

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held by telephone and internet audio conference on the 12th day of November, 2020.

In the Matter of Union Electric Company d/b/a)
Ameren Missouri's 2020 Utility Resource) **File No. EO-2021-0021**
Filing Pursuant to 20 CSR 4240 – Chapter 22)

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

Issue Date: November 12, 2020

Effective Date: November 12, 2020

Union Electric Company d/b/a Ameren Missouri (Ameren Missouri) submitted its 2020 triennial IRP filing on September 27, 2020. Along with that filing, Ameren Missouri filed a motion for protective order. That motion explains that certain information in the IRP filing has been designated as highly confidential and asks that certain persons associated with the Sierra Club not be allowed to view that information.

Under Commission Rule 20 CSR 4240-2.135(6), confidential information can be viewed by attorneys of record for parties to that case and by employees of that party if those employees are working as subject-matter experts for the attorney, or if they intend to file testimony in that case and have filed the non-disclosure certification required by section 20 CSR 4240-2.135(7) of the rule. Section 20 CSR 4240-2.135(4) of that rule allows a party to seek additional protections for its information by filing a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information and an explanation of how the information may be disclosed while protecting the interests of the disclosing entity and the public.

ARGUMENTS OF THE PARTIES

Ameren Missouri's motion for protective order says that in 2011 the Department of Justice on behalf of the United States Environmental Protection Agency (EPA) filed suit in United States District Court against Ameren Missouri, alleging that it violated the law by performing certain construction projects in 2007 and 2010 at the Rush Island Energy Center that resulted in emission increases. That litigation resulted in a decision against Ameren Missouri. Ameren Missouri's appeal of that decision is currently pending before the United States Court of Appeals for the Eighth Circuit. Sierra Club was allowed to intervene in that litigation and has been supportive of the EPA's position.

The remedy imposed by the District Court requires Ameren Missouri to install flue gas desulfurization units (a/k/a scrubbers) at Rush Island and at Ameren Missouri's Labadie Energy Center. The installation of scrubbers would be expensive, and in its 2019 order establishing special contemporary issues, the Commission required Ameren Missouri to model scenarios related to installation of those scrubbers. Ameren Missouri has complied with that requirement by modeling those scenarios as part of its 2020 triennial IRP filing. It is information related to those scenarios that Ameren Missouri asks the Commission to protect from full disclosure to Sierra Club.

Ameren Missouri concedes that the attorneys who have entered an appearance in this IRP case, including appropriate clerical support staff, should have full access to the information regarding the scenarios. However, it contends access should not be given to any Sierra Club employee, consultant, attorney, witness, agent, or representative of any kind that is involved in any way with the ongoing federal litigation (*United States v. Ameren Missouri*, Case No. 11-cv-00077 (E.D. Mo.)) (referred to elsewhere in this order as the

federal litigation)). Ameren Missouri argues this restriction is appropriate because: first, Sierra Club has mishandled Ameren Missouri's confidential information in the past, including in one instance, improper disclosure of confidential information obtained in connection with Ameren Missouri's 2014 IRP filing; second, detailed knowledge of Ameren Missouri's plans for complying with the federal court's order could prejudice Ameren Missouri in future settlement negotiations; and third, Sierra Club may use information it gleans from other proceedings to take contradictory positions in a future rate case or other Commission proceeding, in an effort to oppose as imprudent the same controls that it seeks to impose through the federal litigation, with the ultimate goal of closing all the nation's coal plants.

Sierra Club responded to Ameren Missouri's motion for protective order on October 7, 2020. Sierra Club contends the motion should be denied because Ameren Missouri has failed to show any concrete and specific harm that would result if the protective order is not issued. It argues that even if the Court of Appeals remands the case back to the district court, Sierra Club would likely be able to obtain the information regarding the cost scenarios through discovery as relevant information in that case. Further, Sierra Club points out that the Commission's rule regarding access to confidential information, specifically 20 CSR 4240-2.135(13), already precludes the use of confidential information obtained in this case in any other case, making the proposed protective order unnecessary.

Sierra Club contends Ameren Missouri's proposed protective order would unfairly limit its ability to closely scrutinize Ameren Missouri's 2020 triennial IRP filing. Specifically Sierra Club argues the proposed protective order would prevent it from engaging the

services of two consultants – Tyler Comings and Dr. Ezra Hausman – it has used to review past Ameren Missouri IRP filings because they have been involved in the federal litigation. Sierra Club also responds to the allegations of past mishandling of confidential information cited by Ameren Missouri as justification for the protective order. Sierra Club admits to more than one instance in which it improperly handled protected information it obtained from Ameren Missouri, but contends none of the incidents described by Ameren Missouri involved bad faith, caused any harm to Ameren Missouri, involved public disclosure, or warrant the imposition of special remedial provisions against Sierra Club. Nevertheless, Sierra Club acknowledges the disclosures were not within the context of the Commission case where the information was obtained.

Ameren Missouri replied to Sierra Club’s response on October 19, 2020. Ameren Missouri contends its proposed protective order is narrowly tailored to protect Ameren Missouri’s interests while not limiting Sierra Clubs review of the IRP filing in this case. To that end, Ameren Missouri is willing to allow Tyler Comings, one of the consultants mentioned by Sierra Club who is not closely involved with the federal litigation, to view the confidential information. Sierra Club filed a sur-reply on October 20, 2020.

DECISION

Section 20 CSR 4240-2.135(4) of the Commission’s rule regarding confidential information allows a party to seek additional protections for its information by filing a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information and an explanation of how the information may be disclosed while protecting the interests of the disclosing entity and the public. Ameren Missouri has clearly identified the information it seeks to protect,

and it has demonstrate that the harm it may suffer justifies the limited restrictions it seeks to impose on Sierra Club.

The Commission is troubled by past misuse of confidential information by Sierra Club. Sierra Club argues its actions were inadvertent but it admits that it was using protected information outside the Commission case in which it was obtained. Even inadvertent misuse of such information can cause irreparable harm to the disclosing party and may discourage the free flow of vital information to the Commission from parties that fear their confidential information will not be secure from disclosure. In particular, the Commission emphasizes that under its rule, confidential information disclosed in this case may be used only in this case¹ and must be destroyed or returned to the disclosing party within 90 days after this case closes.² There should be no inadvertent disclosure of such information.

The Commission and the public have an interest in obtaining a fully informed and thoughtful evaluation of Ameren Missouri's IRP, and the limited restrictions on disclosure sought by Ameren Missouri will not limit Sierra Clubs evaluation of the IRP filing as the people working on the IRP will have access to all aspects of that filing. But if Ameren Missouri is not allowed to protect sensitive scenario information created at the direction of the Commission from disclosure it will be less likely to provide that information in future IRP filings.

Further Ameren Missouri has justified the establishment of additional protections under Commission Rule 20 CSR 4240.2.135(4) by showing that knowledge by certain persons associated with Sierra Club of details of Ameren Missouri's compliance options

¹ 20 CSR 4240-2.135(13).

² 20 CSR 4240-2.135(15)

might disadvantage Ameren Missouri in hypothetical future negotiations with those persons concerning compliance with a federal court order. That risk outweighs the limited restrictions Ameren Missouri's designation would impose on Sierra Club. This is particularly true because Ameren Missouri is creating and disclosing these compliance options only because they have been directed to do so by this Commission in this IRP proceeding.

The Commission finds that Ameren Missouri has met its burden to justify issuance of a protective order. Its motion, as limited in its subsequent filings, will be granted.

THE COMMISSION ORDERS THAT:

1. Ameren Missouri's Motion for Protective Order is granted.
2. No Sierra Club representative involved in the federal litigation shall be allowed access to the information in Ameren Missouri's 2020 triennial IRP filing that has been designated as highly confidential with the following exceptions. This restriction does not apply to Sierra Club clerical support staff who may as part of their day-to-day work duties support Sierra Club lawyers who may have been or are involved in the federal litigation and who are involved in the this IRP case. Such support staff may access the highly confidential information in this case only to the extent necessary to perform their administrative duties; provided that Sierra Club identifies each such person via a filing in this case before providing access to the highly confidential information and certifies in such filing that such clerical employees have been instructed to not share the highly confidential information with any person prohibited from obtaining that information by this protective order. This restriction also does not apply to Tyler Comings in this case, and

his use of that information is limited to this IRP case pursuant to Commission Rule 20-CSR 4240-2.135.

2. The information in Ameren Missouri 2020 triennial IRP filing that was filed as highly confidential shall remain highly confidential.

3. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Rupp, Coleman, and
Holsman CC., concur.

Woodruff, Chief Regulatory Law Judge