

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

In the Matter of the Application of)
Grain Belt Express Clean Line LLC for a)
Certificate of Convenience and Necessity)
Authorizing It to Construct, Own, Operate,)
Control, Manage and Maintain a High) Case No. EA-2016-0358
Voltage, Direct Current Transmission Line)
and an Associated Converter Station)
Providing an Interconnection on the)
Maywood-Montgomery 345 kV)
Transmission Line.)

**MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION'S OPPOSITION
TO MISSOURI LANDOWNERS ALLIANCE'S MOTION TO COMPEL ANSWERS TO
DATA REQUESTS INVOLVING "JOINT PROSECUTION AND DEFENSE
AGREEMENT"**

Missouri state and federal courts have long recognized and upheld the Common Interest Doctrine (and the protection it provides to attorney-client privileged communications and attorney work product), and the Missouri Landowners Alliance ("MLA") cites affirmatively to this law in its motion.¹ But, MLA would have the Commission turn away from this legal precedent and rule that this well-established Missouri law may *not* be availed by the applicant and intervenor Missouri Joint Municipal Electric Utility Commission ("MJMEUC") in this matter pending before the Commission. At page 3 of its motion, MLA betrays its true motivation for asking the Commission to stray from settled law and negate the common interest agreement between the applicant and MJMEUC when MLA states that "...perhaps the single most

¹ At pages 6 - 7, MLA cites to *Ayers Oil Co. v. American Business Brokers, Inc.*, which states that "the common interest doctrine extends the attorney-client privilege to two separate clients, who are represented by separate attorneys, who share an identical legal interest, and who agree to exchange information regarding the matter." 2009 WL 4725297 (E.D. Mo. 2009); and *Green Edge Enterprises, LLC v. Rubber Mulch, LLC*, which protected from discovery privileged communications between two separate parties in the action because "the third party shares a common interest in the outcome of the litigation and ...the communication in question was made in confidence." 2006 WL 2623855 (E.D. Mo. 2006).

important issue in this case [is] the impact of the Transmission Service Agreement (TSA) between GBE and MJMEUC."

The Common Interest Doctrine in Missouri:

Ordinarily, the privilege between attorney and client is waived if the communication occurs in the presence of a third party; however, the Common Interest Doctrine "extends the attorney-client privilege to two separate clients, who are represented by separate attorneys, who share an identical legal interest, and who agree to exchange information regarding the matter."² Missouri requires that the common interest between the parties "must be an identical interest and a legal interest, as opposed to a merely commercial interest."³ To invoke the protections of the Common Interest Doctrine, the claiming party must establish (1) that the underlying privilege (such as attorney-client or work product) protects the communication at issue; (2) that the parties disclosed the communication to one another at a time when they shared a common interest; (3) that the parties shared the communication in confidence and in furtherance of that common interest; and (4) that the parties have not waived the privilege.⁴ The common interest parties need *not* be in actual litigation against a common adversary because the focus is on the relationship between the parties to the communication at the time confidential information is shared.⁵ Rather, the Common Interest Doctrine applies to protect the confidence of information shared between parties "for the limited purpose of assisting in their common cause."⁶ Once it is

² *Ayers Oil Co. v. American Business Brokers, Inc.*, No. 2:09 CV 02 DDN, 2009 WL 4725297, at *2 (E.D. Mo. Dec. 2, 2009).

³ *Ayers*, at *2 (quoting *Green Edge Enterprises, LLC v. Rubber Mulch, LLC*, No. 4:02CV566TIA, 2006 WL 2623855, at *1 (E.D. Mo. Sept. 12, 2006).

⁴ *Lipton Realty, Inc. v. St. Louis Housing Authority*, 705 S.W.2d 565 (Mo. Ct. App. 1986).

⁵ *Lipton Realty*, 705 S.W.2d at 570-571.

⁶ *John Morrell & Co. v. Local Union 304A of United Food and Commercial Workers, AFL-CIO*, 913 F.2d 544, 556 (8th Cir. 1990).

established that a particular communication is privileged, that communication is absolutely privileged and it may not be revealed even if there is a substantial need for it.⁷

The Common Interest Agreement between the applicant and MJMEUC complies with Missouri law and so must be upheld:

The MLA admits at page 1 of its motion that it has been provided with a copy of the Joint Prosecution and Defense Agreement (the "Agreement") executed by the applicant and MJMEUC, and MLA even attaches a copy of that common interest Agreement as Exhibit 2 to its motion. MLA further admits at page 2 of its motion that it "assumes that the refusals to answer on the basis of the Agreement are founded on either the attorney-client privilege, or attorney work product." Thus, there is no dispute that MJMEUC has established the first prong of the four-prong test for a valid and enforceable common interest agreement: that the communications at issue are protected by either the attorney-client privilege or the attorney work product doctrine, or both.

The MLA further admits at page 2 of its motion that the Agreement memorializes the existence of the applicant's and MJMEUC's defined common interest prior to the June 1, 2016 date of the Agreement and into the future. Thus there is no dispute that MJMEUC has met the second and third prongs of the test for a valid and enforceable common interest agreement: that the privileged communications were shared between the parties during the existence of their common interest, and that the privileged communications were shared in confidence and in furtherance of the common interest.

⁷ *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42, 45 (Mo.Ct.App.S.D. 2008); *State ex rel. Missouri Highways & Transportation Commission v. Legere*, 706 S.W.2d 560, 566 (Mo.App. 1986); *see also, State ex rel. Cain v. Barker*, 540 S.W.2d 50, 57-58 (Mo. banc 1976); *May Department Stores Co. v. Ryan*, 699 S.W.2d 134, 137 (Mo.App. 1985); *State ex rel. Slattery v. Burditt*, 909 S.W.2d 762, 764-765 (Mo.App. 1995).

MJMEUC's refusal to produce the documents and information at issue, and the existence of this very motion to compel the disclosure of those privileged communications, evidences that MJMEUC has met the fourth prong of the test for a valid and enforceable common interest agreement: no party has waived the privilege.

Under Missouri law, MJMEUC's common interest Agreement with the applicant is valid and must be enforced. Thus, MLA's motion to compel disclosure of the privileged documents and information shared between MJMEUC and the applicant in furtherance of their common interest must be denied.

MLA's additional arguments for compelled disclosure of the privileged information covered by the common interest Agreement between MJMEUC and the applicant also fail:

Despite acknowledging the controlling Missouri law regarding the validity of common interest agreements and the related protection of privileged communications and information, the MLA makes four additional arguments designed to persuade the Commission to stray from the law. *First*, at pages 2 and 4 of its motion, MLA argues that privilege cannot exist for communications between counsel for the applicant and MJMEUC, and between counsel for MJMEUC and the applicant. In this argument, MLA cites the definition of the traditional privilege between an attorney and his or her client, then juxtaposes that definition with the common interest doctrine which protects the privileged communications between an attorney for one client and the client of another attorney. As stated clearly in *Ayers*, the Common Interest Doctrine "extends the attorney-client privilege to two separate clients, who are represented by separate attorneys."⁸ MLA's argument fails on the law.

⁸ *Ayers Oil Co. v. American Business Brokers, Inc.*, No. 2:09 CV 02 DDN, 2009 WL 4725297, at *2 (E.D. Mo. Dec. 2, 2009).

MLA's *second* argument to steer the Commission around and away from the controlling law regarding the common interest Agreement between the applicant and MJMEUC is that these parties' common interest is nefarious in intent. At pages 3 and 5 of its motion, MLA argues that these parties intended their common interest Agreement to operate "as a shield against any inquiries" in order to "avoid discovery into important aspects of the TSA." But, MLA admitted on page 2 of its motion that the common interest Agreement "...seems essentially to state that GBE and MJMEUC have a 'mutuality of interest' in obtaining (among other things) this Commission's approval of GBE's proposed transmission project...." MLA cannot be permitted, on the one hand, to negatively characterize these parties' intent, while on the other hand admitting that the parties' stated intent is a commonly-shared legal interest.

Third, MLA argues that MJMEUC should be compelled to fully respond to the Data Requests it served for the purpose of obtaining more information about the withheld documents than the information provided in MJMEUC's privilege log. Significantly, MLA does *not* argue that the privilege log provided by MJMEUC for all withheld documents failed to provide "information that will permit others to assess the applicability of the privilege or work product doctrine," as required by Missouri Rules of Civil Procedure 57.01.⁹ Indeed, MJMEUC's privilege log, attached as Exhibit 3 to MLA's motion, provides the following information for each withheld document: the reference to the applicable DR by number, the type of document, the identity of the author(s) of the document, the identity of the recipient(s) of the document, the subject matter of the document, and the type of privilege(s) claimed. Instead, MLA asks the

⁹ It appears from MLA's motion and attached exhibits, that MJMEUC's responses to the following DRs are at issue here: MJM.2, MJM.22, MJM.23, MJM.25, MJM.44, MJM.45, MJM.48 - .53. It also appears that there is no dispute that the documents related to these responses are all properly accounted for on MJMEUC's privilege log, and that MLA has no objection to that privilege log.

Commission to ignore Missouri privilege law and compel MJMEUC's full responses to the Data Requests - which would violate the privilege attached to those documents.

Fourth, MLA strays from the stated purpose of its motion (to compel answers to data requests), and admits at pages 3 and 8 that it must be permitted to conduct "legitimate inquiries into important aspects of the TSA" in order to "challenge the supposed benefits of the TSA." MJMEUC respectfully submits that MLA can do just that - without violating MJMEUC's privileges. MJMEUC has already made information about the TSA available to MLA through its responses to data requests and its pre-filed rebuttal testimony. However, MLA through its d/b/a Show Me Concerned Landowners, has pending before the Commission a motion to strike MJMEUC's rebuttal testimony which contains the non-privileged information MLA complains here has been wrongly withheld. Further, MLA will have the opportunity at the hearing to cross-examine any testifying witness about any non-privileged information regarding the TSA.

Conclusion:

Missouri state and federal law, and MLA's own admissions in the pending motion, lead the Commission to the conclusion that the common interest Agreement between the applicant and MJMEUC is legal and must be upheld. Further, the documents protected from discovery by MJMEUC are covered by the attorney-client privilege and/or the attorney work product doctrine, were properly identified on the privilege log provided to MLA, and are not discoverable through Data Requests or an order compelling their production. MJMEUC respectfully requests this Commission deny MLA's Motion to Compel Answers to Data Requests Involving "Joint Prosecution and Defense Agreement."

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition to MLA's Motion to Compel was served by electronically filing with EFIS and emailing a copy to the following interested persons on this 6th day of February, 2017:

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