

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 6th day of
March, 2013.

In the Matter of the Union Electric Company)	
d/b/a Ameren Missouri's Voluntary Green)	<u>Case No. EO-2013-0307</u>
Program/Pure Power Program Tariff Filing)	Tariff No. JE-2013-0197

ORDER REGARDING MOTION TO INTERVENE

Issue Date: March 6, 2013

Effective Date: March 6, 2013

Background

On October 19, 2012, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") filed tariff sheets to implement its Voluntary Green Program/Pure Power Program. The tariff sheets bear an effective date of May 1, 2013.

The tariff sheets were filed in relation to a Nonunanimous Stipulation and Agreement ("Agreement") filed in ER-2012-0166. The Agreement was filed by the signatories on September 20, 2012 and was approved by the Commission on October 3, 2012. The Earth Island Institute d/b/a Renew Missouri ("Renew Missouri") was a party to ER-2012-0166, although it was not a signatory to the Agreement.¹

On November 20, 2012, the Commission's Staff filed a motion to open an investigation into Ameren Missouri's tariff sheets, as described above. On November 26, 2012, the Commission granted Staff's motion to open this investigation, set

¹ Renew Missouri filed its request to intervene in ER-2012-0166 on February 23, 2012 and its request was granted on March 5, 2012.

a procedural conference for December 12, 2012, and directed the filing of a proposed procedural schedule no later than January 2, 2013. On December 11, 2012, Ameren Missouri, the Office of the Public Counsel, and the Commission's Staff jointly requested that the Commission cancel the scheduled procedural conference, set an intervention deadline and adopt a proposed procedural schedule. The Commission granted that request. The intervention deadline was January 2, 2013, and the evidentiary hearing was originally scheduled for March 7, 2013.

On February 20, 2013, Renew Missouri filed an application to intervene 49 days out of time. On February 22, 2013, it prefiled what it terms to be "Surrebuttal Testimony" in conformity with the procedural schedule deadline established for that filing. Because the evidentiary hearing is rapidly approaching, the Commission set an expedited deadline for responses to the application. Responses were filed on February 25, 2013 by Ameren Missouri and the Commission's Staff.

Late Intervention Standard

Intervention is governed by Commission Rule 4 CSR 240-2.075, which provides in pertinent part:

(3) The Commission may grant a motion to intervene or add new member(s) if –

(A) The proposed intervenor or new member(s) has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or

(B) Granting the proposed intervention would serve the public interest.

(10) Motions to intervene or add new member(s) filed after the intervention date may be granted upon a showing of good cause.

"Good cause," is defined as showing a "legally sufficient ground or reason" under the

circumstances.² Good cause means a good faith request for reasonable relief.³ To constitute good cause, the reason “must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical, and good faith is an essential element.”⁴

Renew Missouri’s Application

In its application to intervene Renew Missouri states that its “interests focus on the environmental, economic, business interests and health benefits of renewable energy generation in Missouri, and hence are different from those of the general public and could be adversely affected by an order approving or extending Ameren Missouri’s Pure Power Program Tariff.” Renew Missouri further states: “Good cause exists to grant Renew Missouri late intervention. Renew Missouri did not see a need to intervene until after its Staff reviewed testimony in the case, whereupon it identified arguments and perspectives it could provide in addition to those put forth by Michael Ensrud of PSC Staff.”

Renew Missouri advocates that for any voluntary green pricing program to have any meaningful beneficial effect for participants, 100% of program revenues must be dedicated to the marketing, financing and construction of new renewable energy projects. It also requests the Commission to order Ameren Missouri to file a tariff that would comply with a completely different design modeled after what the City of Columbia has in place. Finally, Renew Missouri states that before allowing this program to continue the Commission should require third-party polling of the program’s participants to see if they understand what they receive for the charge to participate in the program.

² *Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo.1963); *Black’s Law Dictionary*, 6th ed., West Group, 1990, p. 692.

³ *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App. 1996).

⁴ *Schuenemann v. Route 66 Rail Haven, Ltd.*, 353 S.W.3d 691, 696 (Mo. App. 2011), *citing to*, *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. App. 1977).

Ameren Missouri's Response

Ameren Missouri observes that Renew Missouri's statements reflect it was fully aware of this matter and the deadline for requesting intervention. According to Ameren Missouri, to allow Renew Missouri to intervene on the eve of the evidentiary hearing would impair its ability to respond to Renew Missouri's allegations and constitute a violation of due process.

Additionally, Ameren Missouri claims that to allow Renew to file what it has termed to be "Surrebuttal Testimony" would be a violation of Commission Rule 4 CSR 240-2.130(7)(D), which specifically requires surrebuttal testimony to "be limited to material which is responsive to matters raised in another party's rebuttal testimony." Ameren Missouri contends that while a portion of Mr. Wilson's testimony purports to reflect a limited response to the only rebuttal testimony filed in this case (from Mr. Ensrud), the vast majority of Renew Missouri Executive Director Patrick Wilson's testimony is a rebuttal to the Pure Power Program itself." In addition to opposing Renew Missouri's intervention, Ameren Missouri requests this testimony be stricken.

Furthermore, Ameren Missouri states that the relief requested by Renew Missouri is beyond the Commission's authority to grant. Ameren Missouri acknowledges that while the Commission is free to approve or reject its current tariff, the Commission does not have the authority to design a completely different program and then order Ameren Missouri to implement it.

The Commission's Staff's Response

Staff argues that Renew Missouri does not state good cause for late intervention.

Staff asserts that the Commission should not condone Renew Missouri's improper "wait and see" tactic, especially when it could have easily, timely intervened to monitor and participate in this matter. Additionally, Staff observes that Renew Missouri's application fails to meet one of the criteria in Commission Rule 4 CSR 240- 2.075(10) in that Renew Missouri fails to state that it will accept the procedural posture of this matter as it stands.

Analysis and Decision

It is clear from the procedural history of this matter, as well as that of ER-2012-0166, and from Renew Missouri's statements in its motion, that Renew Missouri was fully aware of this action and its procedural schedule. Renew Missouri made a conscious decision not to intervene timely, and instead monitored the filings in the case. Once Staff prefiled the testimony of Michael Ensrud on February 5, 2013, and once Renew Missouri spent 15 days analyzing it, it then decided that it would seek late intervention.

Renew Missouri does not state good cause to intervene at this late date. Renew Missouri was aware this action would be commencing as early as September 20, 2012. The tariff was filed on October 19, 2012. Staff's motion to investigate was filed on November 20, 2012. The Commission issued notice and set the intervention deadline on December 11, 2012. That deadline was January 2, 2013. The evidentiary hearing is currently set for March 19, 2013.⁵ Renew Missouri could have easily intervened timely. It elected not to.

Additionally, the prefiled testimony offered by Renew Missouri is of the nature of direct testimony, not rebuttal and not surrebuttal. By its own admission Renew Missouri states it is offering arguments and perspectives it identified "in addition to those put forth."

This is not responsive testimony as is required by the Commission's rules. To allow that testimony to be offered into the evidentiary record at the hearing would condone a violation of the Commission's rules on prefiled testimony.⁶ However, this so-called testimony is merely prefiled, and this testimony has not been offered or received into the evidentiary record for this matter, so there is no need to strike it. It will simply be disregarded.

Despite the Commission's denial of Renew Missouri's late intervention request, it could have different perspectives that would aid the Commission in making its decision. Consequently, the Commission will grant leave for Renew Missouri to file a brief, *amicus curiae*, to present its perspectives and legal arguments.⁷ However, the Commission makes clear that the assertions, allegations, and statements of attorneys in pleadings, briefs or oral arguments do not constitute evidence.⁸

THE COMMISSION ORDERS THAT:

1. Earth Island Institute d/b/a Renew Missouri's motion to intervene is denied.
2. Earth Island Institute d/b/a Renew Missouri is granted leave to file a brief, *amicus curiae*, to present its perspectives and legal arguments. That brief shall be filed pursuant to the briefing schedule set for the parties.

⁵ The hearing was originally set for March 7, 2013, but it was rescheduled at the request of the parties on February 28, 2013.

⁶ The Commission could grant a waiver or variance to Rule 4 CSR 240-2.130(7)(D) for good cause shown. However, similar to its intervention request, Renew Missouri fails to demonstrate good cause for such.

⁷ See Commission Rule 4 CSR 240-2.075(11) for guidelines.

⁸ It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party. *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), *citing to*, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955).

3. This order shall become effective immediately upon issuance.

BY THE COMMISSION

A handwritten signature in cursive script, reading "Shelley Brueggemann".

Shelley Brueggemann
Acting Secretary

R. Kenney, Chm., Jarrett, Stoll, and
W. Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge