

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

In the Matter of the Petition of Union  
Electric Company d/b/a Ameren Missouri                    )  
for a Financing Order Authorizing the                    )       File No. EF-2024-0021  
Issuance of Securitized Utility Tariff Bonds            )  
for Energy Transition Costs related to Rush            )  
Island Energy Center.

**REPLY TO PUBLIC COUNSEL’S RESPONSE TO  
AMEREN MISSOURI MOTION TO STRIKE**

**COMES NOW** Ameren Missouri, and for its Reply to the above-referenced Office of the Public Counsel’s (“OPC”) Response, states as follows:

1.       OPC makes three points: a. That it (and apparently parties generally) can cite to any prior Commission order it wishes and argue that it is “persuasive authority;” b. That Ameren Missouri also did so; and c. that motions to strike portions of a post-hearing brief are improper.

2.       As for OPC’s first point, OPC, either intentionally or inadvertently, completely fails to acknowledge or appreciate the simple basis for Ameren Missouri’s Motion: that no party can establish a proposition, a *fact* essential to the claim it is making, via a prior Commission decision that itself is not a part of the evidentiary record in the case *at bar*. OPC does not claim otherwise. OPC certainly cites no authority that would support such a claim had OPC made it.

3.       OPC fully admits, however, that that is precisely what it seeks to do. That is, OPC seeks to establish, based on the facts of the *Missouri-American Water* case, that Mr. Murray’s opinion about traditional financing and recovery is the correct opinion, *i.e.*, that Mr. Murray is right about the *fact* of “what they [customers] would pay through general rates.” OPC Response, ¶4. And as for the *Evergy* decisions, OPC seek to establish the *fact* of what Mr. Robinett did or did not do in a prior case as support for his opinions. That OPC contends that the facts it wishes to establish (but that the record in this case does not reflect) might be “persuasive”

in favor of Mr. Murray's or Mr. Robinett's opinions is irrelevant. As every lawyer knows, had they thought of just one more question or asked a better question at hearing, that additional or better question and the facts elicited in the witness's answer might have been persuasive, but it does not matter: the question wasn't asked, and the facts were not elicited. Such unelicited facts similarly can't be injected into the case via a brief.

4. Could Mr. Murray have based his opinions in whole or in part on a prior Commission decision? The answer is "yes." Is there any evidence in this record in this case that he did so? The answer is "no." OPC cannot now attempt to bolster Mr. Murray's opinion on whether quantifiable net benefits exist based on a prior Commission decision that may or may not have been a basis of his opinion, which is exactly what OPC is attempting to do. Similarly, neither can OPC bolster Mr. Robinett's opinion as to how net plant should be determined based upon a prior Commission decision that may or may not have anything to do with the basis for Mr. Robinett's opinions here. Had Messrs. Murray and Robinett desired to support their opinions with those prior decisions, they were free to do so, allowing the parties to respond according to the Commission's procedural rules and to then stand cross-examination about whether and to what extent those decisions provided the support they claimed. But they did not do that and OPC failed to make an evidentiary record to that effect. It cannot do so now, no matter how persuasive OPC's lawyer wants to claim the decisions are.

5. OPC also seeks to create a false equivalency, implying that because Ameren Missouri cited to prior Commission legal interpretations as to what prudent and reasonable mean as a matter of *law*, this somehow gives OPC license to rely on extra-record materials to establish *facts* OPC contends support its position (*i.e.*, facts OPC contends are "persuasive"). It is absolutely true that in the Company's Initial Brief, solely addressing a *legal question* raised by

the bench – not raised in testimony by any party -- Ameren Missouri cited to prior Commission decisions showing how the Commission has interpreted the prudence standard recognized by Missouri courts as applicable to the Commission’s evaluation of utility decision-making. *See, e.g., State ex rel. Associated Natural Gas Co. v. Pub. Serv. Com’n*, 954 S.W. 2d 520 (Mo. App. W.D. 1997).<sup>1</sup> Whether the Commission’s legal interpretation is a correct one would be, if challenged, subject to *de novo* review (as contrasted with judicial review of a factual determination).<sup>2</sup> A legal interpretation is either right or its wrong, a conclusion that does not turn on what the competent and substantial evidence of record in the case is. That is, it’s one thing to cite prior Commission decisions interpreting and applying the *law* to make a *legal argument*, which is what the Company was doing in its Initial Brief, but quite another to seek to establish as a matter of *fact* what the Commission did or did not do in advancing an attempt to establish *facts* that a party think supports its position, such as the facts that OPC apparently believes support Mr. Murray’s and Mr. Robinett’s opinions.<sup>3</sup>

6. As to whether a motion to strike is proper in this circumstance, when the Company filed its Motion in this case the undersigned counsel was fully aware of the decisions OPC cites regarding the Commission’s prior handling of motions to strike. Indeed, the *Kansas City Power & Light Company* decision cited to and quoted by OPC on pages 2 -3 of its Response<sup>4</sup> arguably supports the filing of a motion to strike here.

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<sup>1</sup> These were all Commission decisions that applied the prudence standard examined in detail in *Associated Natural Gas* years after *Associated Natural Gas* was decided.

<sup>2</sup> *In re Amendment of Comm’n Rule Regarding Applications for Certificates of Convenience & Necessity*, 618 S.W.3d 178, 184 (Mo. banc 2011).

<sup>3</sup> The prior Commission decisions cited to by the Company in its Reply Brief were also cited in support of legal arguments, that is, when does the legal doctrine of collateral estoppel apply? Moreover, they were cited after OPC attempted to support its legal argument about collateral estoppel with a different Commission decision, the *Landowner’s* case.

<sup>4</sup> OPC’s Response lacks page numbers but this reference is to the actual pages 2 – 3 of the .pdf file OPC submitted.

7. In that case, the litigant attached a separate document from a different case (that had not been admitted to the record) to a post-hearing brief. The Commission did indicate (as the quote OPC includes in its Response indicates) that if there are “improper arguments, be it legal or factual,” a motion to strike is not necessary, the point being made by the Commission being that it can discern what it should or should not rely on if the improper argument is simply identified. However, in the next paragraph – after the material bolded by OPC in its Response, the Commission found that a motion to strike “may be proper when a party attempts to improperly include in the record documents or exhibits from other cases.” Indeed, in that case, the Commission *granted* the motion to strike in that case in part, that is, it ordered struck from the brief in question the material from the other case.

8. The Company respectfully submits that there is no meaningful distinction between quoting from or reciting facts from a Commission decision in another case (no doubt, such a decision is a “record document” in that other case) and attaching the document (or certain portions of it) to a brief. In both cases, the party’s action “is an improper attempt to supplement the evidentiary record after it has been closed.”<sup>5</sup> If an improper attempt to supplement the evidentiary record in the form of an attachment from another case should be stricken, there is no good reason that an improper attempt to do the equivalent via embedding the material from another case in the brief should also not be stricken. Doing so will create a clear record showing that the Commission did not (because it cannot) rely on such material.

WHEREFORE, Ameren Missouri hereby renews its request that the Commission make and enter its order striking the portions of OPC’s Initial Brief identified in Paragraphs 5 and 6 of the Company’s Motion.

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<sup>5</sup> *Kansas City Power & Light Company* decision, quoted by OPC’s Response.

Respectfully submitted,

/s/ James B. Lowery

**James B. Lowery**, Mo. Bar #40503

JBL LAW, LLC

9020 S. Barry Road

Columbia, MO 65201

(T) 573-476-0050

lowery@jblawllc.com

**Wendy K. Tatro**, #60261

Director & Assistant General Counsel

Ameren Missouri

1901 Chouteau Avenue, MC 1310

St. Louis, MO 63103

(314) 554-3484 (phone)

(314) 554-4014 (fax)

[AmerenMOService@ameren.com](mailto:AmerenMOService@ameren.com)

**Attorneys for Union Electric Company  
d/b/a Ameren Missouri**

**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 29th day of May, 2024.

*/s/ James B. Lowery*

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**James B. Lowery**