearing,

rulings in Complainant's favor, a subsequent contumacious or deliberate failure by Ameren Missouri to comply with any such ruling, *and* a showing of prejudice to Complainant, Complainant is not entitled to any order sanctioning Ameren Missouri for discovery violations, let alone an order of default against Ameren Missouri.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Suggestions in Opposition was served on the following parties via electronic mail (e-mail) or via certified and regular mail on this 5<sup>th</sup> day of January, 2012.

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