

testimony that, candidly, Staff should not be allowed in the first place, that is, unless there is something *improper* about the Company's surrebuttal testimony, then the clarification the Company seeks would effectively change (to use Staff's word, "vacate") the Commission's previously expressed intent.

4. Staff's hyperbole notwithstanding, it was not and is not "absurd" for the Company to question the Commission's order given that, to the undersigned counsels' knowledge, the Commission never allows sur-surrebuttal testimony to be filed in the absence of a claim, first sustained by the Commission, that the surrebuttal testimony to be responded to *was not in fact proper surrebuttal testimony to begin with*. And Ameren Missouri absolutely is "serious" that the Commission should not start such a practice now.

5. Indeed, that the Company's position is not "absurd" is confirmed by the Commission's prior ruling on a similar issue. In a prior case involving the Company, the Commission itself has ruled that speculation by a party (here the Staff) that another party (the Company) *might* file testimony that is improper under the Commission's governing rules, that is in effect additional direct testimony (which is the gravamen of Staff's theory here), does not justify a preemptive order that assumes that in fact a party *will* file improper testimony. Specifically, in a case with analogous although not precisely the same facts, when Public Counsel moved to strike certain Company direct testimony based on its claim that the direct testimony was insufficient (the same theory posited by Staff in in this case) and that this may prejudice Public Counsel later (if the Company were to offer more evidence that should have been in its direct case; again, the same theory Staff posits here), the Commission rejected issuing preemptive orders based on such speculation, stating:

The Commission has a rule that governs the contents, of direct, rebuttal, and surrebuttal testimony. Ameren Missouri adamantly contends it has met all minimum filing requirements and does not request leave to supplement those

fillings, but if Ameren Missouri attempts to supplement its direct testimony by filing improper rebuttal or surrebuttal testimony, then Public Counsel, or any other party, may file an appropriate motion to strike that improper testimony. But *speculation about what the company might file in the future cannot be the basis for a Commission order* (emphasis added, internal citation omitted).²

6. The Company filed the case it filed and supported it with the evidence with which it chose to support it. The Company in no way believes that its direct case is insufficient, but as the Commission rightly pointed out, “[t]he adequacy of Ameren Missouri’s application and evidence supporting it will be evaluated following the hearing based on the totality of the evidence presented as part of the hearing.”³

7. The process due to the litigants in this case is prescribed by the Commission’s rules – specifically, 20 CSR 4240-2.130(7)(A), (C), and (D) – and the Company relied on that process when it filed this case. Those rules implicitly contemplate that if a litigant doesn’t follow those rules, e.g., files surrebuttal testimony that is *not* limited to material that is responsive to rebuttal testimony, there should be a remedy. It is well-established that such a remedy is either striking the offending portions of the surrebuttal testimony or allowing sur-surrebuttal testimony (or additional live testimony) in response to the offending portions. But those rules do not contemplate that a litigant can unilaterally burden the record – and burden the parties who will then have to respond to it —with testimony such a litigant would label to be “sur-surrebuttal testimony” without the Commission first determining that indeed, the Company actually filed improper surrebuttal testimony. Instead, assuming everyone plays by the rules, the party with the burden of proof gets the last word, with the Commission then ultimately deciding whether that party sustained its burden, in this case, the Company’s burden to convince the

² *Order Denying Request for Order Striking Testimony and Tarriff Provisions Supporting Continuation of Fuel Adjustment Rider*, In the Matter of Union Electric Co., File No. ER-2014-0258 (Oct. 29, 2014), p. 3 (EFIS Item No. 99).

³ *Order Denying Motion to Require Supplemental Direct Testimony and Amending Procedural Schedule*, EFIS Item No. 58 (Nov. 1, 2023).

Commission that the projects at issue warrant a finding that they are necessary or convenient for the public service.⁴

8. In summary, Staff apparently desires to relieve itself of a burden that it indeed does, or should have, that is to establish to the Commission's satisfaction, if Staff believes it to be true, that in fact Company surrebuttal testimony in some respect does not comport with 20 CSR 4240-2.130(7)(D). The Company strongly questions whether the Commission's order intended such a result, and thus requests that the Commission clarify that such a result was not intended. But if such a result was intended, for the reasons outlined in the Company's original response and in this reply, the November 1, 2023, Order should be, to use Staff's preferred term, vacated.

9. Given the impact of a ruling on this issue will have on a revised procedural schedule, the Company requests that the Commission, as expeditiously as possible:⁵

- a. Issue an order making clear that Staff may not file sur-surrebuttal testimony without first seeking and obtaining leave to do so, and should require if Staff seeks leave to do so that Staff file an appropriate motion, and the proposed sur-surrebuttal testimony, within five business days after the Company files its surrebuttal testimony; or
- b. If the Commission does intend a revised procedural schedule to include the limited sur-surrebuttal testimony specified in its November 1, 2023, Order, issue an order that:
 - i. requires Staff to file the limited sur-surrebuttal testimony within five

⁴ Section 393.170, RSMo.

⁵ One thing about which the Company does agree with Staff is that it would be beneficial for the Commission to rule on this matter expeditiously given its impact on ongoing discussions about an amended procedural schedule.

- business days after the Company files surrebuttal testimony; and
- ii. that further affords the Company the opportunity to make a responsive filing within five business days after Staff files the limited sur-surrebuttal testimony, either a motion to strike, a motion for leave to file sur-sur-surrebuttal testimony (either together with the motion to strike or as an alternative to it), or a motion to present additional live testimony in response to the limited sur-surrebuttal testimony (either together with the motion to strike or as an alternative to it).

WHEREFORE, the Company respectfully requests that the Commission make and enter an order as specified in ¶ of this Reply.

Respectfully Submitted,

/s/ James B. Lowery

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**ATTORNEYS FOR UNION ELECTRIC
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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing was served on the Staff of the Missouri Public Service Commission and the Office of the Public Counsel via electronic mail (e-mail) on this 17th day of November, 2023.

/s/ James B. Lowery