

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric)
Company, Doing Business as AmerenUE, for an)
Order Authorizing the Sale, Transfer and)
Assignment of Certain Assets, Real Estate,)
Leased Property, Easements and Contractual)
Agreements to Central Illinois Public Service)
Company, Doing Business as AmerenCIPS,)
And, in Connection Therewith, Certain Other)
Related Transactions.)

Case No. EO-2004-0108

MOTION OF UNION ELECTRIC COMPANY FOR RECONSIDERATION OF DISCOVERY ORDER

Comes Now Union Electric Company d/b/a AmerenUE (AmerenUE or Company), pursuant to 4 CSR 240-2.160(2), and files this Motion for Reconsideration of the Order issued January 23, 2004 by Regulatory Law Judge (RLJ) Thompson (hereafter Discovery Order). The Company respectfully disagrees with the Discovery Order concerning its ruling on certain data requests of the Office of the Public Counsel (OPC), and requests the Commission to reconsider this ruling in accordance with the Company's position set forth below.

In summary, the Discovery Order was incorrect and unlawful in concluding that AmerenUE had waived certain privileges by not asserting them in a timely objection letter to the OPC's data requests. The Discovery Order was incorrect because 1) the Company did assert the relevant privileges at the earliest opportunity, and did not waive them; and 2) in any case, it is improper and unfair in this case to require the Company to turn over documents that are subject to the attorney-client and work product privileges, which have long been honored by Missouri courts of law and this Commission.

The Company also disagrees with other provisions of the Discovery Order regarding rulings made on sulfur dioxide related transactions of affiliates of AmerenUE. However, as a

compromise AmerenUE has already provided such information to the OPC, and will not be challenging those rulings.

I. BACKGROUND

This case involves the Company's request to transfer its Illinois service area to an affiliate, Central Illinois Public Service Company d/b/a AmerenCIPS.

On November 26, 2003 the OPC sent AmerenUE Data Request Nos. 532, 535, and 536. In summary, these three Data Requests sought information about the Company's Joint Dispatch Agreement (JDA). As discussed in the direct testimony of Company witness Craig D. Nelson, Vice President of Corporate Planning for Ameren Services Company (Ameren Services), the JDA is an agreement between AmerenUE and its affiliate, Ameren Energy Generating Company. It sets forth the terms and conditions for the joint dispatch of their generating units. Also, AmerenCIPS is a party to the JDA because it governs the assignment of costs and revenues between AmerenCIPS and AmerenUE associated with third party transmission transactions under the Ameren Open Access Transmission Tariff on file with the FERC. (Nelson Testimony at p. 5)

Prior to the receipt of the November 26 Data Requests, AmerenUE had committed to provide to the Commission Staff (Staff) and the OPC an analysis of the JDA. As attested to in the attached affidavit of Richard A. Voytas, Mr. Voytas and other Company representatives had told Staff and the OPC that the analysis would not be complete until the end of 2003, or early 2004. (See Attachment A for Mr. Voytas' affidavit.) Mr. Voytas is the Manager of the Corporate Analysis section of the Corporate Planning Department of Ameren Services.

As a result, when the November 26 Data Requests arrived, the Company had not yet completed the JDA analysis. Consequently, the Company responded on December 12 by stating that it would not be ready to provide the analysis until senior management at AmerenUE had reviewed and approved the results. (See Attachment B for a copy of DR No. 532 and the Company's December 12 response. The Company's responses to Data Request Nos. 535 and

536 were the same as the response to Number 532, and thus they simply referenced the answer contained in that first Data Request.)

Mr. Voytas authored the December 12 response. Mr. Voytas reports to Mr. Nelson. Both Mr. Voytas and Mr. Nelson had prepared direct testimony which was filed in this case on September 17, 2003. The purpose of Mr. Nelson's testimony was to provide an overview of the Company's request for transferring its Illinois service area to AmerenCIPS, and how and why that would occur. The purpose of Mr. Voytas' testimony was to explain why the transfer of the Illinois service area was the least cost alternative available to supply AmerenUE's long term electric capacity and energy needs.

Because of the impending end of year holidays, and due to other work-related commitments of all concerned, the results could not be finalized and presented to senior management until January 12, 2004. At that meeting, attended by the undersigned counsel, the results of the JDA analysis were presented and direction was given as to alternatives for the future disposition of the JDA. Prior to, during, and after that January 12 meeting, information was exchanged between the undersigned counsel and management, and senior management, for the Company that was related to the legal strategy to be employed in the present case and with respect to the future treatment of the JDA and the regulatory issues associated with it.¹

Shortly after the January 12 meeting, Messrs. Nelson and Voytas arranged for discussions with Staff and the OPC to address the analysis of the existing JDA, as the Company had previously committed to do. The Company met with Staff and OPC on January 15. (OPC elected to participate by conference call.) At that time, the Company provided information concerning the analysis of the existing JDA and also discussed those

¹ Per a previous Commission order, any substantive changes to the JDA would require Commission approval. See Order issued January 13, 2000 in Case No. EA-222-37 at p. 4. Approval by one or more other regulatory agencies, primarily the FERC, would be required as well. As discussed below, the Company's Application and testimony in the present case does not propose any changes to the JDA. Instead, the Company has assumed that the JDA would continue without change after the transfer of the Illinois service area.

results at length. Also, the Company began settlement discussions concerning the future disposition of JDA. After this meeting, the Company began to prepare a final response to DR Nos. 532, 535 and 536.

On January 16, OPC, the Company and Staff participated in a discovery conference before the RLJ concerning various objections that AmerenUE had made to some of the OPC's Data Requests. At the conference, the undersigned attorney for AmerenUE indicated that a final response would be forthcoming on Data Requests 532, 535 and 536. The undersigned also indicated what had been provided already, and what would be provided shortly, and indicated that the Company would be asserting the attorney-client and work product privileges for some of the documents responsive to these Data Requests. (Transcript 10-11)

The undersigned indicated that it was his understanding that the Public Counsel had given the Company additional time beyond December 12 to respond to the three Data Requests. (Tr. 13) In response, the Public Counsel agreed that the OPC had allowed the Company more time to provide its responses, but did not believe that this gave the Company "any waiver or extension as to the time to make any objection." (Tr. 13-14)

In response, the RLJ concluded that the privileges were waived because there was no timely objection letters to these Data Requests in the Company's December 12 response. (Tr. 14)

On January 23, the Company completed its final response to Data Request No. 532 and sent it to the OPC. See Attachment C for a copy of the cover page for this final response.²

Finally, the Company notes that it has received and responded to over 100 data requests submitted to it by the OPC in this case (Numbers 501-603). The Company has also received approximately 50 data requests from the Staff. The Company has attempted in good

² The Company's final response to No. 532 contained information that was marked as Highly Confidential, pursuant to the Protective Order issued in this case. However, the cover page, which is provided as Attachment C, does not contain any Highly Confidential information.

faith to respond to all of these data requests in a thorough and timely manner. In light of the many data requests received from the OPC and Staff, and in light of the compressed discovery time frame imposed by the Order establishing a Procedural Schedule in this case, this has been a challenging undertaking for the Company.³

II. DESPITE THE ABSENCE OF AN OBJECTION LETTER, THE COMPANY DID NOT WAIVE THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES.

The Company would agree that if it had an objection to the three Data Requests it should have noted this in its initial response sent on December 12. When preparing an objection, the Company agrees that generally all that is needed in order to decide whether to object is the language of the Data Request itself. This is not true in determining whether to assert a privilege. As a result, the absence of an objection letter should not imply that the Company was waiving any privileges it might assert. Because the matter was still under review, the Company was not in a position to consult with the undersigned counsel and determine what privileges it would want to assert. In any case, Missouri case law makes clear that no waiver occurred in this case.

A. Missouri Law Provides that No Waiver Occurred Because the Documents Have Not Been Disclosed.

The Discovery Order began by citing Rule 56(b)(1) of the Missouri Rules of Civil Procedure. The language of this rule authorizes discovery of certain matters that are not privileged. This necessarily means that privileged matters, such as communications between attorney and client, are not discoverable unless the privileged is waived by the client. State ex rel. Cain v. Barker, 540 S.W.2d 50, 52 (Mo. 1976).

³ On December 2, 2003, the Commission issued an Order Establishing Procedural Schedule for this case. In this Order, the Commission required that “As to all data requests received after the effective date, objections must be served within five days and answers within 10 days, except as the Commission may otherwise direct”. (Order, p. 5) This was a modification to the Commission’s rules allowing for 10 days to object and 20 days to answer data requests. 4 CSR 240-2.090(2). The Order took effect December 2.

The question in this case is whether the Company waived its right to assert privileges by not including them in its December 12 initial response to the OPC. Based on Missouri case law, no waiver occurred because the information that was subject to the privileges has not been provided or disclosed to the OPC or to any other outside party.

In State ex rel. Cain, supra, the Missouri Supreme Court addressed the question of whether a privilege had been asserted in a timely matter. The Court cited a 1926 opinion to answer this question:

The proper time for objection is when a question calling for a disclosure or privileged matter is asked and *before it is answered*. (Emphasis supplied) [540 S.W.2d at citing Rock v. Keller, 278 S.W. 759 (Mo. 1926).]

The Court in State ex rel. Cain then proceeded to address the question at hand:

Here the objection by means of the motion for protective order was timely because it was raised when a request for disclosure of the statements was made but before the request was answered or complied with by furnishing the documents for inspection.

In the present case, the Company did not waive any of the privileges cited at the January 16 conference, as followed up with its written response on January 23, because no answer was provided in the December 12 response, and because the privileged documents have not yet been disclosed.

The Company does not mean to suggest that it is proper to hold back the assertion of privileges until the last possible moment before the documents would otherwise be produced. Further, the Company agrees that not only objections but also privileges should be asserted at the earliest possible opportunity consistent with the Commission's rules of discovery. However, in this case, it was not possible for the Company to decide what privileges it would assert when it gave the OPC its initial response on December 12. Mr. Voytas and others from Corporate Planning had to discuss this matter with the Company's senior management, and also with the undersigned attorney, to obtain management input and legal advice as to how to proceed. In the course of those discussions information was developed by the undersigned to provide legal

advice to Mr. Nelson. Further, the undersigned requested information from Mr. Voytas and his group to provide legal advice as to the future disposition of the JDA. (See Attachment C.)

Consequently, the Company timely asserted the privileges cited at the January 16 discovery conference, as confirmed in writing by the January 23 response.

B. Further, There was no Waiver of Privileges for any Other Reason.

Additional Missouri case law confirms that no waiver occurred here for any reason other than timeliness.

The attorney-client privilege is established by statute in Missouri. (Section 491.060 RSMo.) The privilege protects “confidential communications between an attorney and client concerning representation of the client. In re Marriage of Hershewe, 931 S.W.2d 198, 202 (Mo. App. S.D. 1996). The policy is fundamental and disclosure is the exception. Id.; State ex rel. Missouri v. Timmons, 956 S.W.2d 277, 285 (Mo. App. W.D. 1997). In Timmons, the Western District Court of Appeals discussed how a waiver of the attorney-client privilege could occur:

The attorney-client privilege belongs to the client. [citations omitted] An attorney is incompetent to testify “concerning any communication made to him by his clients in that relation or his advice thereon without consent of such client.” ... A client consents to disclosure by voluntarily revealing the protected information, [...] or by placing the subject matter of the privileged communication in issue in the litigation. [...] In addition, waiver of the privilege may occur where proof of the elements of a party’s claim will necessarily entail proof of the contents of an attorney-client communication.

[956 S.W.2d 285; citations omitted]

A corporate manager, such as Mr. Voytas and Mr. Nelson, is a “client” for purposes of the attorney-client privilege. State ex rel. Polytech v. Voorhees, 895 S.W. 2d 13, 14 (Mo. 1995). In Polytech, the Missouri Supreme Court explained that the work product doctrine protects the thoughts and mental processes of the attorney preparing a case. Work product includes documents prepared in anticipation of litigation. Counsel

must have collected the documents to prepare a case for possible litigation. Id. As discussed above, the documents requested by the undersigned meet this test.

In the present case, the Company as client does not consent to revealing the privileged information, and has not done so. Second, the Company has not placed the subject matter of the privileged communication in issue in the case pending before the Commission. The privileged subject matter concerns the future disposition of the JDA and the regulatory issues associated with such alternatives. (See Attachment C.) The Company's Application has requested Commission approval of the transfer of its Illinois service area to AmerenCIPS, pursuant to Section 393.190 RSMo. and related approvals regarding the transfer of the Company's Illinois decommissioning trust fund. The Application did not request any changes to the JDA, and assumed that the JDA would continue unchanged. As referenced above, Mr. Nelson's testimony has only a single reference to the existence of the JDA in a background section. Mr. Voytas' testimony does not refer to the JDA at all. Nor does the testimony of Kevin Redhage on nuclear decommissioning issues. As a result, the Company has not placed the privileged information regarding the future disposition of the JDA before the Commission.

Finally, the Company's burden of proof in the present case will not entail proof of the contents of the privileged information. The Company's burden under Section 393.190 is to show that the transfer of the Illinois service area will not be detrimental to the public in Missouri. State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466 (Mo. App. ED 1980). The Company has filed the direct testimony of Messrs. Nelson, Voytas and Redhage to provide evidence to meet this burden. As previously discussed, none of the testimonies address the future disposition of the JDA. Instead, the testimony of Messrs. Nelson and Voytas imply that the JDA would not be impacted or changed by the proposed transfer. As noted above, any substantive changes to the JDA would require Commission approval. The Company has not sought any such changes to the

JDA in the present Application. In the Company's view, no such changes are necessary in order to show that there will be no detriment to Missouri as a result of the transfer of the Illinois service area.

Consequently, no waiver occurred for any other reason recognized under Missouri law.

III. THE COMMISSION'S RULES FOR RESPONDING TO DISCOVERY REQUESTS FOR THIS CASE DID NOT ALLOW THE COMPANY TO ASSERT THE PRIVILEGES IN ITS INITIAL DECEMBER 12 RESPONSE.

The Discovery Order assumed that the Company was in a position on December 12 to assert all relevant privileges. This assumption is not a valid one given the Commission's deadlines for objecting and responding to Data Requests.

As discussed above, the Company responded on December 12 and indicated that it was not ready to provide the final results of the JDA because they were currently under review by senior management. Since the basic analysis and review of the existing JDA had not been completed, the Company was not in a position to assert any privileges as to related documents which might fall within the attorney-client or work product doctrines. It was simply premature to respond. The undersigned counsel needed to review the relevant documents and obtain input and direction from senior management to develop a legal strategy for the present case and for the future disposition of the JDA. Additionally, management and senior management needed input from the undersigned to evaluate the legal issues associated with the present case and the future disposition of the JDA. The Company was not in any position to do so until January 12 when the meeting with senior management occurred. Thereafter, the Company in consultation with the undersigned determined the documents for which privileges would be asserted, and prepared and assembled the documents for which no privileges would be asserted and which were turned over to the OPC.

In summary, it was simply not feasible to assert privileges on December 12 and the Company should not be punished for not having done so.

IV. THE DISCOVERY ORDER IS IMPROPER AND UNLAWFUL BECAUSE IT GRANTED TO OPC RELIEF GREATER THAN REQUESTED BY OPC AND PROVIDES AN UNFAIR WINDFALL TO THEM.

In any case, to require the disclosure of the privileged documents would be improper and unfair in that it would grant to OPC a greater amount of information than they sought in their Data Requests. OPC's Data Requests sought only a privilege log for any documents covered by a privilege. Each of the three Data Requests included the following language:

If AmerenUE's response to this DR does not include all documents within the scope of those requested due to AmerenUE's belief that the excluded documents are covered by attorney-client privilege or the attorney work product doctrine or some other objection, please provide the following information regarding each excluded document: the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege cited.

In its response dated January 23, the Company provided information responsive to the OPC's request as to the privileged documents. It would be improper and unfair for the Commission to allow the OPC to have the underlying documents themselves, particularly when the OPC's language would seem to represent an understanding that they would not be entitled to documents for which a legitimate privilege has been asserted.

To ensure that these principles are applied in an even handed manner, the Company commits that it would not seek any information from the OPC or any other party to this case which is the subject of a valid privilege recognized by Missouri law. Missouri has recognized these privileges in order to ensure that clients receive adequate legal advice to make informed decisions. It does no party any good to undermine this.

V. CONCLUSION

In conclusion, the Company requests that the Commission grant this Motion for Reconsideration of the January 23rd Discovery Order and conclude that the privileges asserted in the Company's response to Data Request Numbers 532, 535 and 536 have not been waived.

Respectfully submitted,

UNION ELECTRIC COMPANY,
d/b/a AmerenUE

/s/ Joseph H. Raybuck

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Dated: January 30, 2004

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 30th day of January 2004.

/s/ Joseph H. Raybuck

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

In the Matter of the Application of Union Electric)
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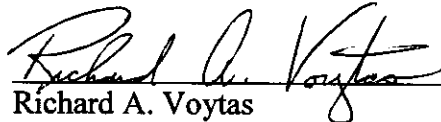
AFFIDAVIT OF RICHARD A. VOYTAS

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

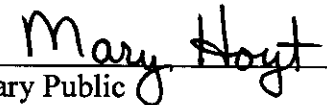
Richard A. Voytas, being first duly sworn on his oath, states:

1. My name is Richard A. Voytas. I work in the City of St. Louis, Missouri and I am employed by Ameren Services Company as Manager, Corporate Analysis.

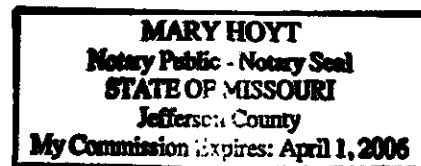
2. I hereby swear and affirm that I have read the Motion Of Union Electric Company For Reconsideration Of Discovery Order, that I am familiar with its contents, and that the contents are true and correct to the best of my knowledge, information, and belief.


Richard A. Voytas

Subscribed and sworn to before me this 30th day of January, 2004.


Notary Public

My Commission expires: 4-1-2006



**AmerenUE's Response to
MPSC Staff Data Request
MPSC Case No. EO-2004-0108
AmerenUE's Application to Transfer Assets to AmerenCIPS**

No. 532:

Request From: Ryan Kind

Please provide a copy of all documents that have been created by or for Ameren or its affiliates within the last three years that contain descriptions or analysis of, or references to, possible plans for modifying or eliminating the JDA (joint dispatch agreement) ratepayer payment terms (e.g. the terms under which a portion of Ameren Energy trading margins are credited to UE's cost of service.) If AmerenUE's response to this DR does not include all documents within the scope of those requested due to AmerenUE's belief that the excluded documents are covered by attorney client privilege or the attorney work product doctrine or some other objection, please provide the following information regarding each excluded document: the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege cited.

Response:

Ameren Services is currently in the process of completing a study of the Joint Dispatch Agreement. This analysis is materially complete and currently awaits the review and approval of Ameren senior management. Once this is complete, a meeting will be scheduled with MPSC Staff and OPC to discuss the results.

**Prepared By: Rick A. Voytas
Title: Manager Corporate Analysis
Date : December 10, 2003**

AmerenUE's Response to
MPSC Staff Data Request
MPSC Case No. EO-2004-0108
AmerenUE's Application to Transfer Assets to AmerenCIPS

No. 535:

Request From: Ryan Kind

Please provide a copy of all documents created by or for AmerenUE or its affiliates in the last three years that contain descriptions (e.g. scope or timing of possible studies) of, or references to, any studies that may be conducted to analyze the advantages or disadvantages of terminating or modifying the JDA.. If AmerenUE's response to this DR does not include all documents within the scope of those requested due to AmerenUE's belief that the excluded documents are covered by attorney client privilege or the attorney work product doctrine or some other objection, please provide the following information regarding each excluded document: the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege cited.

Response:

Please see the response to OPC DR# 532.

Prepared By: Rick A. Voytas
Title: Manager Corporate Analysis
Date : December 10, 2003

AmerenUE's Response to
MPSC Staff Data Request
MPSC Case No. EO-2004-0108
AmerenUE's Application to Transfer Assets to AmerenCIPS

No. 536:

Request From: Ryan Kind

Please provide a copy of all documents created by or for AmerenUE or its affiliates in the last three years that either contain the results (or descriptions of the results) of any studies that have been conducted by or for AmerenUE or its affiliates to analyze the advantages or disadvantages of terminating or modifying the JDA. If AmerenUE's response to this DR does not include all documents within the scope of those requested due to AmerenUE's belief that the excluded documents are covered by attorney client privilege or the attorney work product doctrine or some other objection, please provide the following information regarding each excluded document: the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege cited.

Response:

Please see the response to OPC DR# 532.

Prepared By: Rick A. Voytas
Title: Manager Corporate Analysis
Date : December 10, 2003

AmerenUE's Response to
MPSC Staff Data Request
MPSC Case No. EO-2004-0108
AmerenUE's Application to Transfer Assets to AmerenCIPS

SUPPLEMENTAL RESPONSE

No. 532:

Request From: Ryan Kind

Please provide a copy of all documents that have been created by or for Ameren or its affiliates within the last three years that contain descriptions or analysis of, or references to, possible plans for modifying or eliminating the JDA (joint dispatch agreement) ratepayer payment terms (e.g. the terms under which a portion of Ameren Energy trading margins are credited to UE's cost of service.) If AmerenUE's response to this DR does not include all documents within the scope of those requested due to AmerenUE's belief that the excluded documents are covered by attorney client privilege or the attorney work product doctrine or some other objection, please provide the following information regarding each excluded document: the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege cited.

Supplemental Response No. 1:

The results of the JDA analysis were sent to the OPC on January 15, 2004. Please note that we have marked these results as Highly Confidential.

This will note that we also provided to Staff and OPC Excel spread sheets on January 20, 2004 which include the supporting data for pages 7 and 8 of the presentation.

Also, please note that the JDA analysis used the MIDAS model which is capable of producing outputs which would represent at least 300 pages, and thus voluminous. Further, it would be burdensome to produce and explain all of the inputs and outputs of the MIDAS model. We also note that the same model is involved for the information responsive to OPC Data Request 580. As a result, the OPC is welcome to review this information at our offices in St. Louis.

The only other responsive documents are privileged work product documents and documents covered by the attorney client privilege. In particular, these documents were prepared in November and December of 2003 by the undersigned and my staff in Corporate Planning at the request of Joseph H. Raybuck, one of the attorneys for AmerenUE for this proceeding, as well as documents prepared by Mr. Raybuck at the request of Craig Nelson. The topics covered alternatives for the future disposition of the JDA and the regulatory issues associated with such alternatives.

Prepared By: Rick A. Voytas
Title: Manager Corporate Analysis
Date : January 23, 2004

HIGHLY CONFIDENTIAL