

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 12th day of
September, 2012.

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 REGARDING MOTION TO QUASH NOTICE OF DEPOSITION
OF THOMAS VOSS AND TO QUASH SUBPOENA DUCES TECUM**

Issue Date: September 12, 2012

Effective Date: September 12, 2012

On September 10, 2012, Ameren Corporation filed a motion asking the Commission to quash a notice of deposition and a subpoena duces tecum by which Staff seeks to obtain records from Ameren Corporation. Ameren Corporation also seeks a protective order to prevent Staff from deposing Mr. Voss. Staff intends to depose Mr. Voss on September 13, so Ameren Corporation sought expedited consideration of its motion. Staff responded to the motion on September 11 and Ameren Corporation filed a response later that day.

Staff served its notice of deposition and the subpoena duces tecum on Ameren Corporation on September 5. Although the notice of deposition is directed toward Ameren Corporation's CEO, Thomas Voss, Staff is only seeking the production of documents and is not asking that Mr. Voss appear to be deposed. Ameren Corporation is challenging the notice of deposition and subpoena duces tecum on both procedural and substantive grounds.

Ameren Corporation contends that the notice of deposition and subpoena duces tecum are procedurally defective on two grounds. First, Commission Rule 4 CSR 240-

2.100(2) provides that the Commission is not to issue a subpoena duces tecum fewer than twenty days before a hearing except upon a showing of good cause. The hearing of this case is set to begin on September 24, which is nineteen days from when Staff obtained and served its subpoena duces tecum on September 5. Staff claims that its inclusion of a statement of good cause as part of its application for subpoena duces tecum means that the Commission found such good cause when the presiding officer signed the subpoena duces tecum on September 5. Ameren Corporation also seems to assume that the Commission made such a finding of good cause when the presiding officer signed the subpoena. It objects that the finding was improperly made as the result of an ex parte contact and asks the Commission to reconsider that finding.

Neither Staff nor Ameren Corporation is correct. The Commission has not yet made any finding of good cause. The issuance of a subpoena to appear at a deposition by the Commission is handled much the same way the issuance of subpoenas is handled in civil litigation. Where Missouri Rule of Civil Procedure 57.09(a)(1) allows a subpoena to appear for a deposition to be issued by the officer or person before whom the deposition may be taken, or by the clerk of the court in which the action is pending, Commission Rule 4 CSR 240-2.100(4) provides that subpoenas duces tecum may be issued by the secretary of the commission, a commissioner, or a law judge. If the person or party receiving the subpoena believes it to be improper for any reason, their remedy in both civil litigation and before the Commission is to file a motion to quash and thereby bring the matter to the attention of the court or the Commission. In both situations, an individual's signature on the subpoena is merely a ministerial act and is not a substitute for an order of the Commission, even when, as here, the subpoena was signed by the presiding officer.

Although the Commission has not yet made a determination of whether good cause exists, Staff and Ameren Corporation have now provided extensive arguments on that question. Staff asserts that good cause for waiting until the nineteenth day before the hearing exists because it was unable to schedule the records deposition sooner due to the press of other business. Staff further explained that its witness, David Murray, became concerned about the redacted documents during a site visit to Ameren's headquarters on August 30 and 31. Ameren Corporation counters that Staff has been aware of its objection to producing the documents in question since February 16, 2012, when the company objected to Staff's data request that asked for those documents, but took no action to obtain those documents until September 5.

Staff has certainly waited until very late in the process to attempt to obtain these documents. Even though Staff should have acted sooner, there is no indication that Ameren Corporation has been surprised or any anyway prejudiced by Staff's delay. Furthermore, the Commission is unwilling to deny any party discovery simply because it was a day late in requesting that discovery. The Commission finds good cause for issuing the subpoena nineteen days before the start of the hearing.

Merely finding that Staff has demonstrated good cause for its delay does not end the inquiry. Ameren Corporation also claims that the subpoena, as issued, exceeds the Commission's authority. Ameren Corporation asserts that there is no provision in Chapter 386, RSMo that would allow the Commission to issue a subpoena to a non-party, such as Ameren Corporation. Instead, Ameren Corporation contends the Commission's only authority to issue a subpoena duces tecum to a non-party is found in Section 536.077, RSMo (Supp. 2011). That provision of Missouri's Administrative Procedures Act indicates:

Any such 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 a member thereof.

Ameren Corporation argues that since this subpoena duces tecum was signed by a regulatory law judge without an order of the Commission it is invalid.

However, Section 386.410.2, RSMO 2000 explicitly authorizes the Commission, any Commissioner, or any party in any hearing before the Commission to “cause the deposition of witnesses”, and “to that end may compel the attendance of witnesses and production of books, waybills, documents, papers, memoranda, and accounts.” That is a clear grant of authority to the Commission to issue subpoenas duces tecum and the Commission has explicitly delegated that authority to its regulatory law judges in Commission Rule 4 CSR 240.2.100(4), as it is allowed to do by Section 386.240, RSMO.

Ameren Corporation also challenges the relevance of the documents that Staff seeks. The subpoena duces tecum demands Ameren Corporation produce certain documents presented to or created by the Ameren Corporation board of directors. Ameren Corporation asserts the documents in question pertain solely to Ameren affiliate companies that are not regulated by the Commission and do not relate in any way to any transaction between those entities and Ameren Missouri. However, in its response to Staff’s reply, Ameren Missouri concedes that it has possession of the board of director documents responsive to Staff’s DR No. 7, which Ameren Corporation and Ameren Missouri contend are the same documents sought by Staff through the subpoena.

Staff’s response argues that the documents are relevant because they are expected to reveal that Ameren has hired consultants that use estimated costs of common equity that

are significantly less than that recommended by Ameren Missouri's expert witness in this rate case. Staff further argues that the documents it seeks may reveal risk factors and credit impediments affecting affiliated companies that may also affect Ameren Missouri's cost of debt.

As the party seeking discovery, Staff has the burden of establishing the relevance of the documents it seeks.¹ The Commission finds that Staff has met that burden. The documents it seeks appear to be relevant and the Commission will deny Ameren Corporation's motion to quash.

THE COMMISSION ORDERS THAT:

1. Ameren Corporation's Motion to Quash Notice of Deposition, to Quash Subpoena Duces Tecum, and for Protective Order is denied.

2. This order shall become effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Kenney and Stoll, CC., concur;
Jarrett, C., dissents.

Woodruff, Chief Regulatory Law Judge

¹ Mo. Supreme Court Rule 56.01(b)(1).