

**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. )

**PUBLIC COUNSEL’S MOTION TO EXCLUDE PORTIONS OF THE TESTIMONY OF  
STAFF WITNESS JOHN ROGERS AND AMEREN MISSOURI WITNESS RICHARD  
VOYTAS**

COMES NOW the Office of the Public Counsel (“Public Counsel”) and respectfully moves to exclude portions of the written direct testimony of the Staff of the Missouri Public Service Commission (“Staff”) witness John Rogers and portions of the written direct testimony of Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Ameren”) witness Richard Voytas:<sup>1</sup>

**Background**

1. Pursuant to the 2012 *Unanimous Stipulation and Agreement Resolving Ameren Missouri’s MEEIA Filing* (“2012 Stipulation and Agreement”), the parties in this case have attempted to measure the impact of the company’s energy efficiency programs.<sup>2</sup> The process for developing the factual record outlined in that agreement provided for the filing of EM&V Reports completed by the utility’s evaluators, EM&V Reports completed by the Commission’s auditor, any change requests submitted by the parties, and stakeholder responses to those change requests.<sup>3</sup>

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<sup>1</sup> Doc. Nos. 210 & 212.

<sup>2</sup> *Unanimous Stipulation and Agreement Resolving Ameren Missouri’s MEEIA Filing*, File No. EO-2012-0142, Doc. No. 119.

<sup>3</sup> *Id.* at pp. 15-19.

2. On September 19, 2014, Staff and Ameren Missouri filed a non-unanimous stipulation and agreement proposing to settle the PY2013 Change Requests.<sup>4</sup> Public Counsel objected to the non-unanimous stipulation and agreement on September 26, 2014.<sup>5</sup> By Commission Rule, once Public Counsel objected to the non-unanimous stipulation and agreement, the document became merely a non-binding joint position of the signatory parties (“Black-box proposal”).<sup>6</sup>

3. Thereafter, the parties submitted competing procedural schedules to the Commission.<sup>7</sup> Public Counsel’s comments in support of its proposed schedule suggested that the process provided for in the 2012 Stipulation and Agreement outlined all the evidentiary filings necessary for a Commission determination of this matter, and that no further filings were needed or advisable.<sup>8</sup> Staff and Ameren Missouri requested a procedural schedule that included dates for the filing of additional direct, rebuttal, and surrebuttal testimony, in Public Counsel’s view in contravention of the 2012 Stipulation and Agreement and in order to impermissibly bolster their otherwise unsupported Black-box proposal.<sup>9</sup>

4. The stipulating parties have suggested that their unsupported Black-box proposal is an issue that must be resolved by the Commission. Staff states, “[t]his Stipulation presents issues of first impression to the Commission.”<sup>10</sup> Separately, Ameren Missouri stated, “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

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<sup>4</sup> Doc. No. 188.

<sup>5</sup> Doc. No. 192.

<sup>6</sup> 4 CSR 240-2.115(2)(D).

<sup>7</sup> Doc. Nos. 195 & 196.

<sup>8</sup> Doc. Nos. 197 & 205.

<sup>9</sup> Doc. No. 196.

<sup>10</sup> Doc. No. 199.

the Commission (i.e., the stipulation and objection).”<sup>11</sup> The Company continues, “[a]ccordingly, the schedule adopted should provide for the resolution of the stipulation and the objection.”<sup>12</sup>

5. On October 8, 2014, the Commission issued its *Order Establishing Procedural Schedule to Consider the Program Year 2013 Change Requests* and set out a procedural schedule which incorporates the filing of direct, rebuttal, and surrebuttal testimony.<sup>13</sup>

6. Importantly as to the Black-box proposal, the Commission ordered:

But one aspect of the arguments put forth by Ameren Missouri and Staff in support of their proposed procedural schedule requires comment. Both suggest that the issue that will be before the Commission in the evidentiary hearing is whether the Commission should approve the non-unanimous stipulation and agreement submitted by Staff and Ameren Missouri. That argument misunderstands the status of the stipulation and agreement after Public Counsel objected to it.

Commission Rule 4 CSR 240-2.115(2)(D) establishes that non-unanimous stipulations and agreements to which an objection is raised become merely a non-binding joint position of the signatory parties. Staff and Ameren Missouri may continue to support that joint position, and the Commission can decide to adopt that position if it is supported by competent and substantial evidence in the record. But the Commission cannot “approve” the non-unanimous stipulation and agreement as, by rule, it ceased to exist when a timely objection to it was filed. As a result, the parties are free to offer any evidence they believe is relevant to the question of whether *any change request* should be adopted.<sup>14</sup>

7. Thereafter, Staff, Ameren Missouri, and Public Counsel each filed direct testimony.<sup>15</sup>

### **Issue**

8. The portions of pre-filed direct testimony, listed below and identified by page and line numbers, that refer to and support the Black-box proposal filed by Staff and Ameren Missouri are irrelevant to the resolution of any factual issue in this case and should be excluded.

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<sup>11</sup> Doc. No. 200.

<sup>12</sup> *Id.*

<sup>13</sup> Doc. No. 206.

<sup>14</sup> Doc. No. 206 (emphasis added).

<sup>15</sup> Doc. Nos. 210, 211, and 212.

9. In Staff's direct testimony, Mr. Rogers refers to the Black-box proposal on the following pages and line numbers:

Page 1	Lines 22-27
Page 2	Lines 1-3, 16-21
Page 3	Lines 1-16
Page 11	Lines 9-12
Page 12	Lines 1-24
Page 13	Lines 1-24
Page 14	Lines 1-6
Page 16	Lines 1-23
Page 17	Lines 1-23
Page 18	Lines 1-20 (including footnote 19)
Page 19	Lines 1-19

10. In the Company's direct testimony, filed on October 22, 2014, Mr. Voytas refers to the Black-box proposal on the following pages and line numbers:

Page 2	Lines 1-9
Page 3	Lines 1-25
Page 4	Lines 1-4, 20-23
Page 5	Lines 1-23
Page 6	Lines 1-23
Page 7	Lines 1-22
Page 8	Lines 1-3
Page 49	Lines 8-11

Page 51	Lines 6-8, 21-22
Page 52	Lines 1-5
Page 55	Lines 3-16
Page 61	Lines 20-21

**Analysis**

11. In Missouri, evidence is considered relevant if it “tends to prove or disprove a fact in issue or corroborates other relevant evidence.” *Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005)(citing *Koontz v. Ferber*, 870 S.W.2d 885, 891 (Mo. App. 1993). The issues in this case remain: 1) what are the PY2013 Evaluation, Measurement, and Verification (“EM&V”) annual energy savings to be credited to Ameren Missouri?, and 2) what are the PY2013 net benefits amounts to be credited?

12. Not inconsistent with this articulation of the issues, the Commission allowed the parties additional opportunities above and beyond the procedure outlined in the 2012 stipulation and agreement to “...offer any evidence they believe is relevant to the question of whether any change request should be adopted.”<sup>16</sup> In fact, consistent with the Commission’s direction, Public Counsel also filed direct testimony on October 22, 2014.<sup>17</sup>

13. However, as noted above, the Commission specifically stated that the additional evidence should be related to the question of whether any change request should be adopted.<sup>18</sup> Importantly, within that Order, the Commission made clear that the Black-box proposal *does not* create a factual issue to be resolved in this case.<sup>19</sup> Ignoring the clear guidance from the Commission that the Black-box proposal is not a factual issue in this case, both Staff’s witness

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<sup>16</sup> Doc. No. 206, p. 3.

<sup>17</sup> Doc. No. 211.

<sup>18</sup> Doc. No. 206.

<sup>19</sup> *Id.*

and Ameren Missouri's witness repeatedly refer to and discuss the proposal in their respective direct testimony. This testimony does not merit inclusion in the record.

14. Despite the strained efforts by Staff and Ameren Missouri to characterize as proper evidence their rationale for agreeing to the unsupported Black-box proposal, the statements that Public Counsel requests be stricken are not facts related to resolving either the PY2013 EM&V annual energy savings or the PY2013 net benefits amounts that are at issue in the change requests.<sup>20</sup> Moreover, these portions of testimony offer little more than legal conclusions intended to bolster their failed agreement.

15. Of course, the parties are free to argue in opening statements at hearing or in briefs the legal merit or demerit of Staff and Ameren's changed positions as a resolution to this case. However, there should be no doubt that the legal conclusions and other errata offered by Staff and Ameren Missouri as evidence neither proves nor disproves any fact properly in issue.<sup>21</sup> Nor is the testimony in question relevant for any other valid purpose.

16. Staff and Ameren sought a procedural schedule which includes direct, indirect and surrebuttal testimony, despite its contradiction of the 2012 stipulation and agreement, for one purpose - to bolster a Black-box proposal that is otherwise unsupported by the record of the case. As the Commission correctly noted, the direct testimony in this case is confined to those facts which are relevant to whether the change requests should be adopted. Under that standard, the testimony at issue herein is not relevant. The offending testimony should be excluded.

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<sup>20</sup> Nor are they, put another way, "relevant to the question of whether any change request should be adopted." At most, these statements may be relevant to whether the Commission should adopt the Black-box proposal. They are not relevant to whether the change requests should be adopted.

<sup>21</sup> *Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005); *See also Goodman v. Goodman*, 267 S.W.3d 783, 786 (Mo. App. 2008).

**Relief sought**

17. By acting to exclude these offending portions now, the Commission would save the parties the significant cost in time and other resources required of pre-filing rebuttal and surrebuttal testimony, and conducting cross-examination on something that is not a factual issue.<sup>22</sup>

18. The Commission's recent practice of delaying a decision on the relevance of evidence until the time of hearing should not be followed here.<sup>23</sup> In this instance, a more efficient approach is that the Commission exclude the offending portions of pre-filed testimony in order to permit the parties to avoid unnecessary cost and effort in litigation. The Commission has taken just such an approach in the past, and should do so here.<sup>24</sup>

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission to exclude the portions of Staff witness John Rogers' direct testimony and the portions of Ameren Missouri witness Richard Voytas' direct testimony identified herein.

Respectfully,

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<sup>22</sup> Whether the record after hearing is sufficient to support the resolution offered by Staff and Ameren Missouri in the Black-box agreement, and whether the Commission should then proceed to enter an order consistent with that position, are ultimately legal arguments.

<sup>23</sup> See File No. WR-2013-0461, *Order Denying Evidentiary Motions*, Doc. No. 51 (Dec. 18, 2013); File No. EO-2013-0307, *Order Regarding Motion to Intervene*, Doc. No. 30, (Mar. 6, 2013).

<sup>24</sup> See File No. ER-2012-0174, *Order Granting Treatment as to Response to Second Motion*, Doc. No. 102 (July 6, 2012); File No. ER-2006-0315, *Order Rejecting Tariffs and Striking Testimony*, Doc. No. 64 (June 15, 2006).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 29<sup>th</sup> day of October 2014:

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