

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

Roman Dzhurinskiy and Zinaida Dzurinskaya,	)	
	)	
Complainants,	)	
	)	
vs.	)	<b>File No. EC-2016-0001</b>
	)	
Union Electric Company d/b/a Ameren Missouri	)	
	)	
Respondent.	)	

**PUBLIC COUNSEL’S RESPONSE TO MOTION TO COMPEL DISCOVERY**

COMES NOW the Office of the Public Counsel (“OPC” or “Public Counsel”) and requests the Commission to deny Union Electric Company d/b/a Ameren Missouri’s (“Ameren Missouri”) *Motion to Compel Discovery*. In support of its response, Public Counsel states:

**Background**

1. In Ameren Missouri’s most recent rate case the Commission approved tariff language that exempts certain low-income customers from paying the Energy Efficiency Investment Charge (“EEIC” or “Rider EEIC”). The tariff provides that “customers ... will be exempt from Rider EEIC charges for 12 billing months following assistance received from ... Missouri Energy Assistance (a.k.a. Low Income Home Energy Assistance Program or LIHEAP)[.]” Mo. P.S.C. Schedule No. 6, 1<sup>st</sup> Revised Sheet No. 90.1.
2. Believing they qualify under the exemption, the complainants attempted to have the EEIC charge removed from their electric bill. After the company refused to remove the charge, the complainants filed this complaint (Doc. No. 1). In its subsequent *Answer*, Ameren stated that it “determined, and communicated to Complainant, that he was not eligible for the exemption from the Rider EEIC charge because he had not received an energy assistance pledge on his

residential electric utility account with the Company within the last 12 months.” (Doc. No. 7, p. 2).

3. After completing its investigation, the Commission’s Staff (“Staff”) found that “the Complainants qualify for the “low-income” customer exemption; as they are Ameren Missouri residential customers who, within the previous twelve months, received LIHEAP assistance.” (Doc. No. 16, p. 3). The Staff recommended that “the Commission find that the Complainants qualifying [sic] as “low-income customers” for purposes of exemption from Ameren Missouri’s MEEIA Charges.” *Id* at 4.

4. On September 14, 2015, Public Counsel filed a motion for summary determination asking the Commission to find that the complainants meet the qualifications listed in Ameren’s tariff sheet and issue an order in favor of the complainants (Doc. No. 19).

### **Argument**

5. The complainants, the Commission’s Staff, and Public Counsel all agree that the plain language of the company’s tariff entitles the complainants to relief. Ameren Missouri disagrees and asserts that the tariff is ambiguous. To resolve this dispute, the Commission must determine what the tariff says and what the tariff language means.

6. The only appropriate evidence are those facts which tend to prove or disprove the existence of ambiguity in the tariff language. The data requests from Ameren Missouri to Public Counsel do not help inform the Commission what the tariff language says and do not seek information that would tend to prove or disprove the existence of ambiguity in the tariff. Rather, these data requests are an obvious attempt to distract the Commission and change the issue in this case.

7. In its attempt to foment a change of issues, Ameren Missouri served seven data requests on Public Counsel. Public Counsel objected to those data requests. After the required conference with the Regulatory Law Judge assigned to the case, Ameren filed its motion to compel discovery.

8. These data requests are not relevant to resolving this case. The issue to be resolved is the putative ambiguity of the tariff language that was agreed to by settlement in Ameren's recent rate case. Eligibility verification is a separate and distinct matter not at issue in this complaint case. For the reasons discussed below, Public Counsel continues to object to the company's data requests.

#### **Ameren Missouri – OPC-001**

9. In its motion to compel, Ameren Missouri explains that “the Company has now clarified, twice, that it is not asking for any communication that was part of a filing in EFIS.” (Doc. No. 44, p. 4). What the company has not done is submitted a new data request. Public Counsel is not obligated to guess as to what the company intended to ask, the company must ask the questions that it wants answered and Public Counsel responds to those data requests.

10. Public Counsel objected to this data request in that it is unduly burdensome, lacks foundation, seeks information not reasonably calculated to lead to the discovery of admissible evidence, and requests information that is equally available to the requesting party through the Commission's Electronic Filing System and/or is already in the possession of the requesting party.

11. Ameren's request is unduly burdensome because the information requested by the company is equally available to the company. Specifically, the company is asking for communications that occurred in its own rate case regarding its tariffs. This information is

equally available to the company to examine in the Commission's electronic filing system or is already in the possession of the company. Public Counsel is not required to conduct research or prepare the case for the company's counsel when the information is equally available. The request lacks foundation because there is no basis for the company to believe that Ameren Missouri customers who received LIHEAP Energy Assistance funds towards a non-Ameren utility bill were not "low-income" customers exempt from Rider EEIC, or that the low-income qualifications otherwise were limited beyond the plain language of the tariff. Moreover, the data request does not seek information that is reasonably calculated to lead to the discovery of admissible evidence because it does not prove or disprove the existence of ambiguity in the tariff language.

**Ameren Missouri - OPC-002:**

12. In its motion to compel, Ameren Missouri states that Public Counsel's objection that the data request calls for speculation "is not a valid objection to discovery and is particularly perplexing since the Company is asking OPC how, exactly, it expects the Company to comply with the tariff (as interpreted by OPC)." (Doc. No. 44, p. 4).

13. Public Counsel objected to section "a" of this data request in that it is argumentative, lacks foundation, calls for speculation, and seeks information not reasonably calculated to lead to the discovery of admissible evidence. Public Counsel objected to section "b" of this data request in that it is argumentative, lacks foundation, calls for speculation, and seeks information not reasonably calculated to lead to the discovery of admissible evidence. Public Counsel objected to section "c" of this data request in that it is argumentative, lacks foundation, calls for speculation, and seeks information not reasonably calculated to lead to the discovery of admissible evidence.

14. Because the issue in this case is about the meaning of the tariff language, the data request is not reasonably calculated to lead to the discovery of admissible evidence. Public Counsel’s “belief” about the means or process Ameren uses to identify eligible customers has nothing to do with the tariff language and does not prove or disprove that the language is ambiguous. Ameren’s request assumes that the means or process by which Ameren Missouri can identify customers who are eligible under the tariff matters to the interpretation of the tariff language. The data request is argumentative because it does not actually seek information that Public Counsel is under an obligation to have, but instead attempts to argue that the information requested is important in this case – which it is not. If Public Counsel were to answer this question, Ameren would then attempt to trumpet that purported fact when it has nothing to do with the issue in this case. That type of discovery game is not proper, and thus the data request is argumentative. The data request lacks foundation because it presumes that Public Counsel has some obligation to develop such information requested. The data request calls for speculation because it asks Public Counsel to give answers that are not based on information that Public Counsel is required to develop.

**Ameren Missouri - OPC-003:**

15. In its motion to compel, Ameren states that it asks Public Counsel “whether OPC verified documentation provided to it, with the Department of Social Services Family Support Division. And if not, why not.” (Doc. No. 44, p. 4). Ameren also states that “[t]he request [data request 003] is relevant to OPC’s interpretation of the tariff, and the process it may believe is required when documentation is provided (i.e., how the Company may comply with the tariff).” (Doc. No. 44, p. 5).

16. Public Counsel objected to this data request in that it is argumentative, lacks foundation, and seeks information not reasonably calculated to lead to the discovery of admissible evidence.

17. Public Counsel's interpretation of the tariff is made clear in its *Motion for Summary Determination* – the tariff entitles the complainants to relief. The issue is what the tariff says and what that language means, not whether or not Public Counsel contacted the Missouri Department of Social Services months after the effective date of the tariff at issue in this case. As such, this data request does not seek information that is reasonably calculated to lead to the discovery of admissible evidence.

18. Ameren's request is argumentative because it assumes that Public Counsel has an obligation to verify the authenticity of the Energy Assistance Payment Notice attached to Public Counsel's *Motion for Summary Determination* and argues by implication that Public Counsel is required to verify the truth of a document that has been attached to an affidavit from the complainant. The request lacks foundation because the company has no basis to assert that verifying the contents of an affidavit with a representative of the Missouri Department of Social Services impacts the interpretation of the tariff language. The request has nothing to do with the putative ambiguity of the tariff language.

**Ameren Missouri - OPC-004:**

19. In its motion to compel, Ameren states that this data request “asks whether any OPC Staff and if so who, may be knowledgeable about contracts that directly apply to the Company's ability to obtain information pertinent to determining whether a customer qualifies for the Rider EEIC exemption.” (Doc. No. 44, p. 5).

20. Public Counsel objected to section “a” of this data request in that it is argumentative, compound, overly broad, lacks foundation, and seeks information not reasonably calculated to

lead to the discovery of admissible evidence in this case. Public Counsel further objected to the extent this data request seeks privileged attorney work product.

21. This data request does not seek information that is reasonably calculated to lead to the discovery of admissible evidence. Whether or not any staff of Public Counsel has knowledge about the Missouri Department of Social Services Family Support Division contracts regarding LIHEAP or ECIP funds has nothing to do with the tariff language and does not prove or disprove the existence of an ambiguity in the tariff. Subsection “a” of Ameren’s request is argumentative because it attempts to imply that Public Counsel has an obligation to have knowledge of the Missouri Department of Social Services contracts with community action agencies and that knowledge of those contracts is important to this case. Whether or not Public Counsel has any responsive information, Public Counsel has no such obligation, and knowledge about the contracts has no impact on whether or not the tariff language is ambiguous. Subsection “a” is compound because the question asks about two distinct sets of contracts 1) relating to determining LIHEAP eligibility and 2) relating to the administration of ECIP funds that may have separate and distinct answers. Public Counsel is under no obligation to interpret the meaning of Ameren Missouri’s data requests to attempt to answer a compound question. Subsection “a” is overly broad because it does not define “knowledgeable” and does not specify how that knowledge is relevant to this particular case. Subsection “a” lacks foundation because there is no basis for the company to assert that the contracts between the Missouri Department of Social Services and community action agencies are related to the putative ambiguity of the tariff language.

22. Public Counsel objects to section “b” of this data request in that it is argumentative, overly broad, lacks foundation, and seeks information not reasonably calculated to lead to the

discovery of admissible evidence in this case. Public Counsel further objected to the extent this data request seeks privileged attorney work product.

23. Subsection “b” does not seek information that is reasonably calculated to lead to the discovery of admissible evidence. Whether or not any staff of Public Counsel has knowledge about the Missouri Department of Social Services Family Support Division contracts with home energy suppliers has nothing to do with the tariff language and does not prove or disprove the existence of an ambiguity in the tariff. Subsection “b” of Ameren’s request is argumentative because the company attempts to imply that Public Counsel has an obligation to have knowledge of the Missouri Department of Social Services contracts with home energy suppliers and that knowledge of those contracts is important to this case. Whether or not Public Counsel has responsive information, Public Counsel has no obligation to obtain it, and knowledge about the contracts has no impact on whether or not the tariff language is ambiguous. Subsection “b” is overly broad because it does not define “knowledgeable” and does not specify how that knowledge is relevant to this particular case. Subsection “b” lacks foundation because there is no basis for the company to assert that the contracts between the Missouri Department of Social Services and home energy suppliers are related to the putative ambiguity of the tariff language.

**Ameren Missouri - OPC-005:**

24. In its motion to compel, Ameren disputes that its fifth data request calls for speculation. The company adds that its request “is relevant, as well, because ... it tends to show OPC’s interpretation of the tariff.” (Doc. No. 44, p. 5).

25. Public Counsel objected to this data request in that it is argumentative, lacks foundation, calls for speculation, and seeks information not reasonably calculated to lead to the discovery of admissible evidence.



26. This data request is not reasonably calculated to lead to the discovery of admissible evidence. Any answer that Public Counsel might provide has nothing to do with the tariff language and does not prove or disprove the existence of ambiguity in the tariff. Ameren's request is argumentative because it attempts to imply that Public Counsel has an obligation to analyze or estimate the costs Ameren Missouri would incur, if any, in verifying whether customers have received LIHEAP Energy Assistance or ECIP funds towards a non-Ameren bill and that those estimates would be important in this case. Whether or not Public Counsel has responsive information, Public Counsel has no such obligation to obtain it, and the requested information has nothing to do with proving or disproving ambiguity in the tariff. The company's request lacks foundation because there is no basis for the company to assert that Ameren would incur additional costs to comply with the language of its tariff or that this information would show ambiguity in the tariff language. This data request calls for speculation because it asks Public Counsel to give answers that are not based on information that Public Counsel is required to develop. There are no facts to show that additional costs might be incurred by the company at all, nor would such facts be relevant in this complaint case.

**Ameren Missouri - OPC-006:**

27. In its motion to compel, Ameren states that its sixth data request "asked, essentially, did OPC believe, when Ameren Missouri estimated the costs of implementing the Rider EEIC exemption...that such costs included [additional costs][.] (Doc. No. 44, pp. 5-6). This is not the question that was in the data request. The company also states that request is not unduly burdensome because it is a yes or no question. Ameren also challenges Public Counsel's objection stating that "[w]hen work product is asserted, the burden is on the party asserting the privilege to show that it applies." *Id.*

28. Public Counsel objected to this data request in that it is argumentative, lacks foundation, calls for speculation, and seeks information not reasonably calculated to lead to the discovery of admissible evidence. Public Counsel further objected to the extent this data request seeks privileged attorney work product.

29. This request is not reasonably calculated to lead to the discovery of admissible evidence. Any answer that Public Counsel might provide has nothing to do with the tariff language and does not prove or disprove the existence of ambiguity in the tariff.

30. Ameren's data request is argumentative because the company attempts to imply that Public Counsel's belief or disbelief in the company's estimation of costs in the recent rate case is important to this case. The requested information has nothing to do with proving or disproving the putative ambiguity in the tariff. The data request lacks foundation because the company has no basis to assert that the requested information affects the interpretation of the tariff. The request calls for speculation because it asks Public Counsel to give answers that require relying on facts that cannot be known because they have not occurred. Furthermore, to the extent that Ameren seeks privileged attorney-work product prepared during the company's recent rate case, Public Counsel objects. If Public Counsel had developed its own estimates during the pendency of Ameren's rate case, those estimates, along with Public Counsel's impressions of Ameren's estimates, would be privileged work-product.

**Ameren Missouri - OPC-007:**

31. Ameren does not ask the Commission to compel a response to this data request.

**Conclusion**

32. All parties except the company agree that the tariff is unambiguous and entitles the complainants to relief. In an effort to avoid following the plain language of its tariff, Ameren

Missouri has deliberately attempted to change the issue in this case to questions about administration and eligibility verification. While eligibility verification may be a reason that the company regrets the tariffs it filed that entitle the complainants to relief, it is not the issue to be decided in this case. Public Counsel should not have to facilitate the company's transparent effort to avoid the real issue in this case.

WHEREFORE, Public Counsel provides this *Response to Motion to Compel Discovery* and requests that the Commission deny Ameren Missouri's motion to compel.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 9<sup>th</sup> day of November 2015:

/s/ **Tim Opitz**

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