

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

In the Matter of Union Electric Company	)	
d/b/a Ameren Missouri's Tariffs to	)	<b><u>Case No. ER-2012-0166</u></b>
Increase Its Revenues for Electric Service	)	

**MOTION FOR RECONSIDERATION  
AND REQUEST FOR EXPEDITED TREATMENT**

COME NOW the Office of the Public Counsel and for its Motion for Reconsideration state as follows:

1. For the reasons set forth herein, Public Counsel asks the Commission to reconsider its order of September 24 allowing Ameren Missouri to interject a new issue into this rate case in its sur-surrebuttal testimony. The Commission's provision in its order allowing parties the opportunity to file additional testimony on four days notice (while those parties are preparing for and participating in the hearing) does not even come close to mitigating the harm that the order does. It does not even come close to restoring a level playing field for the parties.

2. On February 3, 2012, Union Electric Company, d/b/a Ameren Missouri, filed tariffs designed to increase rates by approximately \$376 million. On February 6, the Commission issued an order suspending the tariffs until January 2, 2013 and setting an evidentiary hearing beginning on September 24, 2012 (subsequently extended until September 28). On March 28, the Commission issued an order that set the following dates for testimony filings:

Direct Testimony on revenue requirement	July 6, 2012
Direct Testimony on rate design	July 19, 2012
Rebuttal Testimony	August 14, 2012
Surrebuttal or Cross-Surrebuttal Testimony	September 7, 2012

3. On September 11, Ameren Missouri filed a motion asking the Commission to strike a portion of the prefiled surrebuttal testimony of Staff witness Lena Mantle and MIEC witness James Dauphinais. In the alternative, Ameren Missouri requested leave to file sur-surrebuttal testimony responsive to the objected-to portions of the testimony of witnesses Mantle and Dauphinais. The Commission granted Ameren Missouri's alternative request and allowed the company to file specifically limited sur-surrebuttal testimony:

**The disputed issue concerns a provision in Ameren Missouri's FAC tariff relating to Midwest ISO transmission charges. The Commission agrees with the parties that the question can best be brought to the Commission's attention by allowing Ameren Missouri an opportunity to file sur-surrebuttal testimony. The Commission will grant Ameren Missouri's alternative motion for leave to file sur-surrebuttal testimony regarding the disputed issue.<sup>1</sup>**

The "disputed issue" is whether the FAC allows for flow-through of transmission costs. As the Commission recognized, it "concerns a provision in Ameren Missouri's FAC tariff." It is a narrow issue having to do with interpretation of "a provision in Ameren Missouri's FAC tariff" and a proposal to clarify that provision. The "disputed issue" is not a wide-open issue about what might be the best way to deal with transmission costs or about an entirely new mechanism for recovering transmission costs.

4. In response to the Commission's September 13 order allowing sur-surrebuttal testimony, Ameren Missouri filed testimony of Jaime Haro that addressed the issue authorized. But it also introduced a new issue: the concept of a transmission "tracker." The tracker is not proposed to be a "provision in Ameren Missouri's FAC tariff," but instead is an entirely new idea that is intended to be an alternative to resolving the question of what the FAC provides or allows.

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<sup>1</sup> Order Granting Ameren Missouri's Alternative Motion to File Sur-Surrebuttal Testimony, issued September 13, 2012, pages 1-2

5. MIEC, later joined by the Staff, moved to strike the portion of Mr. Haro's testimony that proposed the transmission tracker. MIEC pointed out that Mr. Haro's testimony about a transmission tracker was not responsive to the testimony of either MIEC witness Dauphinais or Staff witness Mantle. The Commission disagreed in an order issued on September 24. The Commission attempted to find middle ground between striking the testimony that introduced the new issue and simply allowing it into the record. For the reasons explained herein, the attempt to find middle ground fails.<sup>2</sup>

6. If Ameren Missouri wants to propose a new tracker mechanism for a new category of costs that have never before been subject to a tracker mechanism in Missouri, it can explain the proposal in its next case in its direct testimony in sufficient detail for parties to respond.<sup>3</sup> Then other parties would have a full and fair opportunity to analyze the proposal, delve into the details, and perhaps even discuss and resolve the issue among themselves. None of those things can happen in the short time remaining in this case.

7. Typically, the Commission does not allow new issues to be interjected into rate cases late in the process. When the Commission itself considered adding the issue of rate stabilization, it quickly recognized that it was too late in the process to allow for adequate consideration of the rate stabilization issue. When Staff attempted to introduce a new issue in this case in surrebuttal through the testimony of David Murray, the Commission struck that testimony, noting:

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<sup>2</sup> There is an old adage that when one finds oneself in a hole, the first thing to do is stop digging. When the Commission's purported solution to a problem is to allow the filing of sur-sur-rebuttal testimony, it appears that unnecessary and harmful digging continues.

<sup>3</sup> As noted in the testimony of Staff witness Hanneken, Ameren Missouri plans to file another case (its sixth since 2007) in the third quarter of 2013, which begins just nine months after rates will go into effect in this case.

The Commission agrees with Ameren Missouri that it would be inappropriate for Staff to attempt to introduce a significant new adjustment in its surrebuttal testimony. Such action would severely limit the ability of Ameren Missouri to respond to the adjustment and would be prohibited under the Commission's rules.<sup>4</sup>

8. The Commission should not be thinking that a new tracker for a new category of costs is just a minor issue. If the transmission tracker proposal is allowed to remain, it will be one of the most controversial issues in the case. Consumer representatives are strongly opposed to trackers in general, and to be forced to address a brand new one on just a few days notice does not provide an adequate opportunity for them to pull together a cogent response.

9. It does not make sense from a due process standpoint or a policy standpoint for the Commission to casually depart from its rules and bring in an issue – after surrebuttal! – that is so controversial. The Commission's rules do not even contemplate sur-surrebuttal testimony, but 4 CSR 240-2.130(7)(D) provides that: "Surrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony." The Commission has generally understood that allowing "responsive" testimony does not constitute leave to raise entirely new proposals as alternatives to issues that have been raised by other parties. It goes without saying that the restrictions on surrebuttal testimony should be even more stringently applied to sur-surrebuttal testimony.

10. When the issue was limited to a question about how the FAC process deals with (or should deal with) transmission costs, Public Counsel was comfortable with the Staff's handling of the issue. But the Staff does not have quite the same position on trackers in general as Public Counsel, and a transmission cost tracker raises some additional issues. Some of the issues with a transmission cost tracker are:

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<sup>4</sup> Order Striking a Portion of David Murray's Surrebuttal Testimony, issued September 7, 2012

- What would be the impact on Ameren Missouri's business risk if a tracker is adopted? What should be the corresponding reduction in allowed return on equity?
- What impact would a transmission cost tracker have on Ameren Missouri's participation in MISO? Would it reduce or eliminate Ameren Missouri's incentive to fight or even question unnecessary transmission projects planned for the MISO footprint?

Public Counsel does not have the ability to even begin to address these issues in the time remaining in this case. Public Counsel has long since allocated its scarce resources according to the issues that have been developed in this case and all the other pending cases. There is simply no spare capacity to address the new tracker issue on such short notice. Staff might be able to hurriedly put some testimony together by September 24, and the MIEC might, but as the Commission knows from Case No. EO-2011-0128, Public Counsel does not necessarily agree with those parties on MISO issues. Moreover, any decision the Commission makes in this case on a transmission cost tracker will have an impact on the other electric utilities in the state. Once such mechanisms are adopted, regardless of the original evidentiary support for them,<sup>5</sup> they have a strong tendency to proliferate.

11. As an alternative to striking a portion of Ameren Missouri witness Haro's sur-surrebuttal testimony, the Commission could simply reconsider its treatment of Ameren Missouri's motion to strike portions of the surrebuttal testimony of MIEC witness Dauphinais and Staff witness Mantle. If the Commission were to have granted the primary relief requested in the motion rather than the alternative relief, there would be no need for any sur-surrebuttal or

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<sup>5</sup> None of the current Commissioners have been in office long enough to remember that the 95% FAC pass-through percentage was established when then-Chairman Jeff Davis conceded at an open meeting that he "plucked that number out of the air." Despite such dubious origins, the 95% has not only remained in effect for GMO (then Aquila), but has also spread to all other electric utilities eligible to use an FAC. Even though there was never any evidentiary support for that percentage, the mere fact that the Commission authorized it in one case has given it a *de facto* presumption of legitimacy that has yet to be overcome.

sur-sur-surrebuttal testimony. While such an approach would mean that the issue of the proper interpretation of the FAC tariffs with respect to transmission costs would not be addressed in this case, that issue would be addressed in a subsequent FAC case. Arguably it would be better to address it in such a case where there would actually be sums in controversy, rather than in this case in which a Commission decision would be akin to a declaratory judgment about how to interpret tariff language even though there are no dollars at issue.

12. In support of its motion for expedited treatment, pursuant to 4 CSR 240-2.080(14)(A), Public Counsel states that it desires the Commission to act as soon as possible.<sup>6</sup> Pursuant to 4 CSR 240-2.080(14)(B) Public Counsel states that allowing the testimony of Ameren Missouri witness Haro in the case, and keeping the late-introduced issue of a transmission tracker in the case, will create a situation in which opposing parties have no sufficient opportunity to address a new issue. Pursuant to 4 CSR 240-2.080(14)(C), Public Counsel states that this motion was filed as soon as possible after the Commission issued its September 24 order and within the time allowed by 4 CSR 240-2.160(2)

WHEREFORE Public Counsel respectfully requests that the Commission reconsider its September 24 order that declined to strike the portion of witness Haro's sur-sur-rebuttal testimony addressing a transmission tracker, and upon reconsideration strike that testimony.

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<sup>6</sup> Since the September 24 order was issued by delegation, Public Counsel assumes that an order granting reconsideration of it can be issued by delegation as well.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

**/s/ Lewis R. Mills, Jr.**

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to all parties this 26<sup>th</sup> day of September 2012.

**/s/ Lewis R. Mills, Jr.**

By: \_\_\_\_\_