

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

In the Matter of the Tariff Filings of Union)
Electric Company d/b/a Ameren Missouri, to) Case No. ER-2012-0166
Increase Its Revenues for Retail Electric Service.)

**MOTION TO QUASH NOTICE OF DEPOSITION, TO QUASH SUBPOENA DUCES
TECUM, FOR PROTECTIVE ORDER, AND FOR RECONSIDERATION OF “GOOD
CAUSE” “DETERMINATION” UNDER 4 CSR 240-2.100
AND MOTION FOR EXPEDITED TREATMENT**

COMES NOW Ameren Corporation, and hereby: moves to quash the Notice of Deposition (the “Notice”) directed to Ameren Corporation President and CEO Thomas Voss; moves to quash the subpoena duces tecum served on Mr. Voss; moves for a protective order in regard to the Notice; moves for reconsideration of the “good cause” “determination” made under 4 CSR 240-2.100; and moves for expedited treatment under 4 CSR 240.2. 080(14). In support thereof, Ameren Corporation states as follows:

1. On September 5, 2012, the Staff served the Notice on the undersigned counsel, seeking to take the deposition of Ameren Corporation President and CEO Thomas Voss. On that same date a subpoena duces tecum was served on Mr. Voss which purports to require the production of certain Ameren Corporation documents.¹ The subpoena was issued after the Staff filed an Application for Subpeona Duces Tecum and claimed “good cause” for a waiver of the requirements of 4 CSR 240.2.100. Taken together, the Notice and the subpoena duces tecum indicate that what the Staff seeks are the production of documents.

¹ The subpoena duces tecum was not served as required by law, but Ameren Corporation is not raising a service defect as a basis for this Motion.

**MOTION TO QUASH AND FOR RECONSIDERATION AND FOR
PROTECTIVE ORDER**

A. The Staff is attempting to do an “end-run” around the Commission’s Established and Binding Discovery Rules.

2. Exhibit A to the subpoena duces tecum contains a listing of Ameren Corporation Board of Directors materials² which the Staff requested in a data request (Data Request No. 7) served on Union Electric Company d/b/a Ameren Missouri on February 6, 2012 (only three days after this rate case was filed). A copy of that data request (“DR”) is attached hereto as Exhibit A. Ameren Missouri timely objected to DR No. 7 on February 16, 2012 on the following bases:

The Company objects to this data request to the extent the same seeks documents protected from discovery by the attorney-client or work product privileges, and further objects because it is overbroad to the extent it seeks information relating to the business, affairs, or operations of affiliates of Ameren Missouri, other than information relating to Ameren Missouri itself or relating to transactions occurring between Ameren Missouri and its affiliates or goods or services exchanged between Ameren Missouri and its affiliates and, consequently, to that extent it is also irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to said objection, access will be provided, as was done in prior cases, to the extent the requested materials relate to Ameren Missouri/transactions involving Ameren Missouri and its affiliates, and to the extent the requested materials are not privileged.

3. The Staff, in the nearly seven months that have elapsed since that objection was lodged, never took any proper steps to claim that Ameren Missouri’s objection should be overruled. During that time period, the Commission scheduled four separate Discovery Conferences – the objection was not brought up at any of them. Moreover, the Staff never availed itself of its right to seek an order overruling the objection under 4 CSR 240-2.090(8)(A). Staff’s failure to follow the Commission’s established practices (and, in fact, Staff’s failure to avail itself of raising the issue at the pre-scheduled Discovery Conferences where the Regulatory Law Judge has the power to rule on disputes on-the-spot) should not be rewarded.

² In some cases it lists materials of a committee of the Ameren Corporation Board.

4. Instead, what the Staff did was make an *ex parte*³ filing seeking a waiver of 4 CSR 240-2.100(2) claiming “good cause” for seeking to compel the production by subpoena of documents to which a proper and timely objection was made *more than six months ago*.⁴ This is not good cause under any reasonable (or even liberal) reading of the term. To the contrary, all the Staff would have had to do is *properly* take-up the Company’s objection and obtain a proper ruling from the Commission about the objection. Had the Staff done so, it would have afforded Ameren Missouri or Ameren Corporation, as the case may be, a proper opportunity to be heard on the matter, an opportunity the Staff apparently sought to deprive these companies of when it sought its *ex parte* “good cause” waiver.

5. Moreover, Staff’s claim of “good cause” fails. The *only* claim the Staff makes is that “due to the press of other business” Staff is just now getting around to pursuing these documents. As already demonstrated, surely Staff can’t expect the Commission to believe that through more than six months and four Discovery Conferences the “press of business” has prevented it from pursuing discovery. While we will concede that “good cause” is a standard that lies largely in the discretion of the Commission, it generally is applied to “prevent a manifest injustice or avoid a threatened one.” *In re Missouri Gas Energy*, 2005 WL 1131060 (citing *Bennett v. Bennett*, 938 S.W.2d 952, 957 (Mo. App. S.D. 1997)). Given the facts and circumstances related to the Staff’s complete failure to properly pursue Ameren Missouri’s six-month-plus old objection, and the lack of relevance of the information sought (as this

³ We believe the Staff’s communication was an improper *ex parte* communication because while it may involved a “procedural issue,” by Staff’s own admission – in its Application for Subpoena Duces Tecum – it makes claims that the documents sought would “corroborate” Staff witness Murray’s testimony and presumably, as far as the Staff is concerned, would impact the most substantive issue in this case – return on equity – which obviously would have a material impact on the outcome of this case. To be clear, we are not suggesting that a party cannot obtain a subpoena unless it provides notice that it is doing so to the other parties, *except* when a condition precedent to the issuance of the subpoena is a ruling from the Commission that “good cause” exists. Surely the Staff knew, or should have known, that Staff’s request to waive 4 CSR 240-2.100 would be contested.

⁴ Without a good cause waiver, the Staff’s subpoena violates the applicable rule since the evidentiary hearings in this case start on September 24, 2012.

Commission has previously found), the only injustice would be to not quash the subpoena duces tecum and deposition notice.

B. The Documents are Not Relevant In Any Event.

6. That the Staff in its Application for Subpoena Duces Tecum expresses *its* singular opinion that the documents it seeks are “relevant” doesn’t make it so. Indeed, the Commission has already ruled against the Staff on the point the Staff apparently claims these documents would be relevant to prove. It appears rather clear, based on other discovery sought by the Staff (and more specifically Staff witness David Murray), that Staff continues to want to advance an argument that has been explicitly rejected by the Commission: that when companies conduct valuation analyses for purposes having nothing to do with rate setting, those valuation analyses can be used to inform what a regulated utility’s cost of equity actually is. The Commission has made it clear that Mr. Murray’s unusual theories, which are not supported by other cost of capital witnesses, provide no basis to inform a decision regarding the appropriate return on equity for Ameren Missouri:

19. In an effort to support his low recommended return on equity, Murray points to various valuation analyses regarding Ameren Missouri done by financial analysts for purposes other than the establishment of rates. Murray reports that in general, experts in the field of asset valuation consistently apply a much lower cost of equity to cash flows generated from regulated utility operations as compared to the estimates of cost of equity from rate of return witnesses in the utility ratemaking process. Murray’s clear implication is that aside from him, all other rate of return witnesses are getting it wrong.

20. Murray’s reliance on valuation analyses to support the reasonableness of his return on equity recommendation is misplaced. Murray acknowledged that he has no experience in asset valuation. In his surrebuttal testimony, Robert Hevert explained in great detail why the valuation analyses cited by Staff are different than the analysis necessary to evaluate a reasonable return on equity in the rate making process. The Commission is persuaded by that explanation and accepts Mr. Hevert’s explanation without repeating his arguments. In sum, as MEG’s witness, Billie Sue LaConte, who has done asset valuation work in the past, indicated, the principles and methods involved in valuing physical assets are

different than the principles and methods involved in estimating a utility's cost of equity.⁵

7. Staff seeks documents that were redacted from Ameren Corporation Board of Directors materials because they did not relate or pertain to Ameren Missouri. A cursory review of Exhibit A to the subpoena duces tecum shows Staff is seeking, among other documents, documents relating to Ameren Corporation's merchant generating company, Ameren Energy Resources Corporation. Other documents sought relate to Ameren Illinois Company, an Illinois Commerce Commission-regulated entity. As the Commission has recognized (when it sustained an Ameren Missouri objection by an attempt by the Office of the Public Counsel to force production of Ameren Corporation or non-Ameren Missouri Ameren Corporation subsidiary documents), these documents are not relevant and not accessible by parties in Commission cases because they do not relate to Ameren Missouri:

It is true that the Commission is authorized and required to examine the dealings of regulated entities with their unregulated affiliates.⁶ However, as Union Electric points out, that authority applies to transactions *between* the affiliates and the regulated entity. It *does not apply* to transactions between the unregulated affiliates and third parties absent a specific showing of relevancy to transactions between the affiliates and the regulated entity. The Commission lacks any general authority to pry into the affairs of unregulated companies, or the third parties that they do business with, merely because they are affiliates of regulated entities (emphasis added).⁷

The same principles apply here. The documents sought relate or pertain solely to entities not regulated by this Commission. They do not relate in any way to any transaction between those entities and Ameren Missouri. Allowing an end-run around Ameren Missouri's objection would be to allow the Staff to "pry into the affairs of unregulated companies . . . merely because

⁵ *Report and Order*, pp. 69-70, Case No. ER-2010-0036 (Ameren Missouri's electric rate case) (footnotes omitted).

⁶ Section 393.140(12), RSMo 2000.

⁷ *Order on Reconsideration Concerning Discovery*, Case No. EO-2004-0108 (Feb. 26, 2004) (Then Deputy Chief Regulatory Law Judge Kevin Thompson, who as Chief Staff Counsel secured the subpoena at issue here, had already ruled in the Company's favor on this issue – this order upheld then RLJ Thompson's ruling).

they are affiliates of . . .” Ameren Missouri. This is improper, as the Commission has recognized.

8. The Staff also claims that the documents “will also reveal risk factors and credit impediments applicable to Ameren Missouri.” Staff’s Application for Subpoena Duces Tecum. Aside from the fact that the Staff cannot know what the documents will “reveal,” it is apparent that the Staff is simply fishing around for material to bolster Mr. Murray’s longstanding claim that the less favorable financial condition of Ameren Corporation’s merchant generation subsidiary may put downward pressure on credit ratings for Ameren Missouri, at least when it comes to the Standard and Poors (“S & P”) credit rating, since S & P does rate all of the Ameren Corporation-owned companies on a consolidated basis (Moody’s and Fitch do not – they rate Ameren Missouri on a standalone basis). That this may be true is a fact well-known to the Staff, which regularly has asked for and received copies of credit rating agency reports that document this fact and has regularly submitted testimony about this, including in this case.⁸ The pre-filed testimony in this case already shows that Ameren Missouri’s S & P credit rating is lower than its Moody’s and Fitch (standalone) ratings. The Staff is on a fishing expedition in a pond where it doesn’t belong, and which even the Commission, as earlier noted, has no rights to fish.

C. The Subpeona is Unauthorized and Defective.

9. While we have already demonstrated that the Notice and subpoena duces tecum should be quashed for substantive reasons, a proper subpoena duces tecum has not been issued in any event.

⁸ “Ameren Missouri’s Moody’s, S&P and Fitch issuer/corporate credit rating are ‘Baa2’, ‘BBB-’, and ‘BBB+’, respectively. Ameren’s Moody’s, S&P and Fitch issuer/corporate credit rating are ‘Baa3’, ‘BBB-’, and ‘BBB’, respectively.³⁴ Moody’s and Fitch rate Ameren one notch lower than Ameren Missouri because Moody’s and Fitch tend to give more weight to the stand-alone financial risk and business risk of the subsidiary, i.e. they view Ameren Missouri’s credit quality as being stronger than that of the parent. However, S&P’s ratings methodology is based on its view that without significant ring-fencing mechanisms in place, they will rate the subsidiary based on the consolidated credit quality of the parent company. In fact, S&P does not even provide Ameren Missouri’s stand-alone financial ratios in its published research reports. S&P only publishes Ameren’s financial ratios.” Staff Cost of Service Report, p. 22, l. 14-23. Staff’s Cost of Report in fact contains a discussion of these issues at pages 22-24.

10. For non-party, non-public utility the Commission's power to issue a subpoena duces tecum is found in Section 536.077, RSMo. (Cum. Supp. 2011).⁹ Under that statute, the *agency* must issue the subpoena. The agency "may delegate to any member, officer, or employee thereof the power to issue subpoenas in contested cases; provided that, except where otherwise authorized by law, *subpoenas duces tecum shall be issued only by order of the agency or member thereof*" (emphasis added). Moreover, as noted earlier, before a subpoena can be issued less than 20 days before a hearing, the *Commission* must make a "good cause" determination under 4 CSR 240-2.100(2).

11. The Commission has not authorized a subpoena duces tecum in this case, nor has it made the requisite good cause determination. No single Commissioner has done so either. There is no showing that the Commission, by a majority vote, has delegated the power to issue a subpoena duces tecum or to make the required "good cause" showing to Judge Woodruff; indeed, it is not clear if such a power *could* be delegated given the specific terms of Section 536.077,¹⁰ but in any event, there is no showing that such a delegation has been made.¹¹

12. The Staff may claim that the Commission possesses the power to issue a subpoena duces tecum to Mr. Voss apart from Section 536.077. An examination of every conceivable source of the Commission's various powers to issue a subpoena duces tecum demonstrates that this is not the case.

⁹ The Commission has the power to require depositions of non-party, non-public utility personnel pursuant to Section 386.410, RSMo (2000), and has implemented that authority in 4 CSR 240-2.090 by applying the Missouri Rules of Civil Procedure to its proceedings.

¹⁰ While the Commission could delegate by majority vote any of its powers relating to an "act, matter or thing which the commission is authorized *by this chapter* to do or perform," its power to issue subpoenas duces tecum to non-party, non-public utilities is not a power found in Chapter 386. Section 386.240, RSMo. (2000) (emphasis added).

¹¹ Not even Judge Woodruff has issued any order containing a good cause determination.

13. Section 386.320.3 authorizes the Commission to issue a subpoena duces tecum to “any person or corporation subject to its supervision.” Ameren Corporation is not subject to the Commission’s supervision, and neither is Mr. Voss, who is Ameren Corporation’s CEO.¹²

14. Section 386.440 contains no power to issue a subpoena duces tecum, but rather, only authorizes the Commission to issue subpoenas to compel the attendance of witnesses.

15. Section 393.140(9) is only applicable to “the manufacture and furnishing of gas for light, heat or power and the furnishing of natural gas for light, heat or power, and the generation, furnishing, and transmission for light, heat or power . . . [and providing water or sewage treatment].” Section 393.110.1, RSMo. (2000). Ameren Corporation does none of those things.

16. As already noted, that leaves only Section 536.077 as authority to direct a subpoena duces tecum to Ameren Corporation, and its terms have not been complied with.

D. Summary

17. In summary, the subpoena duces tecum and Notice should be quashed, both on substantive and procedural grounds. And while the Company does not believe that a Mo. R. Civ. P. Rule 56.01(c) protective order is necessarily needed given the invalidity of the subpoena duces tecum that was purportedly issued, justice requires that a protective order be issued that orders that the Staff is not to be allowed to “pry into” matters which even this Commission has no authority over.

MOTION FOR EXPEDITED TREATMENT

18. The Commission should act on the motions made herein by September 12, 2012, insofar as the Notice and subpoena duces tecum purport to require production of documents on September 13, 2012.

¹² It is not even clear that Section 386.320.3 applies to any company other than a telegraph or telephone corporation, but that issue is irrelevant here.

19. The harm that will be avoided includes the continuation of the attempt to enforce an unlawful subpoena duces tecum, and harm that would be created if parties are allowed, at the eleventh hour in Commission cases, to attempt end-runs around the Commission's established discovery processes.

20. The Notice and subpoena duces tecum was served just two days before surrebuttal testimony in this case was due, on a day when the undersigned counsel were consumed with handling discovery matters, including deposing witnesses, finalizing surrebuttal testimony, and a myriad of other duties in this case. Consequently, this pleading was prepared as soon as was reasonably possible after service of the subpoena duces tecum and notice.

WHEREFORE, the Company prays that the Commission make and enter its order quashing the Notice and the subpoena duces tecum, and issue its protective order preventing the Staff from seeking access to documents of Ameren Corporation that do not relate to transactions between Ameren Missouri, on the one hand, and Ameren Corporation or one of its subsidiaries on the other, and for such other and further relief as is just and proper under the circumstances.

Dated: September 10, 2012

Respectfully submitted,

/s/ James B. Lowery

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 10th day of September, 2012.

/s/James B. Lowery

James B. Lowery

Missouri Public Service Commission

Data Request

Data Request No. 0007
Company Name Union Electric Company-Investor(Electric)
Case/Tracking No. ER-2012-0166
Date Requested 2/6/2012
Issue General Information and Miscellaneous - Company Information
Requested From Mary L. Hoyt
Requested By Lisa Ferguson
Brief Description Board of Director's Meeting Minutes

Description

1. Please provide all copies of or make available for review all Ameren and Ameren Missouri Board of Director's meeting minutes, Board of Director Committee meeting minutes, all related reports, documents and all accompanying materials or handouts presented or distributed (whether electronic presentations or materials in hardcopy format) during the period covering October 1, 2010 updated through July 31, 2012 .
2. Please provide all copies of or make available for review all Ameren and Ameren Missouri Senior and Upper Management meeting minutes, Senior and Upper Management Committee meeting minutes, all related reports, documents and all accompanying materials or handouts presented or distributed (whether electronic presentations or materials in hardcopy format) during the period covering October 1, 2010 updated through July 31, 2012.

Due Date 2/26/2012

The attached information provided to Missouri Public Service Commission Staff in response to the above data information request is accurate and complete, and contains no material misrepresentations or omissions, based upon present facts of which the undersigned has knowledge, information or belief. The undersigned agrees to immediately inform the Missouri Public Service Commission Staff if, during the pendency of Case No. ER-2012-0166 before the Commission, any matters are discovered which would materially affect the accuracy or completeness of the attached information.

If these data are voluminous, please (1) identify the relevant documents and their location (2) make arrangements with requestor to have documents available for inspection in the Union Electric Company-Investor(Electric) office, or other location mutually agreeable. Where identification of a document is requested, briefly describe the document (e.g. book, letter, memorandum, report) and state the following information as applicable for the particular document: name, title number, author, date of publication and publisher, addresses, date written, and the name and address of the person(s) having possession of the document. As used in this data request the term "document(s)" includes publication of any format, workpapers, letters, memoranda, notes, reports, analyses, computer analyses, test results, studies or data, recordings, transcriptions and printed, typed or written materials of every kind in your possession, custody or control or within your knowledge. The pronoun "you" or "your" refers to Union Electric Company-Investor(Electric) and its employees, contractors, agents or others employed by or acting in its behalf.

Security Public
Rationale NA

Exhibit A