

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of Union Electric Company, d/b/a)	<u>File No. ER-2012-0166</u>
Ameren Missouri's Tariff to Increase Its Annual)	Tariff No. YE-2012-0370
Revenues for Electric Service)	

ORDER GRANTING AMEREN MISSOURI'S MOTION TO STRIKE PORTIONS OF NRDC'S BRIEF

Issue Date: November 14, 2012

Effective Date: November 14, 2012

On November 9, 2012, Union Electric Company, d/b/a Ameren Missouri filed a motion asking the Commission to strike three portions of the initial post-hearing brief filed on November 2 by the Natural Resources Defense Council, Renew Missouri, and the Sierra Club (collectively NRDC). Ameren Missouri complains that the challenged portions of the NRDC brief improperly attempt to introduce evidence that is not part of the hearing record.

NRDC filed a response to Ameren Missouri's motion on November 13. In that response, NRDC concedes that one portion of its brief does cite to various studies that were not made a part of the hearing record and agrees that portion of the brief was improper. However, NRDC contests Ameren Missouri's challenge to the other two portions of its brief.

Before addressing the particular allegations of Ameren Missouri's motion to strike, the Commission will first address the question of whether an order to strike a portion of a post-hearing brief is an appropriate remedy when improper argument is offered in such brief. The law is certainly clear that the Commission must make its decision based on competent and substantial evidence. The briefs filed by the parties are not evidence and the Commission cannot accept facts presented for the first time in a party's brief as

competent and substantial evidence. However, it is not clear that the Commission needs to strike portions of a party's brief that would improperly seek to introduce such facts.

In its motion, Ameren Missouri concedes that it was unable to find any case law regarding administrative proceedings that specifically addresses the appropriateness of striking portions of a brief that improperly attempt to introduce new evidence. Ameren Missouri, however, does cite *Daniels v. Mo. Div. of Employment Security*¹ for the proposition that it is appropriate to strike such passages from a brief filed at the Court of Appeals.

A review of the *Daniels* decision reveals that while the Court of Appeals held that it was unable to review evidence outside the record that was presented for the first time on appeal, it actually refused to review the appellant's argument for failure to present a proper point relied on as required by the Court's rules. The Court of Appeals did not strike any portion of the appellant's brief.

The Commission is reluctant to encourage the filing of motions to strike portions of an opponent's brief. The Commission is capable of determining for itself whether competent and substantial evidence exists to support a particular proposition. The Commission is also aware that facts alleged for the first time in a party's brief are not competent and substantial evidence. If a party believes an opponent has offered improper argument, usually its best remedy is to address that argument in its own reply brief. However, since the propriety of NRDC's brief has been challenged, the Commission will address the challenged portions of the brief.

Ameren Missouri's first challenge is to a portion of a paragraph on page 5 of the brief that cites studies by the U.S. National Academy of Sciences and other organizations

¹ 248 S.W.3d 630 (Mo. App. S.D. 2008).

regarding energy efficiency and customer reaction to payback times. The challenged portion begins with “On this point, overwhelming evidence has been marshaled ...” and continues through the end of the paragraph. NRDC agrees the studies it cites in this portion of the brief are not in evidence and agrees it should not have cited to them in its brief. The Commission will strike that portion of NRDC’s brief.

The other two portions of NRDC’s brief that Ameren Missouri challenges do not cite to non-record evidence. The first explains a provision in the MEEIA stipulation and agreement that Ameren Missouri’s witness, William R. Davis, introduced into evidence as a schedule to his testimony. The second explains the concept of free-ridership and its impact on the recovery of revenues through a lost-revenue mechanism. While they do not cite to non-record evidence, both portions of NRDC’s brief go beyond a description of the record evidence or argument from that evidence and attempt to offer additional expert testimony to rebut the surrebuttal testimony of Ameren’s witness. As such, the challenged portions of the brief are improper and the Commission will strike them.

The portion of NRDC’s brief that will be struck is found on page 6 of the brief and begins with “First, the Commission-approved lost-revenue mechanism does allow Ameren to recover lost revenues ...” and continues through “By not accounting for free-ridership, the lost revenue mechanism allows for recovery of revenues that might have been lost as a result of efficiency from third-party policies or programs.”

THE COMMISSION ORDERS THAT:

1. Union Electric Company, d/b/a Ameren Missouri’s Motion to Strike Portions of Post-Hearing Brief is granted, as described in the body of this order.

2. This order shall become effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Morris L. Woodruff, Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 14th day of November, 2012.