

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

In the Matter of the Application of)	
Union Electric Company d/b/a)	<u>Case No. ET-2021-0082</u>
Ameren Missouri for Approval of)	Tracking No. YE-2021-0081
Its Surge Protection Program.)	

**STAFF RESPONSE TO AMEREN MISSOURI’S MOTION
TO PROHIBIT CERTAIN CROSS-EXAMINATION**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through counsel, and for its *Response to Ameren Missouri’s Motion to Prohibit Certain Cross-Examination* states:

1. Ameren Missouri filed a *Motion* three business days before the evidentiary hearing scheduled in this matter, in violation of the parties’ right to ten days to respond¹, seeking to block two of the three parties from entering evidence into the record for the benefit of the Commission. Ameren Missouri waived its objection by joining the *Joint List of Issues* agreed to and filed in this matter March 26, 2021, which included the proposed order for cross-examination. Staff had not yet prepared any cross-examination questions for the Office of the Public Counsel’s (OPC) witness, Keri Roth, at the time of the filing of this *Motion*. However, Staff contests this *Motion* because of both legal and policy reasons, as well as the dangerous precedent potentially set by granting the blanket prohibition requested in the *Motion*.

2. Section 536.070.2, RSMo, specifically grants parties to Commission proceedings² the right to cross-examine witnesses. Notably, “**Each party** shall have the

¹ 20 CSR 4240-2.080.13

² Section 536.010.8, RSMo, “‘State Agency’ means each board, commission, department, officer or other administrative office or unit of the state other than the general assembly, the courts, the governor, or a political subdivision of the state, existing under the constitution or statute and authorized by the constitution or statute to make rules or to adjudicate contested cases.”

right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses **on any matter relevant to the issues**” One of the procedural methods Staff has at its disposal to ensure information is provided to the Commission, on the record, is through cross-examining witnesses of the various parties that appear before the Commission. Section 386.410, RSMo, specifically states that the technical rules of evidence do not apply in Commission proceedings, which means that counsel is permitted to utilize certain methods that may not apply in a traditional courtroom setting. However, Staff would address the Missouri rules of evidence, which generally state that the trial court should not instruct counsel on how to conduct its case.³ Finally, the right of due process is granted by the Fifth Amendment to the United States Constitution and has been interpreted to permit parties to judicial proceedings the right to examine witnesses.

3. Several policy considerations also need to be accounted for in considering this *Motion*. Most notably is the fact that granting this *Motion* has the potential to prevent information from entering the record. After that is the concern that it is impossible to predict what matters may be addressed in a witness’ testimony on the stand prior to the commencement of the evidentiary hearing. While counsel for a party may not believe that it intends to ask questions of a witness, the subject of live testimony may necessitate otherwise. Staff investigations are often developing throughout the entire procedural schedule and positions can change as it reviews discovery. Late discovery or voluminous

³ Section 611.1 22A Mo. Prac. Missouri Evidence, “In Missouri, the trial judge has broad discretionary power over the examination of witnesses, the order of introducing evidence, and the conduct and comments of counsel and the conduct of the trial. He or she may exercise that power to avoid wasted time, to confine the evidence to the points at issue, to insure that the trial proceeds in an orderly manner, to limit the number of witnesses that may be called to prove a specific point, and to allow a witness to be recalled at any stage of the trial (as many times as the court allows) for further direct examination, cross-examination, or to correct or clarify previous testimony. It is often said, however, that the trial court has no right to instruct counsel on how to try their cases or to dictate trial strategy or tactics.” (internal citations omitted).

discovery that is reviewed at a late hour may mean positions would change right up until the filing of the position statements. Additionally, while the immediate matter only consists of the Company, OPC and Staff, there are often cases before the Commission featuring ten parties or more. Agreeing with the proposition to prevent certain parties from cross-examining certain other parties' witnesses could turn into a veritable match game depending on the various issues and positions to a matter. Further, if a party has a like position on one issue, but contrary positions on another issue, the parties **must be** permitted to cross the other's witnesses to make a record on which the Commission can base its decision. Determining whether a party's position is sufficiently contrary or aligned with another party's would be unduly burdensome, and likely would result in improper examination of attorney work product and hearing strategy before the hearing even began. Finally, the Commission's procedural order does not account for the filing or addressing of motions in limine. Parties are always afforded the right to object to specific questions and have that objection addressed by the judge in the evidentiary hearing. That is exactly how objections should be handled in this matter as well.

4. In summary, Staff is opposed to this proposition generally, but specifically in the immediate matter due to the minimal time remaining before the evidentiary hearing to consider this unprecedented suggestion. For the legal and policy concerns that granting this *Motion* would trigger, as outlined in the paragraphs above, Staff prays that the Commission will reject this *Motion* and permit the parties to proceed under a more just procedure.

WHEREFORE, Staff respectfully submits its *Response* in this case; prays the Commission will reject Ameren Missouri's *Motion*, or in the alternative delay ruling on the motion until the conduct of the evidentiary hearing; and grant such relief as is just in the circumstances.

Respectfully submitted,

/s/ Whitney Payne

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 9th day of April, 2021, to all counsel of record.

/s Whitney Payne