

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 12<sup>th</sup> day of  
November, 2014.

In the Matter of Union Electric Company d/b/a )  
Ameren Missouri's Filing to Implement Regulatory )  
Changes in Furtherance of Energy Efficiency )  
as Allowed by MEEIA )

**File No. EO-2012-0142**

**ORDER REGARDING MOTIONS TO STRIKE TESTIMONY**

Issue Date: November 12, 2014

Effective Date: November 12, 2014

On October 29, 2014, the Staff of the Commission filed a motion asking the Commission to exclude a portion of the direct testimony offered by Public Counsel's witness, Geoff Marke. On the same date, Public Counsel filed a motion asking the Commission to exclude a portion of the testimony of Staff witness John Rogers and Ameren Missouri witness Richard Voytas. On October 31, Ameren Missouri filed its own motion to exclude portions of Geoff Marke's testimony. In response to those motions, the Commission directed the parties to respond to each of the motions by November 6. Staff, Ameren Missouri, Public Counsel, and the Missouri Division of Energy each filed responses on that date.

Some background is required to understand these competing motions. This proceeding concerns Union Electric Company, d/b/a Ameren Missouri's implementation of its Missouri Energy Efficiency Investment Act (MEEIA) programs. One aspect of the implementation of those programs requires the utility to engage the services of an independent auditor to evaluate, measure, and verify (EM&V) the utility's energy efficiency measures. Ameren Missouri hired Cadmus and ADM to conduct that audit. The Commission's Staff hired Johnson Consulting Group to perform an independent audit.

Cadmus and ADM filed their EM&V Report on June 12, 2014, and Johnson Consulting Group filed its EM&V Report on July 2 (updated on August 27).

On July 3, both Ameren Missouri and Staff filed motions asking the Commission to make certain changes to the EM&V reports. The Commission established a procedural schedule to consider those motions at a hearing scheduled for August 28 and 29. That procedural schedule was subsequently extended, and later indefinitely stayed to allow Ameren Missouri and Staff more time to settle their differences.

On September 19, Staff and Ameren Missouri filed a non-unanimous stipulation and agreement to settle the program year 2013 change requests. Public Counsel objected to the stipulation and agreement on September 26. As provided by Commission Rule 4 CSR 240-2.115(2)(D), a non-unanimous stipulations and agreements to which an objection is raised become merely a non-binding joint position of the signatory parties.

Thereafter, the Commission directed the parties to submit a proposed procedural schedule. Staff and Ameren Missouri proposed a procedural schedule that would give the parties an opportunity to submit prefiled direct, rebuttal, and surrebuttal testimony, and would culminate in an evidentiary hearing on January 6 and 7, 2015. Public Counsel submitted a competing procedural schedule that would schedule an evidentiary hearing on October 23 and 24, 2014, without allowing for the prefiling of testimony. Public Counsel's subsequent comments on the proposed procedural schedules suggested that, aside from the change requests and the responses to those requests, no further evidence was needed for the Commission to make a decision and suggested the parties be precluded from offering such evidence.

Public Counsel submitted its response to Ameren Missouri's and Staff's proposed change requests on October 6. That response explains Public Counsel's opposition to the

change request proposed by Ameren Missouri and supports Staff's original argument that market effects should not be included for the LightSavers program and should not be applied to the final estimate of the net-to-gross ratio for program year 2013. Public Counsel opposed the stipulation and agreement as a black-box settlement that does not address the market effects question that will arise again in future years.

On October 8, the Commission adopted the procedural schedule proposed by Staff and Ameren Missouri. As required by that schedule, on October 22, Staff filed the direct testimony of John Rogers, Ameren Missouri filed the direct testimony of Richard Voytas, and Public Counsel filed the direct testimony of Geoff Marke. The procedural schedule requires the parties to file rebuttal testimony on November 17.

Public Counsel's motion asks the Commission to exclude the portions of Staff's and Ameren Missouri's testimony that addresses and explains the revised positions taken by Staff and Ameren Missouri in their non-unanimous stipulation and agreement. Public Counsel argues that because the Commission cannot approve the objected-to stipulation and agreement, it should exclude as irrelevant any testimony about the positions described in that stipulation and agreement.

Staff's motion asks the Commission to strike the portion of Mr. Marke's testimony that describes an additional adjustment for what the witness calls "rebound effects". Staff asserts that because "rebound effects" are not described in either of the EM&V Reports and are not addressed in the change requests filed by Staff and Ameren Missouri, it is too late for Public Counsel to address them at this stage of the proceeding.

The basis for Staff's argument is the stipulation and agreement that the Commission approved in the case in 2012. In that stipulation and agreement, the parties, including Staff, Ameren Missouri, and Public Counsel, agreed to certain procedural measures to govern the

evaluation of change requests regarding the EM&V Reports. One provision of that stipulation and agreement requires that “any stakeholder group participant who wants a change to the impact evaluation portion of the Final EM&V Report will have 21 days from the issuance of the Final EM&V Report to file a request with the Commission to make such a change.”<sup>1</sup> Public Counsel did not file a timely change request and therefore, Staff argues, it cannot be allowed to recommend an additional change in its direct testimony apart from the changes proposed by either Staff or Ameren Missouri in their “timely” change requests.

Ameren Missouri’s motion to strike portions of Marke’s testimony repeats the rationale for Staff’s motion and also challenges the portion of that testimony that addresses the calculation of net shared benefit because that testimony does not pertain to any change request proposed by any party.<sup>2</sup>

A paragraph from Public Counsel’s response to Ameren Missouri’s motion to strike very well explains why all three motions to exclude testimony should be denied. Public Counsel says:

By seeking to exclude this testimony, Ameren Missouri seeks to limit the Commission’s ability to reach a just and reasonable result in this case. As the Commission is well aware, the Commission is not bound to accept a change request exactly as filed by a party. Once competent and substantial evidence is presented to establish a record on which the Commission can rule, the Commission may then weigh the merits and proceed to issue any order it chooses in accordance with the law and the weight of the evidence. The Commission should decline to follow the Company’s request to limit its review of material evidence.<sup>3</sup>

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<sup>1</sup> *Unanimous Stipulation and Agreement Resolving Ameren Missouri’s MEEIA Filing*, Paragraph 11(iv).

<sup>2</sup> Ameren Missouri also complains that a portion of Marke’s direct testimony that describes corrections to Public Counsel’s October 6 Response to Change Requests is confusing and asks the Commission to require Public Counsel to refile that response with the changes clearly delineated. The Commission does not find the changes to be confusing and will not require Public Counsel to refile the response.

<sup>3</sup> *Public Counsel’s Response to Ameren Missouri’s Motion to Strike*, Paragraph 11.

As Public Counsel adds in a footnote to that paragraph, the Commission has an obligation to get it right, and can do so only by considering all the evidence.

The Commission agrees with Public Counsel that excluding testimony regarding the “rebound effect” on procedural grounds does not help the Commission to “get it right”. Ironically, Public Counsel then asks the Commission to exclude testimony by Staff and Ameren Missouri witnesses to explain their changed positions as announced in their nonunanimous stipulation and agreement. As the Commission has explained several times, once an objection is made to that stipulation and agreement, the Commission cannot approve it. It is merely a revised position of the signatory parties, to which they are not bound. However, the signatory parties may offer testimony and other evidence to explain why their revised positions are appropriate. Similarly, the parties that disagree with those positions may offer testimony and other evidence to explain why those positions are not appropriate and, if they wish, to support alternative positions. That is why the Commission has established a full procedural schedule and will conduct an evidentiary hearing in this case.

At various times, Staff, Ameren Missouri, and Public Counsel have cited provisions of the 2012 stipulation and agreement as the reason to prevent the Commission from considering some aspect of their opponents position. In proposing a procedural schedule, Public Counsel argued that the 2012 stipulation and agreement required the Commission to schedule a very quick evidentiary hearing at which the parties would not be allowed to present any evidence. Staff, Ameren Missouri, and Public Counsel now argue that procedural provisions of the 2012 stipulation and agreement preclude the Commission from considering certain evidence.

Those arguments are not persuasive for two reasons. First, the 2012 stipulation and agreement specifically states that it is an agreement between the signatory parties, not a

contract with the Commission.<sup>4</sup> Thus, the procedure recommended in the stipulation and agreement is not binding on the Commission. Second, the highly expedited procedure recommended in the 2012 stipulation and agreement has proven to be completely unworkable in practice. The Commission wants to get it right, and that is why the Commission has established a procedural schedule to allow the parties to offer any evidence they believe is relevant to the question of whether any change request should be adopted.

None of the motions to strike is well founded, and all will be denied.

**THE COMMISSION ORDERS THAT:**

1. Staff's Motion to Exclude the Portion of Public Counsel Witness Geoff Marke's Direct Testimony Regarding Rebound Effects is denied.
2. Public Counsel's Motion to Exclude Portions of the Testimony of Staff Witness John Rogers and Ameren Missouri Witness Richard Voytas is denied.
3. Ameren Missouri's Motion to Strike Portions of the Direct Testimony of Geoff Marke is denied.
4. This order shall be effective when issued.

**BY THE COMMISSION**



A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff  
Secretary

R. Kenney, Chm., Stoll, W. Kenney,  
Hall, and Rupp, CC., concur.

Woodruff, Chief Regulatory Law Judge

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<sup>4</sup> *Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing*, Paragraph 29.