

Under those definitions, parties are to fully (“shall include all testimony...”) address criticisms or disagreements with the moving party’s direct case in rebuttal testimony and are not to lodge those criticisms or disagreements for the first time in surrebuttal testimony under the pretext of “responding” to another party’s rebuttal testimony, when the movant – the party with the burden of proof – cannot effectively respond. That is exactly what Staff and OPC have done here.

Staff Witnesses Eubanks’ and Shawn Lange’s Surrebuttal Testimony

2. Starting at page 1, l. 22, Staff witness Eubank’s purports to respond to OPC witness Seaver’s rebuttal testimony regarding a retire versus retrofit analysis presented by Company witness Michels in his direct testimony. Mr. Michels’ analysis examined 48 different scenarios (with varied assumptions on items such as scrubber costs, gas prices, and other resource planning assumptions) for the purpose of evaluating whether Ameren Missouri’s customers would have been better off adding scrubbers to Rush Island in response to the federal District Court’s original decision that required adding scrubbers, or whether customers would be better off if the Company retired Rush Island instead, thereby avoiding the significant costs of adding and operating scrubbers to Rush Island.¹ The Company’s conclusion, based on that analysis was that “[u]nder nearly all reasonable combinations of assumptions, Ameren Missouri’s customers realize lower costs . . .” if Rush Island is retired than if scrubbers were added to allow it to remain open.² On that basis, the Company made the decision to retire Rush Island rather than retrofit it with scrubbers, which led to the filing of this case since the early

¹ Michels Direct, p. 2, l. 14-18 (Describes purpose of testimony is to present the analysis); p. 5, l. 15 to p. 6, l. 9 and Table MM-D1 (summarizing the results of the analysis).

² *Id.*, p. 6, l. 16 to p. 7, line 2.

retirement left the undepreciated investment in Rush Island which the Company seeks to securitize in this case.

3. In its rebuttal testimony, Staff agreed with the Company's retire instead of retrofit decision, affirmatively recommending that the Commission find the retirement of Rush Island instead of retrofitting it was reasonable and prudent.³ Staff's rebuttal testimony referenced Mr. Michels' direct testimony on that question because it is Mr. Michels that presents the Company's evidence in support of the prudence of the retirement. Indeed, Staff's contention in this case is that the "actual question" in this case is "whether or not the early retirement or abandonment of Rush Island is deemed reasonable and prudent."⁴ Staff's rebuttal testimony lodged not a single criticism against Mr. Michels' analysis and did not disagree with it – nor with the retirement of the plant – in any way. Applying the Commission's rule, Staff did not reject Mr. Michels' conclusions or analysis, Staff did not disagree with any aspect of Mr. Michels' testimony or analysis, and Staff did not propose an alternative to this aspect of the Company's direct case. Not surprisingly, the Company submitted no surrebuttal testimony responding to Staff on the retire versus retrofit issue because, as between Staff and the Company, there simply was no issue.

It should be noted that Staff was in full possession of the details of Mr. Michels' analysis when Staff filed its rebuttal testimony. Staff itself noted that most of Mr. Michels' direct testimony in this case duplicated his similar testimony (which presented the same analysis) in File No. ER-2022-0337. And the workpapers underlying Mr. Michels' analysis were provided to Staff (and all parties) in File No. ER-2022-0337.⁵ No party submitted any discovery to the

³ Eubanks Rebuttal, p. 3, ll. 8-10.

⁴ Majors Rebuttal, p. 5, l. 18 to p. 6, 3.

⁵ *Id.*

Company respecting Mr. Michels' analysis in this docket. And as noted Staff, having agreed that retiring the plant instead of retrofitting it was prudent, raised absolutely no question about or criticism of Mr. Michels' analysis which is the key underpinning of that prudent decision.

4. In rebuttal testimony, OPC disagreed with the Staff's conclusion that retiring Rush Island rather than retrofitting it with scrubbers was prudent and instead claimed that installing scrubbers would have been less costly for customers when other factors, such as solar generation OPC claims is being added because Rush Island is retiring, is accounted for.⁶ OPC also criticized Mr. Michels' analysis as being insufficient and lacking sufficient "explanation."⁷ This was of course proper and necessary rebuttal testimony – given OPC's position – because OPC indeed did disagree with the Company on this issue.

5. Purporting to "respond" to Mr. Seaver's testimony, Staff's surrebuttal testimony agrees with Mr. Seaver stating that Mr. Michels' testimony "lacks a robust discussion" of his analysis, followed by referencing back to criticisms Staff lodged about Mr. Michels' modeling of solar facilities in File No. EA-2023-0286.⁸ Staff then provides a "high level" list of "concerns" with the Company's modeling in File No. EA-2023-0286 and then claims those criticisms are relevant to the retrofit versus retirement issue raised in this case: "it is Staff's position that Ameren Missouri should have known about developing changes at MISO related to the seasonal construct and should have considered those changes when deciding whether to retire or retrofit Rush Island."⁹ Not stopping there, Staff also has filed surrebuttal testimony from Staff witness Shawn Lange, claiming that how carbon dioxide prices are modeled "may impact the retirement-

⁶ Seaver Rebuttal, p. 9, ll. 11-22.

⁷ *Id.*, p. 9, l. 23 to p. 10, l.2.

⁸ Eubanks Rebuttal, p. 1, l. 22 to p. 2, l. 15.

⁹ *Id.*, p. 4, ll. 4-8.

retrofit analysis.”¹⁰ Mr. Lange’s 3-4 pages of surrebuttal testimony then purports to “respond to OPC witness Jordan Seaver” claiming Staff agrees in part with Mr. Seaver’s criticisms of the sufficiency of Mr. Michels’ retire versus retrofit analysis, but in reality, the testimony is simply three pages of criticisms of and disagreements with how Mr. Michels modeled carbon regulation.

6. Staff’s surrebuttal is blatantly improper because it reflects direct disagreement with the Company’s direct case, that is, the validity of the retirement versus retrofit analysis presented by Mr. Michels’ direct testimony that underpins the retirement decision. Specifically, the Commission rule required that Staff include *all* testimony which explains why [Staff]... rejects, *disagrees* or proposes an alternative to the [Company’s] ... direct case (emphasis added). It didn’t. Staff clearly had the specific disagreements it brings up only now when it filed its rebuttal testimony, but did not lodge them, as required. Had Staff lodged them, the Company would have had the opportunity to address them in its surrebuttal testimony, as the Commission’s rules intend. Staff’s failure to comply with the Commission’s rule on rebuttal testimony, if not redressed, will deprive the Company of that opportunity, despite the fact that it is the Company that bears the burden of proof in this case.

7. Staff will no doubt respond by claiming that surrebuttal testimony is proper so long as it is “responsive” to matters raised in another party’s rebuttal testimony. But such a position can only be sustained if the Commission’s definition of surrebuttal testimony is read in a vacuum, completely divorced from the rule on *rebuttal testimony*. If the rule on rebuttal testimony is to have meaning; if parties truly are required to raise all disagreements with the moving party’s direct case in rebuttal testimony, they cannot be allowed to ignore the rebuttal testimony rule’s requirements and then bring disagreements that they could and should have

¹⁰ *Id.*, ll. 8-11 (pointing to Mr. Lange’s surrebuttal testimony).

lodged in rebuttal testimony up for the first time in surrebuttal testimony under the guise of “responding” to another party’s rebuttal testimony.

8. For the foregoing reasons, the Commission should strike the following provisions of Staff witness Eubanks’ surrebuttal testimony:

Page 1, starting at line 22 through page 4, line 13 (through the word “case,”).¹¹

In addition, the Commission should strike the entirety of Staff witness Shawn Lange’s surrebuttal testimony.

OPC Witness Murray’s Surrebuttal Testimony

9. For similar reasons, significant portions of OPC witness Murray’s testimony should also be stricken.

10. In compliance with Section 393.1700.2(f), the requirement that the Company must demonstrate that securitization will provide net present value benefits for customers as compared to the use of traditional means to finance and recover Energy Transition Costs, Company witness Mitch Lansford provided extensive direct testimony, analysis, analysis results, and workpapers supporting the existence of such net present value benefits. The method used by Mr. Lansford in his direct testimony was to compare the NPV of using securitization for the Rush Island costs versus the NPV of what Mr. Lansford contends is the traditional means of financing and recovery of such costs, that is, reflecting the Rush Island costs in base rates at a financing charge equal to the Company’s WACC and recovering the costs over time.¹² Mr. Lansford’s position is that this reflects the traditional method financing and recovering the costs and that there are NPV benefits from securitization when method is compared to the lower cost

¹¹ Disagreeing with Mr. Seaver’s proposed disallowance in no way responds to the Company’s direct case but is directly responsive to Mr. Seaver’s rebuttal testimony.

¹² Lansford Direct, p. 12, l. 12 to p. 14, l. 14.

of securitization.¹³ Mr. Murray filed rebuttal testimony addressing Mr. Lansford's direct testimony and analysis on the topic: "I am addressing Ameren Missouri's following positions: (1) the return Ameren Missouri assumes the Commission would allow it to receive under traditional ratemaking methods ..."¹⁴ Mr. Murray's rebuttal testimony raised certain conceptual issues about Mr. Lansford's testimony and analysis and Mr. Murray took the position (either directly or indirectly) that the traditional method of financing and recovery of the costs in question would be a 15-year amortization without any recovery of carrying costs during that period.¹⁵ Mr. Lansford responded to these conceptual items in his surrebuttal testimony.

11. Now Mr. Murray has filed extensive additional surrebuttal testimony that both disagrees with Mr. Lansford's direct case approach and with Mr. Lansford's direct case conclusions, and that proposes an alternative to both, while also changing his position from his rebuttal testimony.¹⁶ While he *purports* to be responding to Staff witness Keith Majors's rebuttal testimony on such points, as Mr. Murray concedes, Mr. Major's rebuttal testimony on the topic was quite brief – 12 lines on page 19 – where Mr. Majors simply states that he agrees with Mr. Lansford's conclusions about net present value benefits of securitization.¹⁷ But Mr. Majors goes into no detail or discussion whatsoever about the details of Mr. Lansford's analysis or its assumptions, adds nothing to it, and reaches no new conclusions, meaning that Mr. Murray's surrebuttal testimony -- that disagrees with those details and assumptions and conclusion can only be in response to Mr. Lansford direct testimony. Indeed, on the pages/lines in question, Mr. Murray references Mr. Lansford 13 separate times.

¹³ *Id.*

¹⁴ Murray Rebuttal, p. 1, ll. 10-12 (pointing, on the next page, to Mr. Lansford as the Company's witness on this topic). Note that Mr. Murray's rebuttal testimony lacks page numbers. References to page numbers herein are to pages in the .pdf file in EFIS.

¹⁵ Murray Rebuttal, p. 3, l. 18-22

¹⁶ Murray Surrebuttal, p. 5, l. 5 to p. 10, l. 28.

¹⁷ Majors Rebuttal, p. 19, ll. 7-19.

12. Starting at page 5, l. 5, Mr. Murray begins describing a “method” he developed to compare the cost of traditional ratemaking to securitization. But Mr. Murray’s “method” relies extensively on Mr. Lansford's direct workpapers (specifically Schedule MJL-D5) where he also makes certain modifications.¹⁸ Given Mr. Murray's "method" is an extension of Mr. Lansford's direct testimony workpapers and Mr. Majors testimony on this topic was to simply agree with Mr. Lansford's direct testimony analysis, Mr. Murray’s surrebuttal testimony was clearly and can only be responding to Mr. Lansford direct case.

13. Mr. Murray does not stop there and changes his position from his rebuttal testimony to now contend that traditional methods of financing and recovery of the costs in question would be a 15-year amortization with recovery of carrying costs during that period at the Company's embedded cost of debt rate from December 31, 2023; *i.e.*, he is now proposing a different *alternative* to Mr. Lansford’s direct case, raised for the first time in surrebuttal testimony.¹⁹ He goes on to further disagree with Mr. Lansford’s direct testimony’s claim that there are NPV benefits from securitization in c concluding that there are no NPV benefits under his alternative approach outlined in his surrebuttal testimony where he uses the utility’s historical embedded cost of long-term debt.²⁰ This directly contradicts – disagrees with – Mr. Lansford’s analysis and conclusions that in fact securitization does produce NPV benefits for customers.

14. A few additional examples of Mr. Murray’s direct disagreement with Mr. Lansford’s direct case (and/or his proposal of an alternative to it) follow. Mr. Murray disagrees that Mr. Murray’s direct testimony Schedule MJL-D4 is “consistent with traditional ratemaking principles” (and may imply that Schedule MJL-D5 while more consistent, is also inconsistent

¹⁸ Murray Surrebuttal, p. 5, l. 7-14

¹⁹ *Id.*, p. 10, ll. 5-12

²⁰ Murray Surrebuttal, p. 10, ll. 22-24.

with such principles).²¹ At p. 5, ll. 19-20, Mr. Murray directly disagrees with Mr. Lansford's direct case contention Schedule MJL-D4 reflects traditional ratemaking, stating that it is "not consistent with traditional ratemaking." Mr. Murray goes on to give the reasons for his disagreement, which he failed to do in his rebuttal testimony, as the Commission's rules require (p. 5, lines 21-25).

15. In summary, Mr. Murray's Surrebuttal, p. 5, l. 5 to p. 10, l. 28 and the schedules that support this testimony (Murray Surrebuttal Schedules DSM-1 through DSM-7) reflect disagreements with Mr. Lansford's direct testimony and his sponsorship of an approach to and the results of modeling NPV benefits from securitization that by Commission rule were required to be reflected in Mr. Murray's rebuttal and not saved for his surrebuttal under the guise of "responding to Mr. Majors, who said nothing more in his rebuttal testimony beyond that he agreed with Mr. Lansford. And Mr. Murray's surrebuttal at the cited pages and lines (and the subject schedules) reflect alternatives to Mr. Lansford's direct case approach and to his own rebuttal testimony that also were required to be proposed in his rebuttal testimony."²² Therefore, the cited portions of Mr. Murray's surrebuttal testimony (and schedules) identified in this paragraph should be ordered stricken

Summary

16. The bottom line is that the Staff and OPC have violated the Commission rule that requires them to include *all* reasons they disagree with the Company's direct case (or alternatives to) in their rebuttal testimony and then, in an attempt to absolve themselves of the consequences of that failure, are attempting an end-run around that rule under the guise of filing testimony that

²¹ *Id.*, p. 5, l. 11-12.

²² *E.g.*, p. 10, ll. 5-7 (Where Mr. Murray proposes use of a "more reasonable return" than reflected in Mr. Lansford's direct case proposal).

is “responsive” to each other’s rebuttal testimony. This tactic undermines the Commission’s rules and procedures that are intended to protect all parties from unfair surprise. If they are allowed to succeed in these efforts, they will compromise the Company’s ability to respond to their positions in this case, even though it is the Company, not them, that bears the burden of proof in this case. As a consequence, the Commission should strike this improper surrebuttal testimony.

**ALTERNATIVE MOTION FOR
LEAVE TO FILE SUR-SURREBUTTAL TESTIMONY**

17. For the reasons outlined above, the proper remedy is to strike the testimony that violated the Commission’s rules. Otherwise, the Commission risks encouraging continued attempts to disregard the rules, adding to the administrative burden of processing cases. If, however, the Commission declines to grant Ameren Missouri’s motion to strike, Ameren Missouri should be given a full and fair opportunity, consistent with fundamental notions of fair play and Due Process, to respond to those portions of the Eubanks, Shawn Lange, and Murray testimonies that are the subject of the Company’s motion to strike. Consequently, in the alternative to its motion to strike, the Company requests leave to file sur-surrebuttal testimony (by April 8, 2024) on the issues addressed by said witnesses in the above-cited portions of their surrebuttal testimonies.

MOTION FOR EXPEDITED TREATMENT

18. The Commission should act on the motions made herein by April 3, 2024, insofar as the hearings in this case commence just 12 days later, and depending on the Commission’s rulings, the Company may need to prepare and file additional sur-surrebuttal testimony within a very short timeframe (just three business days thereafter).

19. The harm that will be avoided includes the impact on the Company's (and other parties') ability to compile an issues list, witness schedule, and position statements for the case, to complete discovery, and to properly prepare for hearing. Granting the Company's motion to strike will also avoid the harm inherent in what would otherwise amount to sanctioning these parties' failure to comply with the Commission's rules if the motion to strike were not granted.

20. The surrebuttal testimony at issue was not filed until late in the day on Friday, March 22, 2024. These motions are being filed just three business days later, which was as soon as this pleading could reasonably have been prepared.

WHEREFORE, the Company prays that the Commission make and enter its order granting the Company's motion to strike the above-cited portions of the surrebuttal testimony of Staff witnesses Eubanks, the surrebuttal testimony of Staff witness Shawn Lange in its entirety, and the above-cited portions of the surrebuttal testimony of OPC witness Murray or, alternatively, granting the Company leave to file sur-surrebuttal testimony in response to said portions of their testimony by April 8, 2024, and for such other and further relief as is just and proper under the circumstances.

Dated: March 27, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing have been e-mailed to the attorneys of record for all parties to this case as specified on the certified service list for this case in EFIS, on this 27th day of March, 2024.

/s/ James B. Lowery
James B. Lowery