

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 3rd day of
October, 2013.

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,)	<u>File No. EA-2012-0281</u>
Operate, Maintain, and Otherwise Control and)	
Manage a Utility Waste Landfill and Related Facilities)	
at its Labadie Energy Center.)	

**ORDER DENYING MOTION TO STRIKE CROSS-SURREBUTTAL
TESTIMONY, BUT ALLOWING AMEREN MISSOURI TO FILE
ADDITIONAL RESPONSIVE TESTIMONY**

Issue Date: October 3, 2013

Effective Date: October 3, 2013

On September 19, 2013, Ameren Missouri filed a motion asking the Commission to strike the cross-surrebuttal testimony filed by Charles Norris on behalf of Labadie Environmental Organization (LEO) and Sierra Club.¹ The Commission ordered that any party wishing to respond to Ameren Missouri's motion do so no later than September 25. LEO and Sierra Club filed a timely response. No other party responded.

Ameren Missouri contends Mr. Norris' cross-surrebuttal testimony violates the Commission's rules regarding testimony because it is in substance rebuttal testimony that should have been filed earlier in the procedural schedule. Ameren Missouri contends it is prejudiced by the filing of Norris' testimony because if that testimony had been filed as

¹ Ameren Missouri asked the Commission to rule on its motion expeditiously to allow sufficient time to prepare for the evidentiary hearing that at the time was scheduled for October 15, 16, and 17, 2013. Subsequently, the Commission rescheduled the hearing for November 12, 13, and 14, 2013.

rebuttal testimony, Ameren Missouri would have had an opportunity to pre-file surrebuttal testimony in response. LEO and Sierra Club counter that Norris' testimony is proper cross-surrebuttal designed to respond to the rebuttal testimony of two Staff witnesses, Claire Eubanks and John Cassidy. To understand the conflicting contentions of Ameren Missouri and LEO and Sierra Club, it is first necessary to understand the procedural schedule that has evolved in this case.

On March 19, 2013, the Commission adopted a procedural schedule jointly proposed by all the parties, including Ameren Missouri and LEO and Sierra Club. That procedural schedule required Ameren Missouri to file direct testimony on April 26. Non-Ameren Missouri parties were then required to file rebuttal testimony on May 31. Finally Ameren Missouri was to file surrebuttal testimony, and all other parties were allowed to file cross-surrebuttal testimony on June 28. An evidentiary hearing was set for September 23, 24, and 25.

Ameren Missouri filed the direct testimony of Craig Giesmann on April 26. The Commission's Staff responded by filing the rebuttal testimony of John Cassidy and Claire Eubanks on May 31. Since LEO and Sierra Club did not file rebuttal testimony and Staff's testimony largely supported Ameren Missouri's position, Ameren Missouri did not file surrebuttal testimony on June 28.

However, many individual members of LEO and Sierra Club appeared at local public hearings in Union, Missouri on June 25 and in Washington, Missouri on July 10. Those witnesses presented testimony challenging Ameren Missouri's application on environmental and public health grounds. Ameren Missouri complained that the testimony

at the local public hearings was in effect the rebuttal testimony of LEO and Sierra Club and asked for leave to file surrebuttal testimony to respond to that testimony.

In an order issued on August 14, the Commission allowed Ameren Missouri an opportunity to file surrebuttal testimony on September 13. That order also allowed other parties an opportunity to file cross-surrebuttal testimony at the same time. In response to a further motion from Ameren Missouri, on August 28, the Commission clarified that its August 14 order “did not waive or modify the requirements of the Commission’s rule regarding the filing of surrebuttal testimony.” The Commission did not otherwise restrict the filing of surrebuttal testimony or cross-surrebuttal testimony by any party.

Commission Rule 4 CSR 240-2.130(7) establishes the definitions for direct, rebuttal, and surrebuttal testimony. Subsection (A) of that rule provides that direct testimony “shall include all testimony and exhibits asserting and explaining that party’s entire case-in-chief”. In this case Ameren Missouri has the burden to support its application and only Ameren Missouri filed direct testimony. Subsection (C) of that rule states “[w]here only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party’s direct case.” In this case, only two Staff witnesses filed rebuttal testimony, although the Commission treated the testimony offered by the public at the local public hearings as rebuttal testimony for the purpose of allowing Ameren Missouri to respond with surrebuttal testimony. Finally, subsection (D) of the rule states “[s]urrebuttal testimony shall be limited to material which is responsive to matters raised in another party’s rebuttal testimony.”

For LEO and Sierra Club’s surrebuttal testimony to comply with the regulation, it must be responsive to some other party’s rebuttal testimony. In their rebuttal testimony,

Staff's witnesses describe Staff's review of Ameren Missouri's application for a certificate and explain why Staff recommends the application be granted. Charles Norris' surrebuttal testimony on behalf of LEO and Sierra Club takes issue with Staff's recommendations and in doing so offers testimony explaining why he believes Ameren Missouri's application should not be granted. That testimony is appropriate surrebuttal to Staff's rebuttal testimony and complies with the Commission's regulation.

Ameren Missouri also expresses concern that as the applicant with the burden of proof, it must be allowed an opportunity to respond to Mr. Norris' testimony. That argument is not persuasive as a basis to strike Mr. Norris' surrebuttal testimony. As previously indicated, that testimony is proper cross-surrebuttal to Staff's rebuttal and if not allowed, LEO and Sierra Club would have no opportunity to respond to Staff's testimony. However, Mr. Norris' testimony does raise matters to which Ameren Missouri should be given an opportunity to respond.

In most cases, the Commission does not allow the parties to file additional testimony after surrebuttal testimony; normally all issues are appropriately joined within three rounds of testimony. However, the circumstances of this case are unique and warrant a modification of normal procedures. The Commission will allow Ameren Missouri an opportunity to file sur-surrebuttal testimony to respond to Mr. Norris' surrebuttal testimony. The opportunity to file additional testimony will not unduly disrupt preparations for hearing as the hearing date has already been extended into November at the request of the parties for other reasons.

THE COMMISSION ORDERS THAT:

1. The Motion to Strike Cross-Surrebuttal Testimony of Charles H. Norris is denied.
2. Union Electric Company d/b/a Ameren Missouri is allowed until October 11, 2013 to file testimony responsive to the cross-surrebuttal testimony of Charles H. Norris.
3. This order shall become effective upon issuance.



BY THE COMMISSION

Morris L. Woodruff

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll,
and W. Kenney, CC., concur.
Hall, C., abstains.

Woodruff, Chief Regulatory Law Judge