

**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)	
Necessity Authorizing it to Construct, Install, Own,)	File No. EA-2014-0136
Operate, Maintain and Otherwise Control and Manage)	
Solar Generation Facilities in O'Fallon, Missouri.)	

**RESPONSE TO MOTION TO COMPEL AND
MOTION FOR PROTECTIVE ORDER**

COMES NOW Earth Island Institute d/b/a Renew Missouri (“Renew Missouri”) and submits this Response to Motion to Compel and Motion for Protective Order in response to the Motion to Compel of Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”). In support of its Response to Motion to Compel and Motion for Protective Order, Renew Missouri states as follows:

BACKGROUND

1. This case involves Ameren Missouri’s application for a Certificate of Convenience and Necessity, which asks the Commission to grant the Company permission to build a 5.7 MW solar facility in O’Fallon Missouri.
2. The data request at issue in Ameren Missouri’s Motion to Compel is the third batch of discovery requests which the Company has submitted to Renew Missouri in this case. DR 009 is the second batch of data requests for which the Company has deemed it necessary to file a Motion to Compel; both Motions have been filed in the last two days, during the week leading up to the hearing scheduled for Friday, April 4, 2014.
3. The first Motion to Compel – filed on March 31, 2014 – was in relation to DRs 004-006, which asked Renew Missouri to disclose details regarding private communications with non-parties to this case. Renew Missouri considered these data requests to be irrelevant,

burdensome, and intended to harass or frustrate Renew Missouri from pursuing its positions in this case. Furthermore, Ameren Missouri presumably issued DRs 004-006 after reading an email provided by Renew Missouri, the contents of which were “redacted” or blacked out by virtue of being covered by attorney-client privilege. Despite Renew Missouri’s objections to DRs 004-006, it nevertheless acknowledged that its objections were untimely. Therefore, in the interest of saving the Commission considerable time and effort, Renew Missouri elected to simply provide answers to DRs 004-006 rather than respond with substantive objections. As is clear in Renew Missouri’s answers (attached as Exhibit A), the Company’s data requests failed to elucidate any information that could reasonably be argued to be relevant to any issue in this case.

4. This second Motion to Compel – filed on April 1, 2014 – is in relation to DR 009, which again seeks information relating to private communications with non-parties to this case. Renew Missouri has filed a timely objection to this request. Again, Ameren Missouri has elected to risk wasting Commission resources in the days leading up to the hearing in this case. Unfortunately, in this instance Renew Missouri does not feel it can give in to the Company’s request, as doing so would set the precedent of allowing utilities to force the disclosure of a broad array of irrelevant, private communications that will not affect the outcome of a case. Accordingly, Renew Missouri submits this Response to the Motion to Compel and an accompanying Motion for Protective Order.

RESPONSE TO AMEREN MISSOURI’S MOTION

5. Ameren Missouri DR 009 asks Renew Missouri to “provide any and all written communications, including but not limited to e-mails, letters received from officers, members of the governing body and/or members of MOSEIA regarding Ameren Missouri’s Solar Certificate Application.”

6. On March 31, 2014, Renew Missouri responded with an objection on the grounds that Ameren Missouri had failed to meet its burden of establishing the relevance of the private communications requested, pursuant to Missouri Supreme Court Rule 56.01(b)(1).

7. The Commission's rule at 4 CSR 240-2.090(1) states: "[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." Accordingly, Missouri Supreme Court Rule 56.01 ("Rule 56.01") controls. Rule 56.01(b)(1) states as follows:

"In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The party seeking discovery shall bear the burden of establishing relevance." (emphasis added).

8. In enforcing the above standard for discovery, Missouri courts have protected against discovery abuses. "Pursuant to Rule 56.01, the trial court may order any party to produce documents that contain evidence relevant to the subject matter in the pending action. However, the provisions for discovery were neither designed nor intended for 'untrammelled use of a factual dragnet or fishing expedition.' *City v. City of Crystal City*, 334 S.W.3d 519, 523 (Mo. App., 2010) (quoting *Misischia v. St. John's Mercy Medical Center*, 30 S.W.3d 848 864 (Mo.App.2000): "It is the affirmative duty and obligation of the trial court to prevent the subversion of pre-trial discovery into a "war of paper" for any reason or purpose.").

9. Under Rule 56.01(b)(1), Ameren Missouri fails to meet its burden of establishing the relevance of the requested written communications between Renew Missouri and MOSEIA or its affiliated individuals. In its Motion at pg. 2, the Company states:

“Because MOSEIA is a leader in Missouri’s solar energy industry and its mission is to promote the growth of solar energy in this state, Ameren Missouri wants to determine if MOSEIA has expressed any views regarding Renew Missouri’s challenge to the Company’s application in this case. If communications exist expressing MOSEIA’s position on either Ameren Missouri’s application or Renew Missouri’s challenge, that information may itself be relevant.”

However, the Company offers no rationale or explanation for how MOSEIA’s “views” on the case or Renew Missouri’s involvement could possibly be relevant to: 1) whether the evidence establishes that the proposed solar facility is necessary or convenient for the public service; or 2) whether the Commission should impose conditions on its approval of the Company’s application. (See List of Issues, filed on April 1, 2014). In fact, Ameren Missouri makes no claim as to how MOSEIA’s views are relevant either to the Company’s claim that it is entitled to a CCN or to any other parties’ positions on any issue in this case.

10. Furthermore, Ameren Missouri fails to establish how the requested written communications could be reasonably calculated to lead to the discovery of admissible evidence. On pg. 2 of its Motion, the Company continues: “Alternatively, that information may lead to the discovery of relevant information because the Company may be able to use communications from MOSEIA to cross examine Renew Missouri’s witness.” First of all, Renew Missouri’s expert – Mr. Cohen – has had absolutely no communication with any member, officer, or representative of MOSEIA regarding this case at any time. Furthermore, any contact that Mr. Cohen could have had with MOSEIA would have no bearing either on the relevancy or validity of his testimony, or on his qualifications as an expert. Therefore, the requested communications are extremely unlikely to lead to any admissible evidence through the cross examination of Mr. Cohen.

11. On pg. 3 of its Motion, Ameren Missouri concludes: “Renew Missouri’s alternate ground for its objections – that information requested from individuals who are not parties to the

case cannot be relevant – is completely without merit.” Contrary to what is alleged in Ameren Missouri’s Motion, Renew Missouri’s objection to DR 009 relies only on the single ground of relevance, as laid out by Rule 56.01(b)(1). The fact that MOSEIA is not a party to this case is not itself grounds for objection, and Renew Missouri does not claimed it as such. Rather, that MOSEIA is a non-party gets to the basic question of DR 009’s relevance to this case. On pg. 3, Ameren Missouri claims that the “views” of MOSEIA or any affiliated individuals “is unquestionably relevant – if for no other purpose than impeachment of Renew Missouri’s witness...” But as explained above, Ameren Missouri offers no suggestion for how MOSEIA’s views or opinions might be relevant to an issue in the case or, alternatively, might be used to impeach Renew Missouri’s witness. Based on the basic standard of relevance in Missouri, Ameren Missouri again fails to establish why any communications regarding the “views” of MOSEIA could be reasonably calculated to lead to the discovery of admissible evidence.

12. At the center of Ameren Missouri’s Motion is its assertion on pg. 1 that the requested information is “crucial to Ameren Missouri being able to prepare for and participate in a hearing...” But courts have held that the ability of requested information to aid a party in preparation for trial is not justification for its disclosure: “Unless matter was admissible in evidence, or was likely to lead to admissible evidence, discovery was not permitted even though the information might aid the inquiring party in preparing for trial.” *State ex rel. Isbell v. Kelso*, 442 S.W.2d 163 (Mo. App., 1969).

MOTION FOR PROTECTIVE ORDER

13. Even if the Commission determines that the information requested by Ameren Missouri DR 009 may lead to the discovery of admissible evidence, the Commission should

grant Renew Missouri's Motion for a Protective Order pursuant to Rule 56.01(c) and 4 CSR 240-

2.135(2). Rule 56.01(c) states:

[U]pon motion by a party or by the person from whom discovery is sought, and for good case shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; ... (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters...

14. Missouri courts have sought a balance between the interrogator's need for the discovery and the respondent's burden in disclosing such discovery. "In evaluating a discovery request, the need of the interrogator to obtain the discovery must be weighed against the respondent's burden in disclosing it; in addition, even though the information is properly discoverable, the trial court should consider whether the information may be obtained in a less burdensome way than that designed by the requesting party." *State ex rel. Coffman Group, L.L.C. v. Sweeney*, 219 S.W.3d 763, 766 (Mo. App. 2005). In addition, "In ruling upon objections to discovery requests, trial judges must consider not only questions of privilege, work product, relevance and tendency to lead to discovery of admissible evidence, but they should also balance need of interrogator to obtain information against burden in furnishing it. *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325 (Mo. App. 1985).

15. Regarding Ameren Missouri DR 009, justice requires that the Commission protect Renew Missouri – and individuals or entities who communicate in confidence with Renew Missouri – from annoyance, embarrassment, oppression, or undue burden or expense.

16. Renew Missouri communicates with many contacts in the various energy industries in Missouri, including individuals in the solar industry, the utility industry, representatives of commercial and industrial energy consumers, as well as individuals in regulatory agencies. These conversations and communications occur in the ordinary course of

business in relation to a broad array of issues and proceedings in which Renew Missouri is involved. Compelling Renew Missouri to disclose all emails received in confidence could compromise Renew Missouri's ability to communicate and function in its ordinary course of business. Such compulsion is certainly an undue burden and an annoyance for Renew Missouri as well as the members of MOSEIA. Furthermore, MOSEIA and its members have chosen not to become involved in this case. To compel their written communications to be made available in this case would subject members of MOSEIA to unnecessary embarrassment and oppression. Taking into account the interests of both Renew Missouri and MOSEIA in not having their ordinary conversations made available to Ameren Missouri without a compelling showing of need and relevance, justice requires that the Commission protect Renew Missouri and MOSEIA from annoyance, embarrassment, oppression, or undue burden or expense.

17. Finally, good cause exists to grant Renew Missouri a protective order. Ameren Missouri's need to obtain this information is: 1) so that the Company may know the views of MOSEIA regarding the application and Renew Missouri's involvement; and 2) to cross examine Renew Missouri's witness. Surely these needs are outweighed by Renew Missouri's burden of disclosing communications given in confidence with an expectation of privacy from MOSEIA, whose members have purposefully chosen to not become involved in this case. Furthermore, Ameren Missouri has failed to establish how MOSEIA's views might possibly be used either to suggest that the Company is entitled to a CCN or to impeach Renew Missouri's witness. Accordingly, no significant harm will result from the requested protective order. The information requested in DR 009 is not "crucial to Ameren Missouri being able to prepare for and participate in a hearing" as the Company claims on pg. 1 of its Motion; rather DR 009 is intended to annoy, embarrass, oppress, and place an undue burden on Renew Missouri as it prepares for hearing.

WHEREFORE, Renew Missouri requests that the Commission deny Ameren Missouri's Motion to Compel, and grant Renew Missouri's Motion for Protective Order by ordering that: 1) discovery for Ameren Missouri DR 009 not be had; 2) that the matters requested by Ameren Missouri DR 009 not be inquired into, or that the scope of discovery in this case be limited to information directly related to the List of Issues filed in the case; and 3) any other order regarding discovery that the Commission deems appropriate.

Respectfully Submitted,

/s/ Andrew J. Linhares

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been transmitted by e-mail this 2nd day of April, 2014, to all counsel of record in this case.

/s/ Andrew J. Linhares

Andrew Linhares, # 63973