

**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 IN LIMINE OR 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, rebuttal, and surrebuttal testimony of the Staff of the Missouri Public Service Commission (“Staff”) witness John Rogers and portions of the written direct and surrebuttal testimony of Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Ameren”) witness Richard Voytas, and to preclude its use at trial in any way:¹

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.² 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.³

¹ Doc. Nos. 210, 212, 227, 238 & 239.

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

³ *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.⁴ Public Counsel objected to the non-unanimous stipulation and agreement on September 26, 2014.⁵ 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”).⁶

3. 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.⁷

4. 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.⁸

⁴ Doc. No. 188.

⁵ Doc. No. 192.

⁶ 4 CSR 240-2.115(2)(D).

⁷ Doc. No. 206.

⁸ Doc. No. 206 (emphasis added).

5. Thereafter, Staff, Ameren Missouri, and Public Counsel each filed direct, rebuttal, and surrebuttal testimony.

Issue

6. The portions of pre-filed direct, rebuttal, and surrebuttal testimony, listed below and identified by page and line numbers, that refer to and purport to provide support for 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.

7. 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

8. In the Staff's rebuttal testimony⁹, Mr. Rogers refers to the Black-box proposal on the following pages and line numbers:

Page 16 Lines 25-28

Page 17 Lines 1-28

9. In the Staff's surrebuttal testimony¹⁰, Mr. Rogers refers to the Black-box proposal on the following pages and line numbers:

Page 2 Lines 18-19

Page 5 Lines 5-11

Page 6 Lines 1-3

Page 7 Lines 10-15

Page 8 Lines 3-6

Page 9 Lines 7-9

Page 12 Lines 1-3

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

⁹ Doc. No. 227.

¹⁰ Doc. No. 239.

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

11. In the Company's surrebuttal testimony¹¹, Mr. Voytas refers to the Black-box proposal on the following pages and line numbers:

Page 2	Lines 16-18
Page 6	Lines 21-23
Page 7	Lines 1-7

Analysis

12. The Commission's rules provide that the presiding officer shall rule on the admissibility of all evidence.¹² If a party objects to evidence, the party may still make an offer of proof to preserve the evidence in the record "unless it is wholly irrelevant, repetitious, privileged, or unduly long."¹³ As a consequence of that language in the rule, the Commission should exclude evidence that is wholly irrelevant, repetitious, privileged or unduly long.

¹¹ Doc. No. 238.

¹² 4 CSR 240-2.130(3).

¹³ *Id.*

13. In Missouri, evidence is considered relevant if it “tends to prove or disprove a fact in issue or corroborates other relevant evidence.”¹⁴ Necessarily, then, in order to examine if evidence is relevant, it must be measured against the issues in the case. If the evidence does not prove or disprove a fact in issue, the Commission should exclude it as irrelevant.

14. The main 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? Further, Public Counsel has raised several sub-issues to help guide the Commission’s consideration of the two main issues.¹⁵

15. Importantly, within the Commission’s procedural order, the Commission made clear that the black-box proposal *does not* create a factual issue to be resolved in this case.¹⁶ “Staff and Ameren 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.”¹⁷

16. Ignoring the clear guidance from the Commission that the black-box proposal is not a factual issue in this case, both Staff’s witness and Ameren Missouri’s witness repeatedly refer to and discuss the proposal in their respective direct, rebuttal, and surrebuttal testimony.

¹⁴ *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)).

¹⁵ Doc. No. 245.

¹⁶ *Id.*

¹⁷ *Id.*

This testimony lacks foundation, is irrelevant as to any issue properly before the Commission and does not merit inclusion in the record.

17. Staff and Ameren Missouri have continued to characterize as proper evidence their rationale for agreeing to the unsupported black-box proposal. These statements in support of the “black-box” position 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, nor are they relevant to any of the sub-issues raised by Public Counsel. The fact that these statements regarding the “black-box” position are not relevant to resolving the issues in this case is indicated in the rebuttal testimony of Staff’s witness in which he states that “should the Commission not decide in favor of the joint position, a Commission decision on each of the following issues concerning the PY2013 EM&V for the Ameren Missouri demand-side programs would be necessary in order to determine the PY2013 annual energy savings and PY2013 annual net shared benefits...”¹⁸ The Staff’s witness then lists twenty-two (22) separate items that the Commission should address.¹⁹ Despite stating that these issues should be resolved, the Staff does not provide any evidence or opinion in its testimony relating to those issues. Instead, the Staff continues to spend time, as does Ameren Missouri, baldly and perfunctorily asserting that the “black-box” position is just and reasonable.

¹⁸ Doc. No. 227, p. 10. As articulated in its statement of issues, Public Counsel does not agree that such an analysis is required. This testimony should be seen for what it is, a weak attempt to make the unsupported proposal appear comparatively more enticing to the Commission than the straw man alternative.

¹⁹ *Id.* at 10-13.

18. The Commission cannot issue an order based on the mere agreement of the Staff and the Company that their position is, in the view of the Staff and the Company, reasonable. Without establishing the underlying reasons for arriving at those “black-box” numbers, the Staff and Ameren Missouri’s position lacks foundation.

19. Of course, the parties are free to argue in opening statements 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 statements concerning the black-box proposal offered by Staff and Ameren Missouri as evidence have no foundation and neither prove nor disprove any fact properly in issue, and so, are irrelevant and inadmissible.²⁰

20. By acting to exclude these offending portions now, the Commission would prevent the Commission from hearing irrelevant, unfounded evidence that would serve to waste the Commission’s time and resources.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission to exclude the portions of Staff witness John Rogers’ direct, rebuttal, and surrebuttal testimony and the portions of Ameren Missouri witness Richard Voytas’ direct, and surrebuttal testimony identified herein and preclude use of the testimony in any way at trial.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

/s/ Tim Opitz
Tim Opitz

²⁰ *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).

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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 30th day of December, 2014:

/s/ Tim Opitz
