

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

In the Matter of the Application of)
Union Electric Company for Authority)
To Continue the Transfer of)
Functional Control of Its Transmission)
System to the Midwest Independent)
Transmission System Operator, Inc.)

Case No. EO-2011-0128

**AMEREN MISSOURI’S SUGGESTIONS IN OPPOSITION TO OFFICE OF THE PUBLIC
COUNSEL’S MOTION TO CONTINUE HEARING**

COME NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or the “Company”), by and through counsel, and hereby submits these suggestions in opposition to *Public Counsel’s Motion to Continue Hearing and Request for Expedited Treatment* (“OPC’s Motion”) and, in this regard, states as follows:

1. OPC’s Motion seeks to delay evidentiary hearings that it agreed to more than four months ago based upon what the facts indicate is its dubious claim that it is suddenly may not “understand” the issues in this case. OPC makes these claims in a pleading that tells the Commission only half of the story, making it appear as though OPC was taken aback by the filing of a Non-Unanimous Stipulation and Agreement by the Company, the Staff, the Missouri Industrial Energy Consumers (“MIEC”) and the Midwest Independent Transmission System Operator, Inc. (“MISO”) yesterday afternoon. Even worse, OPC’s claims that it cannot (or has not had a fair opportunity to) prepare for the hearing because of the non-unanimous stipulation. Its claim does not withstand scrutiny. As discussed below, what OPC’s Motion really reflects is that OPC wants to conduct discovery it had the full knowledge, authority, and capability to conduct for the past year (but that for whatever reason (probably because it wanted to ride the Staff’s coattails in this case) it did not conduct, and that OPC wants to “regroup” now that it finds itself largely alone on positions it had hoped the Staff and MIEC would agree with it on.

The issues in this case are not now “new” and OPC is fully capable of understanding them. It is evident that OPC simply doesn’t like how those issues have played out.

2. OPC first complains that it was “relying on its participation” in a deposition of Ameren Missouri witness Maureen Borkowski to prepare for the hearing. If that were true, OPC should have taken steps in the approximately one year this case has been pending to serve a Notice of Deposition so that it could take Ms. Borkowski’s deposition. OPC cannot deny that it has known Ms. Borkowski’s positions with respect to Ameren Missouri’s transmission operations throughout the pendency of this case (and before) or that it didn’t know and understand Ms. Borkowski’s role regarding Ameren Missouri’s affiliate, Ameren Transmission Company for many, many months as well. Indeed, as early as September 9, 2011 (for data requests propounded in late August) Ms. Borkowski answered transmission-related data requests from OPC. As far back as 2010, Public Counsel Lewis Mills was invited to meetings (and attended at least one meeting) between Ms. Borkowski and some of the Commissioners (properly noticed under 4 CSR 240-4.020(8)) in her role as President of Ameren Transmission Company.¹

3. In OPC’s Motion, OPC indicates that it was consulted by the Staff before the Staff noticed Ms. Borkowski’s deposition. On Friday, November 4, 2011, the Staff informally requested that Ms. Borkowski be deposed on November 15 or 16. On Saturday, November 5, 2011, the Company confirmed Ms. Borkowski would be made available the afternoon of Wednesday, November 16. While the undersigned counsel does not have first-hand knowledge of this fact, it is reasonable to believe that the Staff advised OPC on approximately November 6-7 (Monday or Tuesday) that the deposition had been scheduled as had already been discussed

¹ See Notice of Meeting filed September 27, 2010 (regarding a September 30, 2010 meeting) and Notice of Meeting filed December 21, 2010 (regarding a December 23 meeting that Ms. Mills attended).

with OPC. The Staff served a formal Notice of Deposition on all parties, including OPC, on November 9.

4. The larger point is that not only was OPC fully capable of serving its own Notice of Deposition on November 9 so that it could be sure it could depose Ms. Borkowski on November 16, but OPC could have sought to depose Ms. Borkowski *for the last year*. That OPC didn't do so is OPC's fault.² It doesn't justify delaying a hearing other parties, including the Company, have been working toward and preparing for, as agreed to by OPC and as ordered by the Commission several months ago.

5. While the Company will not reveal the substance of any settlement discussions that have occurred, the Company is compelled to provide the Commission a much more complete and fair recitation of the events of the past several days. On Tuesday, November 8 (the day before Ms. Borkowski's deposition was noticed by the Staff), OPC proposed a settlement of this case to the Company (on its behalf and on behalf of the Staff). The Company responded with a counteroffer on November 10. By Monday, November 14, the Company and the Staff had a "handshake deal" on terms very close to those proposed by the Company, needing only to reduce the deal to writing. It is the undersigned counsel's understanding that on that day the Staff advised OPC that it intended to settle the case (as between the Staff and the Company) with the Company whether OPC settled or not.

6. On Monday November 14, the Company requested the opportunity to discuss the settlement it had reached with the Staff with OPC, and was told that OPC was not available until the afternoon of Wednesday, November 16. On November 16, the Company again asked for a

² Nor was OPC entitled to "advance notice" that the Staff was withdrawing its Notice of Deposition. It was Staff's properly noticed deposition. If it had occurred OPC could have asked questions, but under the Missouri Rules of Civil Procedure, whether it was noticed in the first instance was up to the Staff, as was its cancellation. Again, nothing precluded OPC from noticing its own deposition – for November 16, or during the past year.

time to discuss settlement and a call was scheduled (at the time offered by OPC) for 5 p.m. that day. Prior to that call OPC was provided a draft of the Non-Unanimous Stipulation and Agreement that was filed – the draft was, in all material respects the same as the draft that was filed. The call occurred, and OPC indicated it would get back to the Company as early as possible on Thursday, November 17, perhaps with some additional demands. Shortly before Noon on Thursday, November 17, OPC made some additional demands, but those demands were not acceptable to the Company and the Company so advised OPC.

7. The Company would not normally consume any of the Commission’s reading time with the details outlined above, but believes OPC’s Motion attempts to create the appearance that OPC had no idea what the terms of the non-unanimous settlement would be, and didn’t have any way to know that Ms. Borkowski might in fact not be deposed on November 16. The fact is that OPC knew, before the deposition was even noticed, that settlement discussions were occurring (OPC initiated them) and OPC knew the substance of many of the terms of the settlement that was ultimately filed early this week. OPC may not like the fact that Staff and MIEC now support the Company’s request in this case, on the terms outlined in the Non-Unanimous Stipulation, but there is nothing unfair (from a Due Process standpoint or otherwise) about the circumstances OPC finds itself in.³ Moreover, the Company wants to be clear with the Commission about the efficacy of further attempts at settlement with OPC: further discussions are highly likely to “fail no matter how much time is available,” as OPC itself suggests. Discussions haven’t failed because of the impending hearings. Discussions have failed because OPC has asked for far too much.

³ OPC has been given the process to which it was due. The Company filed an application, OPC had a year to conduct discovery, OPC participated in the development of and agreed upon a procedural schedule, a hearing will be held, witnesses will appear, and OPC will have full opportunity to cross-examine them. OPC *wants* more process; OPC is not due it as a matter of law.

8. OPC's characterization of the "issues raised by" the Stipulation as "new" is also demonstrably inaccurate, as is OPC's claim that the "signatory parties concede" that the issues in this case have been changed. The original issues list filed by the parties contained seven discrete issues. Issue One simply asked whether the Company's MISO participation, on the terms outlined in Ameren Missouri witness Ajay Arora's surrebuttal testimony would not be detrimental to the public interest. Mr. Arora had proposed 5 key terms for participation. The revised Issue One simply points to four of those 5 key terms, that are identical to what Mr. Arora had proposed, dropping the fifth key term. And dropping the fifth key term is only a detriment to the Company, for the fifth key term asked for deferred accounting for a future cost-benefit study to give the Company an opportunity to include costs in rates later. OPC can't be heard to complain that that term was dropped. Issue One, in substance, is not new or changed.

9. Issue Two was not changed at all. Issue Three was also not changed. While in the original issues list the proposed condition was shown as being supported by both OPC witness Ryan Kind and MIEC witness James Dauphinais, the only difference in the revised Issue Three is that it is shown as being supported only by Mr. Kind. The condition at issue is *identical*. Issue Four was not changed at all.

10. Issue Five and Issue Six were proposed to be included in the original issues list *by the Staff and the Staff alone*, and indeed are issues that arose out of specific recommendations made by Staff witness Adam McKinnie in Mr. McKinnie's rebuttal testimony. Given Staff's agreement that Mr. McKinnie's recommendations which were the subject of Issue Five and Issue Six are not needed to ensure that the Company's MISO participation is not detrimental to the public interest (in view of the settlement to which the Staff has agreed) OPC can't be heard to complain that the Company's, Staff's, MIEC's and MISO's *suggestion* that issues OPC didn't

even raise are no longer issues somehow precludes OPC from putting on whatever case OPC wants to put on. We would also note that OPC can ask Mr. McKinnie about his testimony (as can the Commission).⁴

11. Issue Seven has not changed.

12. Contrary to the convoluted argument OPC makes in its Motion, the Non-Uniform Stipulation is, at this time, merely a statement of the positions of the settling parties. If OPC wants to argue that issues it didn't raise are issues, then it can do so. If OPC wants to answer the *legal issues* posed in conditions it didn't raise, it can do so. OPC doesn't need Ameren Missouri to tell it what Ameren Missouri's view of the law is in order to do its job, and if the Commission desires answers to legal questions (and a party chooses not to provide that answer) then the party acts at its peril that the Commission may listen to others' views instead. Moreover, if OPC wants to ask witnesses questions about conditions it didn't raise, it can do so. Had OPC wanted to file testimony on those issues, it could have done so. This is much like other instances observed in this case – had OPC wanted to ask data requests earlier, or had objections to its discovery resolved earlier – it could have done so.⁵ And, as noted, had OPC wanted to depose Ms. Borkowski it has had a year to do so, and at a bare minimum could have served its own Notice.

13. OPC's Motion also tries to "warn" the Commission that a *concession* Ameren Missouri is making (in paragraph 10.j of the Non-Uniform Stipulation) has something to do with the Commission "surrendering jurisdiction." This claim is inaccurate and disingenuous.

Throughout this case OPC has complained that if an Ameren Missouri affiliate builds

⁴ Nor is there a "failure to comply" with any Commission order, as OPC suggests in its footnote 1. Parties, including in this case, routinely take *no position* on a variety of issues that end up on an issues list. And while the Commission often orders the parties to "agree" on a list of issues, parties routinely cannot agree, nor can the Commission force them to do so.

⁵ See *Order Denying Public Counsel's Motion to Compel Ameren Missouri to Respond to a Data Request* issued today, November 18, 2011.

transmission in Ameren Missouri's service territory then the Service Agreement OPC references in its Motion may be less effective and the Commission's "jurisdiction" may not be preserved. OPC is entitled to its opinion, but the fact that Ameren Missouri made a concession that at least in part mitigates the very issue OPC has raised throughout this case doesn't make this a "new" issue that OPC needs time to understand. OPC could have conducted whatever discovery it wanted to (i.e., "the amount of transmission investment built in Missouri"), or put on whatever testimony it wanted to (and in fact it did) on these issues. It is obvious that OPC just wants more time because it didn't use the time it had wisely, or had hoped others (Staff, for example) would do its job for it.

14. OPC's Motion claims there is "no urgent need" to hold the hearings. That contention is beside the point. This case is more than a year old. Attorneys and witnesses have scheduled their affairs to accommodate these hearings. As outlined above, nothing of substance has changed, save OPC would probably like to be back in a position where the Staff and MIEC are "on its side," so to speak instead of being in the position it finds itself in; that is, alone in making certain contentions that Staff and MIEC now believe (as evidenced by the Non-Uniform Stipulation) need not be advanced in order to ensure that Ameren Missouri's continued MISO participation is not detrimental to the public interest. Moreover, if the Company's MISO participation were not going to be continued (either because the Commission did not approve it or because it conditioned it in a way such that Ameren Missouri decides not to continue) we are already past the point in time where Ameren Missouri could, as a practical matter, withdraw from MISO by April 30, 2012. Any delay in the hearings means Ameren Missouri's actual withdrawal, even if that is unlikely to occur, would be delayed even further

past April 30, 2012. The fact that a party may not be ready for a hearing that has been scheduled for four-plus months is hardly justification to delay a hearing, regardless of its urgency.

15. Finally, the contentions at paragraph 8 of OPC's Motion fail to withstand scrutiny. There aren't any new or changed issues, as outlined above. Parties are free to "change their positions" whenever they want. OPC isn't entitled to rely upon support from other parties to sustain its own case. Issues and position are clear. OPC could have done any discovery it may now want to do (and wish it had done) for the past year. The positions of the signatory parties are clear, as reflected in the Non-Unanimous Stipulation and in their Statements of Position. All other parties have filed Statements of Position as well.

WHEREFORE, the Company hereby requests that the Commission *deny* OPC's Motion.

Dated: November 18, 2011.

Respectfully submitted,

SMITH LEWIS, LLP

By: /s/ James B. Lowery
James B. Lowery, #40503
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

**Union Electric Company,
d/b/a Ameren Missouri**

Thomas M. Byrne, #33340
Managing Associate General Counsel
1901 Chouteau Avenue
P.O. Box 66149, MC-131
St. Louis, Missouri 63101-6149
(314) 554-2514 (Telephone)
(314) 554-4014 (Facsimile)
tbyrne@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 to this case, on this 18th day of November, 2011.

/s/James B. Lowery
James B. Lowery