

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

In the Matter of the Application of Union Electric)	
Company d/b/a Ameren Missouri for Permission and)	
Approval and a Certificate of Public Convenience and)	File No. EA-2019-0021
Necessity Authorizing it to Construct a Wind Generation)	
Facility.)	

MOTION TO STRIKE PROPOSED ISSUES AND WITNESSES

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri" or the "Company"), pursuant to 4 CSR 240-2.080(13), and hereby requests the Commission enter its order striking portions of the "List of Issues, Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements" submitted by intervenors Atchison County and DeKalb County (collectively, the "Counties").¹ In support of its Motion, Ameren Missouri states as follows:

1. On November 15, 2018, the Commission issued its *Order Adopting Procedural Schedule* ("Procedural Order"), requiring that pre-filed rebuttal testimony be filed by December 21, 2018 and pre-filed surrebuttal and cross-surrebuttal testimony by January 22, 2019. Testimony is pre-filed in Commission cases "to give the parties notice of the claims, contentions, and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing." See, e.g., *Order Adopting Procedural Schedule and Expediting Transcript, In the Matter of the Tariff Filing of Laclede Gas Company*, Case No. GT-2003-0032 (Aug. 29, 2002).

2. On December 21, 2018, the Counties and the Tarkio R-1 School District timely filed rebuttal testimony from a total of five witnesses. That testimony in substance opposes the

¹ It is the Company's understanding that Intervenors Tarkio R-1 School District, Rock Port R-1 School District, and Fairfax R-2 School District (collectively, the "School Districts") support the Counties' filing. Tarkio R-1 has indicated its affirmative support by a filing it made on February 6, 2019.

relief sought by the Company. The Staff and the Missouri Division of Energy also filed rebuttal testimony² which supported the relief requested by the Company (in the Staff's case, with certain conditions).³ Neither the Counties nor the School Districts filed surrebuttal testimony responsive to the Staff's or the Division of Energy's rebuttal testimony. See 4 CSR 240-2.130(7)(D), allowing for the filing of surrebuttal testimony that is "responsive to the matters raised in another party's rebuttal testimony."

3. If the Counties wanted to present evidence other than that reflected in their rebuttal testimonies, the Counties were required to have filed rebuttal testimony from additional witnesses or were required to file surrebuttal testimony to respond to other parties' rebuttal testimony as appropriate, in accordance with the Procedural Order and the Commission's rules. They didn't and their "addition" of witnesses should therefore be stricken.

4. While it would have been within the power of the Commission to adopt a procedure in this case that substituted live testimony for pre-filed testimony, the Commission did not do so. See 4 CSR 240-2.130(9), providing an alternative to the default rule that testimony be pre-filed.⁴ Cf. 4 CSR 240-2.130(8) ("Except as set out in this section [i.e., subsection (9) of 4 CSR 240-2.130], the prepared testimony of each witness shall be filed . . ."). That testimony is to be pre-filed, so that the content of all witnesses' testimony (subject only to testimony elicited by questions the parties or Commissioners ask on cross-examination) is known to all parties and the

² The Staff filed testimony from Jamie S. Myers and a report sponsored by several Staff witnesses as contemplated by 4 CSR 240-2.130(8).

³ The Company has since agreed with the Staff, Renew Missouri, the Division of Energy, MIEC, and NRDC that the Company's application should be approved, including agreement on the Staff's recommended conditions.

⁴ Sometimes the Commission adopts such an alternative procedure. See, e.g., *Order Setting Hearing, In the Matter of the Application of Atmos Energy Corporation for a Variance*, Case No. GE-2009-0443 (July 24, 2009).

Commission itself before the evidentiary hearing occurs, is further reflected in the prohibition on supplementation of pre-filed testimony found in subsection (10) of 4 CSR 240-2.130.⁵ The clear purpose of that rule is to require all parties to produce – pre-file -- all of the testimony they will offer in support of their respective positions in the case while preventing parties from supplementing that evidence once the original direct, rebuttal, or surrebuttal testimony was pre-filed. If a party can't supplement its case by filing pre-filed supplemental testimony from a witness that at least did pre-file direct, rebuttal, or surrebuttal testimony, then certainly a party can't be allowed to supplement its case by providing testimony at a hearing from a witness that did not pre-file testimony at all. Not only would this violate the Procedural Order and the Commission's rules – thus also violating the other parties' procedural Due Process rights which rest upon the Procedural Order, the Commission's rules, and decades of Commission practice– but it would also lead to an illogical, absurd, and unfair result. It would lead to such a result because the logical extension of the Counties' claim that they can “add” whatever witnesses they want is that a party to a Commission case could intervene, ignore the applicant's direct case, ignore rebuttal testimony, fail to identify any witnesses on whom discovery could be conducted before hearing, and then show up with a parade of witnesses (or as here, wait until two weeks before the evidentiary hearings are to start to identify who is in the parade) to “make its case” for the first time during the evidentiary hearing. In more than 15 years of significant practice at the Commission, the undersigned counsel has never seen the Commission allow a party to show up with whatever witnesses the party later decides they would like to testify rather than filing the testimony of the party's chosen witnesses in compliance with a procedural order and the Commission's rules

⁵ Subsection (10) also does not preclude the Commission from providing a party with a reasonable opportunity to address matters not previously disclosed which arise at the hearing, a circumstance that could arise based on testimony elicited during cross-examination of witnesses.

requiring pre-filed testimony. If such maneuvers were allowed, the party that didn't follow the rules would gain a big advantage over the parties that did follow the rules, encouraging other parties in other cases to do the same. Moreover, the orderly presentation of cases will be exchanged for surprise witnesses, fights in the hearing room, and longer and less organized cross-examination, all increasing the chances of producing a muddled record and a flawed result.

5. The Counties should not be allowed to supplement or otherwise bolster the testimony of their witnesses that pre-filed testimony through live testimony from other witnesses. To allow such a maneuver would not only violate the Procedural Order, the Commission's rules, and basic principles of fairness and Due Process, but it would run directly counter to decades of Commission practice while also undermining the Commission's longstanding view that, with limited exceptions, testimony should be pre-filed to "give the parties notice of the claims, contentions, and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing." Laclede, supra. The Company would note that the Counties' and the School Districts have already violated the Procedural Order and the Commission's rules cited herein when their officials provided testimony at the Rock Port local public hearing. If the Counties and the School Districts (who were permissively allowed to intervene in this case and who thus chose to bind themselves to comply with the Procedural Order and the Commission's rules) were to present evidence, they should have confined their presentation to that allowed by that Order and those rules. Regardless, they certainly should not be allowed to compound their non-compliance by "adding witnesses" at this time.⁶

⁶ Out of respect for the local public hearing process, the Company elected not to object at the local public hearing. The local public hearing testimony is of record, including from five of the witnesses the Counties seek to "add" now.

6. For the foregoing reasons, the Commission should strike the Counties' additional witnesses listed on page 3 of the Counties' February 5, 2019 filing and prohibit them from appearing as witnesses at the evidentiary hearing.

7. With respect to the eight additional "issues" the Counties seek to add to the issues to be decided in this case, the Company objects to all of them in that they are not truly "issues" for decision. Instead, these "issues" are positions or arguments the Counties obviously intend to advance or make in answer to Issues 1 and 2 agreed upon by all parties except the Counties (and the School Districts).

8. For example, Issue No. 7 is simply a reflection of the Counties' contention (from pre-filed testimony) that if the application is to be approved, the approval should be on the condition that the Company "submit to local tax assessment." The Counties can make that point by responding to Issue No. 2.⁷ To take another example, if the Counties contend that granting the application would "grant the applicant special treatment" that should not be granted (Counties' Issue No. 9), then the Counties can respond to Issue No. 1 by stating that the Commission should reject the Company's application on that basis.⁸ What the Commission should not sanction is an effort by a single party (here a bloc of parties) to impose a laundry list of their *positions or arguments* on the Commission and the other parties under the guise of calling those positions or arguments "issues."

WHEREFORE, the Company prays that the Commission make and enter its order striking the 11 additional witnesses the Counties seek to "add" to the List of Witnesses, and also barring their appearance

⁷ On the List of Issues submitted by all parties except the Counties and the School Districts. Issue No. 2 reads: "If the Commission approves the CCN and merger approval sought by the Company's application in this docket, what conditions, if any, should the Commission impose?"

⁸ Issue No. 1 reads: "1. Should the Commission grant the certificate of convenience and necessity ("CCN") and merger approval sought by the Company's application in this docket or reject it?"

as witnesses at the evidentiary hearing in this case, and further striking the eight additional “issues” the Counties seek to “add” to the Issues List in this case.

Respectfully submitted,

/s/ James B. Lowery

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**ATTORNEYS FOR UNION ELECTRIC
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Dated: February 8, 2019.

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing have been e-mailed or mailed, via first-class United States Mail, postage pre-paid, to counsel of record this 8th day of February 2018.

*/s/ James B. Lowery*_____

James B. Lowery