

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

In the Matter of the Application of Union Electric)
Company d/b/a Ameren Missouri for Permission and)
Approval and a Certificate of Public Convenience and)
Necessity Authorizing it to Construct, Install, Own,) File No. EA-2012-0281
Operate, Maintain and Otherwise Control and Manage)
A Utility Waste Landfill and Related Facilities at its)
Labadie Energy Center)

**INTERVENORS' OPPOSITION TO MOTION TO STRIKE
CROSS-SURREBUTTAL TESTIMONY OF CHARLES H. NORRIS, P.G.**

Intervenors Labadie Environmental Organization (LEO) and Sierra Club oppose Union Electric Company d/b/a/ Ameren Missouri's (Ameren) Motion to Strike the Cross-Surrebuttal Testimony of Charles H. Norris, P.G. (Motion), Intervenors' sole witness. Stripped of its vituperation, Ameren's latest motion deems Mr. Norris' cross-surrebuttal testimony improper because in the course of responding to the Staff's rebuttal testimony, he comments on Ameren's position as well. As the Commission made clear in its August 14 Order Revising Procedural Schedule (Doc. No. 88) and its August 28 Order Clarifying Order Revising Procedural Schedule (Doc. No. 98 at 2), Intervenors were entitled to file precisely this sort of testimony. Ameren's present motion is merely another attempt to profit unfairly from its own sandbagging and prevent the Commission from getting a full and complete view of the facts.

BACKGROUND

1. Last March, the parties agreed on a schedule which the Commission adopted. *See* Order Adopting Procedural Schedule, Doc. No. 20.

2. On April 26, Ameren pre-filed its case-in-chief, consisting of the 7-page direct testimony of its employee, Craig Giesmann. Mr. Giesmann is a civil engineer who was not involved with the selection of the proposed Labadie site. (Doc. No. 30, at 2, line 8.)

3. Mr. Giesmann's direct testimony was brief and conclusory. He submitted no documents with his testimony, and referred to but a few. As the applicant for a Certificate of Convenience and Necessity, Ameren bears the burden of proof. Intervenors therefore decided to challenge Mr. Giesmann's testimony through cross-examination, and rely on Ameren's failure to meet its burden to carry the day.

4. Intervenors made this decision in part because they feared that filing rebuttal testimony would facilitate Ameren's ability to sandbag. At least in theory, if Intervenors did not file rebuttal testimony, then Ameren would not be able to surrebut and would sink or swim on Mr. Giesmann's testimony. Although under no obligation to share their trial strategy, Intervenors have explained their reasoning at least twice – somewhat cryptically at the June 19 pre-hearing conference (Conference Transcript, Doc. No. 41 at 30), and more explicitly in their August 26 opposition to Ameren's Motion for Clarification (Doc. No. 95, ¶9.)¹ Despite Ameren's innuendoes, there is nothing inappropriate about this strategy. It is put to use every day by litigators in a wide variety of settings.

5. On May 31, the Staff filed its rebuttal testimony, offering as witnesses staff members John Cassidy and Claire Eubanks. Neither witness "rebutted" Ameren's direct testimony as that term is commonly understood. Instead, they bolstered Ameren's skeletal direct

¹ Despite this, Ameren persistently misreads these statements as a confession of the Intervenors' intent to subvert the Commission's rules, instead of a frank statement about its strategy. At any rate, Intervenors' fears of ambush were well-founded. Ameren's surrebuttal testimony from its five witnesses was everything its direct testimony was not.

testimony and relied on the documents supplied by Ameren in response to Data Requests in a way that Ameren's direct witness failed to do.

**THE TESTIMONY OFFERED BY INTERVENORS IS
PROPER CROSS-SURREBUTTAL**

6. Ameren complains that Intervenors' expert does not offer true cross-surrebuttal testimony, in violation of the Commission's rules and its August 14, 2013 Order. This is not the case.

7. Ameren resurrects its argument that Intervenors were required to file rebuttal testimony as a prerequisite to filing cross-surrebuttal testimony. (Motion at 3-5.) The Commission did not give credence to this contention when Ameren offered it last month in its Motion for Clarification or, Alternatively, Motion for Reconsideration of August 14, 2013 Order Revising Procedural Schedule. (Doc. No. 93, at 3-4.) As the Commission stated:

The Commission's rule allows each party to file surrebuttal testimony that is responsive to matters raised in another party's rebuttal testimony. That does not permit any party to submit surrebuttal testimony for the purpose of bolstering or adding to their own case. The Commission will not otherwise restrict the filing of surrebuttal or cross-surrebuttal testimony by any party.

Commission Order responding to said Motion (Doc. No. 99 at 2). The Commission should again reject Ameren's contention, as nothing in the Commission's rules requires a party to file rebuttal testimony as a prerequisite to filing cross-surrebuttal as to other parties' rebuttal testimony.

8. Ameren also suggests that the proper filing of cross-surrebuttal testimony is limited to a different kind of case, one in which there are multiple positions, rather than the question of whether a certificate should issue. (See Motion at ¶ 9 & n.4). Ameren cites no support for this view. Mr. Norris' testimony addresses the issues raised by Staff witnesses in their rebuttal testimony, just as it is required to do. Merely because Mr. Norris' testimony is not as narrowly tailored to the contours of the Staff's testimony as Ameren would like does not make

it improper; any witness, especially an expert, is allowed to explain their reasoning in more detail than the fact, statement, or evidence they seek to refute. Indeed, Ameren's numerous surrebuttal witnesses venture well beyond the public hearing testimony they are purporting to rebut.

9. In challenging Mr. Norris' right to address the alternative sites issue, Ameren's Motion (¶¶ 8-9) ignores the Commission's August 14 Order Revising Procedural Schedule (Doc. No. 88 at 3):

[T]he Commission directs the parties to address the question of whether any other studies, reports, or other documents examining alternative sites, options, or possibilities exist. If any such studies, reports, or other documents are in the possession of any party, that party shall attach such studies, reports, or other documents to its surrebuttal testimony. Of course, the parties are not limited to this single issue and may address other issues in surrebuttal testimony.

10. Ameren cannot credibly claim to be surprised by the content of Mr. Norris' testimony. It has gone to the trouble of retrieving Mr. Norris' December 2010 testimony before the Franklin County Commission, at which Ameren representatives were present, and points out the similarities between his previous testimony and his current Cross-Surrebuttal testimony. Motion, ¶ 14. As Ameren also points out, it has been aware since last April that Mr. Norris had been retained by Intervenors as a consulting expert, since its designation of documents as Highly Confidential requires even consulting experts to make their identity known to all before viewing them. 4 CSR 240-2.135(4)(D), (6).

11. As an alternative to striking Mr. Norris' testimony, Ameren seeks leave to file additional testimony to rebut his testimony. (Motion at 12.) There is no basis for this extraordinary relief, which would go well beyond anything contemplated by the Commission's initial and revised procedural schedule Orders (Docs. Nos. 20 and 88). In addition, it is little more than a repackaged plea to have its own "last word" on pre-filed testimony. The

Commission effectively rejected that plea in its August 28 Order Clarifying Order Revising Procedural Schedule. (Doc. No. 98).

12. Ameren is far from helpless in the face of Mr. Norris' testimony. Ameren will have the opportunity to cross-examine Mr. Norris at the evidentiary hearing and to critique his testimony in its post-hearing briefs.²

13. Mr. Norris' testimony is proper under the Commission's Rules and Orders herein. Accordingly, Intervenors respectfully request that the Commission deny Ameren's motion.

LABADIE ENVIRONMENTAL ORGANIZATION
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September 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was sent via email on September 25, 2013, to all parties of record.

/s/ Maxine I. Lipeles

² In fact, its critique of Mr. Norris's testimony is well underway. *See, e.g.*, Motion at ¶¶ 13, 14, 16.