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 Increase Its Revenues for Retail Electric Service.	)))	Case No. ER-2012-0166

MOTION TO STRIKE SURREBUTTAL TESTIMONY OF LENA MANTLE AND JAMES R. DAUPHINAIS REGARDING TREATMENT OF MIDWEST ISO TRANSMISSION CHARGES, AND ALTERNATIVE MOTION FOR LEAVE TO FILE SUR-SURREBUTTAL TESTIMONY, AND MOTION FOR EXPEDITED TREATMENT

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri") and hereby moves for an order from the Commission striking a portion of the surrebuttal testimony of Staff witness Lena M. Mantle and Missouri Industrial Energy Consumers ("MIEC") witness James R. Dauphinais relating to Midwest Independent Transmission System Operator, Inc ("Midwest ISO") transmission charges and, alternatively, moves for an order granting the Company leave to file sur-surrebuttal testimony to respond to these issues, and moves for expedited treatment of its motions. In support thereof the Company states as follows:

MOTION TO STRIKE

1. On July 6, 2012, as contemplated by the procedural schedule filed by the parties and adopted by the Commission, the Staff filed its direct testimony.[1] Included in the Staff's direct testimony were approximately 16 pages of fuel adjustment clause ("FAC")-related testimony from Staff witness Lena Mantle. Among other things Ms. Mantle included a very short section entitled "Changes to FAC Tariff Sheet Terminology." There she indicated that

[1] The Staff filed its direct testimony in the form of a "report," as has been its practice in recent rate cases.

each Missouri utility's FAC tariffs "operate . . . in the same fashion and are fundamentally the same," but she noted that each had "unique FAC tariff sheets with unique acronyms and definitions."[2] Ms. Mantle went on to refer to "clean-up" changes that she said would be detailed in the Staff's Rate Design Report to be filed on July 19, 2012, noting that "Staff has been working with all of the electric utilities, including Ameren Missouri, on proposals and hopes to come to consensus on the *terminology* to be used within the electric utility industry in Missouri" (emphasis added).[3] She concluded this discussion with the following statement:

> It is not Staff's intent to change the meaning of different phrases in each utility's FAC tariff sheets, but to help avoid and minimize confusion when discussing the FACs of electric utilities in Missouri.[4]

2. On July 19, 2012, the Staff filed its Rate Design Report. Ms. Mantle again sponsored several pages, referring to the subject matter as "Changes to FAC Tariff Sheet Terminology."[5] She repeated her claims (quoted above), including the claim that the Staff did not intend to change the "intent or meaning" of the tariffs.[6] She went on to refer to the changes to Ameren Missouri's FAC tariff sheet that she was suggesting as "clean-up" changes.[7] Ms. Mantle also included a brief (8 lines) discussion of what she called a "clarification regarding transmission costs" and recommended that a sentence be added to the FAC tariff sheet which would read "Only transmission costs incurred for the purchase or sale of electricity shall be included."[8]

3. When it filed its rebuttal testimony, the Company filed approximately four pages of testimony in response to Ms. Mantle's cryptic and possibly inconsistent suggestion that she

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[2] Staff Revenue Requirement Cost of Service Report ("Staff Report") p. 167, l. 8-9.
[3] *Id.* p. 167, l. 26-28.
[4] *Id.* p. 167, l. 28 to p. 168, l. 2.
[5] Staff's Rate Design and Class Cost of Service Report ("Staff Rate Design Report"), p. 31, l. 2.
[6] Staff Rate Design Report, p. 31, l. 21-23.
[7] *Id.* p. 32, l. 4.
[8] *Id.* p. 32, l. 22-23.

was seeking to only "clean-up" the FAC tariff, was not intending to change the intent or meaning of it, and was only seeking to "clarify" matters.[9] Ameren Missouri witness Jaime Haro made four basic points, as follows: (1) that the Staff hadn't provided a sufficient explanation to allow the Company to understand what problem the Staff was seeking to solve or why it would be appropriate to cease including charges that were already included in the FAC (if that was the Staff's intent); (2) that the Staff hadn't identified what charges, if any, it sought to remove from the FAC calculation; (3) that Staff's proposal might impact charges the Company had to incur to serve its load (and which have been included in the FAC since 2009); and (4) that if the Staff's intent (which was not at all clear) was to exclude transmission charges the Company had to incur to secure power for its load it would be an inappropriate exclusion given that the charges were part and parcel of its Midwest ISO participation and the considerable benefits that participation brings to Missouri customers.

4. In Ms. Mantle's surrebuttal testimony, the Company learned that indeed Ms. Mantle was not seeking to "clean-up" or "clarify" anything.[10] For the first time in her surrebuttal testimony,[11] Ms. Mantle:

- Claimed that charges assessed by the Midwest ISO under Midwest ISO Schedule 26, which are recorded in FERC Uniform System of Account ("USoA") 565 – and which had been included in the FAC calculations since the very beginning of Ameren Missouri's FAC – were "never intended" by the Staff to be included;
- Claimed that even though the Company must pay these kinds of charges based upon the megawatt-hours ("MWh") it in fact does acquire from the Midwest ISO to serve its Missouri retail load such charges are not costs that should be included as part of

[9] Rebuttal Testimony of Jaime Haro, p. 19, l. 18 to p. 23, l. 22.
[10] The Company had learned this was likely the case during a conference call with Ms. Mantle and others on the Staff on August 23, 2012 (one week after rebuttal testimony was filed) when the Company and the Staff "met" to see if it could come to agreement on various FAC tariff changes, but at that time it was not clear exactly what Ms. Mantle was proposing. What was clear at that time is that whatever she was proposing was something that was (or should have been) well-known to the Staff when it filed its direct case on July 6, 2012. We discuss that issue further below.
[11] Mantle surebuttal, p. 2, l. 14 to p. 7, l. 6.

purchased power costs in the FAC – again, this despite the fact that the FAC tariff has, quite explicitly, provided that they should be included from the very first day it was filed and approved in 2008-2009;

- Claimed, for the first time that the structure of the FAC tariff, which expressly included all charges in USoA Accounts 555, 565, and 575, unless a particular charge was expressly *excluded*, should now be completely reversed so that every individual charge must be called out or else it cannot be included; and
- Recommended, for the first time, that charges under at least five Midwest ISO schedules that are and have always been recorded in USoA Account 565 no longer be included in the FAC.

5. Ms. Mantle made another claim that while it *literally could* be true, it is highly misleading in the context used by Ms. Mantle. In an apparent attempt to pre-empt a motion such as the one contained in this pleading, Ms. Mantle claimed that the Staff did not learn that Schedule 26 charges were intended to be included (or were included) by the Company in its FAC calculations until the Staff saw a posting on Ameren Missouri's website regarding the Lutesville to Heritage transmission line, which is a 345 kV baseline reliability project to be constructed by Ameren Missouri near Cape Girardeau. The implication Ms. Mantle is obviously making is that the Staff had no reason to believe that regional transmission organization ("RTO") charges associated with transmission built in the RTO's footprint had, would or could be included in FAC charges. To read Ms. Mantle's surrebuttal testimony (and to listen to her brief comments on this topic on the August 23, 2012 conference call referenced above) one would think that the Staff has never heard of such a thing. That is not, however, true.

6. In Case No. ER-2010-0356, KCP&L-GMO's 2010 general rate case, KCP&L-GMO proposed to include the very type of transmission-related RTO charges Ms. Mantle is now discussing, which have always been included in Ameren Missouri's FAC, in KCP&L-GMO's FAC tariff. Ms. Mantle's direct report, John Rogers, filed rebuttal testimony in that case (on December 15, 2010) that opposed including such charges – which according to Mr. Rogers'

testimony would be recorded in FERC USoA Accounts that included Accounts 565 and 575 – in the FAC.[12] As an alternative, the Staff actually recommended establishing a tracker to address such costs, which would have allowed KCP&L-GMO to defer increases in these costs above the level assumed when base rates were set for consideration for future recovery in a future rate cases. There was rather extensive discussion – from KCP&L-GMO and the Staff – about these issues in their various testimonies, including from another of Ms. Mantle's colleagues, Dan Beck (filed on January 12, 2011).[13] It is clear that this very issue has been one known to the Staff for approximately two years.

7. Moreover, Schedule 26 charges recorded in Account 565 were included in the charges used in the calculation of net base fuel costs ("NBFC") in Case No. ER-2008-0318 (the Company rate case where the Company's FAC was established). Schedule 26 charges recorded in Account 565 have been reflected in every FAC adjustment (all nine of them) made by Ameren Missouri since its FAC took effect in 2009.

8. The point is that Ms. Mantle's suggestion that the Staff had no idea that these kinds of charges were included in the Company's FAC (thus "justifying" her misleading claims that she was only seeking to "clean-up" or "clarify" the tariff) lack credibility; or at best, reflect tremendous sloppiness on the Staff's part. Either way, the Staff failed to properly include in its direct case "all testimony and exhibits asserting *and explaining* its case-in-chief" as it was required to do by 4 CSR 240-2.130(7)(A) (emphasis added). The Staff's failure to explain its case-in-chief on this issue is a continuation of a disturbing practice we have observed in this and

[12] Rebuttal Testimony of John A. Rogers, Case No. ER-2010-0356, pp. 3 – 7.
[13] Please also see Direct Testimony of KCPL-GMO witness Tim Rush, Case No. ER-2010-0356, filed June 4, 2010, pp. 6, 19-22; the Staff Report Revenue Requirement Cost of Service, Case No. ER-2010-0356, filed November 17, 2010, pp. 160-166 and Appendix 8 thereto; the Surrebuttal Testimony of Staff witness Dan Beck, Case No. ER-2010-0356, filed January 12, 2011, pp. 1-4.

recent cases on several issues. For example, in the Company's last rate case, Ms. Mantle added entirely new bases to her FAC-related recommendations when she filed surrebuttal testimony (bases that were or should have been known to her when direct testimony was filed and should have been included in direct testimony). This necessitated taking a second deposition of Ms. Mantle; the Staff opposed the second deposition, but the Commission ordered her to appear. Staff witness David Murray in the last case attempted to inject an entirely new basis for disallowing Sioux scrubber costs, again for the first time in surrebuttal testimony. The Commission granted Ameren Missouri's Motion to Strike Mr. Murray's testimony. And as detailed in the Motion to Strike a portion of the Mr. Murray's surrebuttal testimony in this case, Mr. Murray has again waited until surrebuttal testimony to propose and to "support" (to the extent he does) a new and significant adjustment to the Company's revenue requirement.

9. Ms. Mantle's cryptic direct testimony has also spawned "surrebuttal testimony" from MIEC witness James R. Dauphinais.[14] What Mr. Dauphinais is now opportunistically attempting to do is to himself propose a substantive change to an FAC tariff that has been in effect for more than three years under the guise of "rebutting" Mr. Haro's rebuttal testimony. Like Ms. Mantle and the Staff, if MIEC wished to change the FAC tariff MIEC should have made its proposal, and supported and explained it, as part of its case-in-chief or, at a bare minimum, MIEC should have rebutted *Ameren Missouri's* FAC tariff filing – filed as part of Ameren Missouri's case-in-chief – by filing rebuttal testimony claiming what Mr. Dauphinais now claims. But MIEC chose to "sandbag" the Company by in effect attacking the existing FAC

[14] Dauphinais surrebuttal, p. 1, l. 16-17; p. 3, l. 18-24; 9, l. 8 to p. 16, l. 16.

tariff by proposing changes to it for the first time in surrebuttal testimony at a time that the Company would have no fair opportunity to engage in discovery or respond.[15]

10. The bottom line is that the Staff and MIEC have violated the Commission rule that requires them to fully explain their case-in-chief through their direct testimony and schedules (4 CSR 240-2.130(7)(A)) and have undermined the applicable Commission procedures that protect all parties from unfair surprise in rate cases. If Staff and MIEC are allowed to succeed in this effort, they will not only compromise the Company's ability to respond to their positions in this case, but they will also be incentivized to "sandbag" issues in future cases to obtain a strategic advantage. As a consequence, the Commission must strike this improper surrebuttal testimony.

11. For the foregoing reasons, Ameren Missouri's motion to strike should be granted.

ALTERNATIVE MOTION FOR LEAVE TO FILE SUR-SURREBUTTAL TESTIMONY

12. 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 Ms. Mantle's and Mr. Dauphinais' improper surrebuttal testimony. Consequently, in the alternative to its motion to strike, the Company requests leave to file sur-surrebuttal testimony (by September 19, 2012) on the issues addressed by Ms. Mantle and Mr. Dauphinais in the above-cited portions of their surrebuttal testimonies.

[15] It is bad enough that in a rate case, where the utility has the ultimate burden of persuasion, that non-utility parties are allowed to file a "direct case" which in many ways is in rebuttal or opposition to the utility's direct case, and then get to rebut the utility's direct case some more on rebuttal, only to get a third bite at the apple on surrebuttal. This is completely at odds with every other conceivable civil (or criminal) proceeding where the party with the burden of persuasion properly gets the last word. Regardless, the Company recognizes that this is the practice currently existing at the Commission. However, the point is that this practice should not be abused (and the Commission should not sanction its abuse) be letting parties advance new positions for the first time in surrebuttal testimony – that is what MIEC has done here.

MOTION FOR EXPEDITED TREATMENT

13. he Commission should act on the motions made herein by September 14, 2012, insofar as the hearings in this case commence just 10 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).

14. 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 sanctioning parties' failure to properly support and explain their cases-in-chief if the motion to strike were not granted.

15. The surrebuttal testimony at issue was not filed until late in the day on Friday, September 7, 2012. These motions are being filed just two business days later, which was as soon as this pleading could reasonably have been prepared. The Company would also note that if Ms. Mantle's position were adopted the Company estimates that it would forego, over the next three years alone, approximately $25 million of charges that it must pay as part of serving its load as a Midwest ISO participant and which the current FAC clearly includes in the FAC calculations.[16] (The impact of Mr. Dauphinais position is less straightforward because he apparently does not suggest excluding as many charges from the FAC as Ms. Mantle does.) The Commission should not be deciding such important issues based upon new grounds brought up for the first time in surrebuttal testimony, and certainly should not be doing so without the Company that is affected having a full and fair opportunity to respond. *Cf.*, *Order Regarding Motion to Strike Testimony and Motion to File Supplemental Surrebuttal Testimony*, Case No.

[16] Depending on the timing of further rate cases that number will grow in future years.

ER-2007-002 (Mar. 8, 2007) ("By attempting to substantively change their previous positions by offering corrections in their surrebuttal testimony, AmerenUE and Staff have inserted a new issue into this case. The Commission is not willing to try to resolve that $60 million issue on the record before it." The Commission then allowed the supplemental testimony).

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 testimonies of Staff witness Lena M. Mantle and MIEC witness James R. Dauphinais or, alternatively, granting the Company leave to file sur-surrebuttal testimony in response to said portions of their testimony by September 19, 2012, and for such other and further relief as is just and proper under the circumstances.

Dated: September 11, 2012

Respectfully submitted,

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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 11th day of September, 2012.

/s/James B. Lowery
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