BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filings of Union Electric Company d/b/a Ameren Missouri, to Increase Its Revenues for Retail Electric Service.	)))	Case No. ER-2012-0166

MOTION TO QUASH NOTICE OF DEPOSITION, FOR PROTECTIVE ORDER AND MOTION FOR EXPEDITED TREATMENT

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or the "Company"), and hereby moves to quash the Notice of Deposition (the "Notice") directed to Ameren Services Company paralegal Mary Hoyt, for a protective order in regard to the Notice, and for expedited treatment of its motions. In support of its motions the Company states as follows:

1. On September 5, 2012, the Staff served the Notice on the undersigned counsel, seeking to take the deposition of Ameren Services Company ("Ameren Services") paralegal Mary Hoyt. At the same time, the Staff served a Notice of Deposition and Subpoena Duces Tecum to take the deposition of Ameren Corporation President and CEO Thomas Voss, and purporting to require the production of certain Ameren Corporation documents.[1] The impropriety of the notice and subpoena duces tecum directed to Mr. Voss is addressed in a separate Motion (the "Voss Motion") filed concurrently herewith.

2. Ameren Services employs attorneys, including the undersigned Thomas M. Byrne, who then provide representation to Ameren Corporation and its subsidiaries.[2] Ms. Hoyt is a paralegal who reports to Mr. Byrne.

[1] The notice and subpoena duces tecum directed to Mr. Voss indicated that he need not personally appear.
[2] Ameren Services also retains outside counsel, including the undersigned James B. Lowery and his law firm Smith Lewis, LLP, who also represents Ameren Corporation and various of its subsidiaries.

3. On information and belief the undersigned believe that the Staff intends to attempt to question Ms. Hoyt regarding the matters addressed in the Application for Subpoena Duces Tecum apparently submitted to Judge Woodruff (on an *ex parte* basis) in order to obtain the subpoena duces tecum directed to Mr. Voss. More specifically, the Staff apparently desires to question Ms. Hoyt regarding what documents or parts of documents she prepared for production in response to Staff data requests. No other explanation for her deposition is conceivable in that Ms. Hoyt is not a witness in this case and has no independent knowledge of any substantive issue in this case. The full scope of her job with regard to this case is as a paralegal, acting at the direction of attorneys representing the Company.

4. The steps Ms. Hoyt took in preparing discovery responses (which included compiling documents that the Staff inspected at the Company's offices provided pursuant to discovery requests) were taken at the direction of the undersigned counsel and other attorneys representing the Company in this case. Those directions reflected the mental impressions, conclusions, opinions, analyses and thought processes of attorneys representing the Company with respect to which documents and parts of documents were properly objectionable and which were not. Those directions, based on those mental impressions, conclusions, opinions, analyses, and thought processes, were given respecting documents for which a timely and proper objection was made. The Staff made no attempt to comply with the Commission's rules regarding challenging those objections, as outlined in more detail in the Voss Motion, which is incorporated herein by this reference.

5. The mental impressions, conclusions, opinions, analyses, and thought processes of attorneys are absolutely privileged under Missouri law. Mo. R. Civ. P. 56.01(3) (These mental impressions, etc. are sometimes referred to as "opinion work product" or "intangible

work product"). The Commission itself has recognized the absolute protection afforded intangible work product:

> The work product doctrine in Missouri protects two types of information from discovery: both tangible and intangible. *Ratcliff V.Sprint Mo., Inc.*, 261 S.W.3d 534, 547 (Mo. App. W.D. 2008). Tangible work product consists of documents and materials prepared for trial and is given a qualified protection under Rule 56.01(b)(3); its production may be required on a showing of substantial need. *State ex rel. Ford Motor Co. v. Westbrooke,* 151 S.W.3d 364, 367-68 (Mo. banc 2004). Intangible work product consists of the mental impressions, conclusions, opinions, and legal theories of an attorney. *Ratcliff,* 261 S.W.3d at 547. *Intangible work product has absolute protection from discovery*. *Bd. of Regist. For Healing Arts v. Spinden,* 798 S.W.2d 472, 476 (Mo. App. W.D. 1990). **[*18]** The doctrine limits discovery in order to prevent a party in litigation "from reaping the benefits of his opponent's labors" and to guard against disclosure of the attorney's investigative process and pretrial strategy. *Westbrooke,* 151 S.W.3d at 366 n.3; *State ex rel. Atchison, Topeka & Santa Fe Ry. Co v. O'Malley,* 898 S.W.2d 550, 553 (Mo. banc 1995) (emphasis added).[3]

6. That attorneys instruct their employees based on such opinion work product obviously does not waive the privilege. Otherwise, lawyers could never share documents or information or otherwise use paralegals, secretaries, clerks or other employees to perform their duties and represent their clients. Rule 56.01(3) recognizes this basic principle by specifically providing protection to not just an attorney's opinion work product but to the opinion work product of any "other representative of a party concerning the litigation." It's clear that the agents of the attorney like a paralegal are also representing a party concerning the litigation the attorney is handling for the party.

7. While there are no Missouri cases directly on point on these facts, other courts confronted with similar questions have recognized these principles. In *Wal-Mart Stores v. Dickinson*, 29 S.W.3d 796, 805-05 (Ky. 2000), the Supreme Court of Kentucky stated:

> We believe that the [attorney-client] privilege should apply with equal force to paralegals, and so hold. A reality of the practice of law today is that attorneys make extensive use of nonattorney personnel, such as paralegals, to assist them in rendering legal services. Obviously, in order for paralegals, investigators, secretaries and the like to effectively assist their attorney employers, they must

[3] *Order Regarding Staff's Motion to Compel*, Case No. ER-2009-0089 (Mo. PSC Dec. 9, 2009).

> have access to client confidences. If privileged information provided by a client to an attorney lost its privileged status solely on the ground that the attorney's support staff was privy to it, then the free flow of information between attorney and client would dry up, the cost of legal services would rise, and the quality of those same services would fall. *Cf. Williams v. Trans World Airlines. Inc.*, 588 F. Supp. 1037, 1044 (W.D. Mo. 1984). **Likewise, and for the same reasons, we hold that attorney work product prepared by a paralegal is protected with equal force by CR 26.02(3) as is any trial preparation material prepared by an attorney in anticipation of litigation.** *Accord United Coal Companies v. Powell Construction Company,* 839 F.2d 958, 966 (3rd Cir. 1988); *Fine v. Facet Aerospace Products Company 133 F.R.D. 439*, 444-45 (S.D.N.Y. 1990). (emphasis added in **bold**).

See also Zenith Radio Corp. v. Radio Corp. of America, 121 F.Supp. 792, 795 (D. Del. 1954), where the court explained that "'work product' encompasses the impressions, observations and opinions recorded by an attorney, as the product of his investigation of a case in his actual preparation for trial on behalf of a client [and] has been extended to include the recorded investigative work of a person hired by the attorney in his trial preparation and acting under his supervision and direction."

8. For the foregoing reasons, the Notice of Deposition should be quashed and a protective order should be issued pursuant to Mo. R. Civ. P. 56.01(c).

MOTION FOR EXPEDITED TREATMENT

9. The Commission should act on the motions made herein by September 11, 2012, insofar as the Notice and subpoena duces tecum purport to require production of documents on September 12, 2012.

10. The harm that will be avoided includes the wasted time and expense, as well as the distraction for the undersigned counsel who are continuing to engage in discovery and otherwise prepare for three weeks of evidentiary hearings in this case (among other duties), and harm that would be created if parties are allowed, at the eleventh hour in Commission cases, to attempt end-runs around the Commission's established discovery processes by seeking to depose paralegals involved in preparing discovery responses for the Company.

11. The Notice of Deposition was served just two days before surrebuttal testimony in this case was due, on a day when the undersigned counsel were occupied deposing a witness in this case, assisting witnesses with finalizing surrebuttal testimony, and otherwise handling discovery and a myriad of other duties in this case. Consequently, this pleading was prepared as soon as was reasonably possible after service of the Notice of Deposition.

WHEREFORE, the Company prays that the Commission make and enter its order quashing the Notice of Deposition, and issue its protective order preventing the Staff from deposing Mary Hoyt, and for such other and further relief as is just and proper under the circumstances.

Dated: September10, 2012

Respectfully submitted,

/s/ James B. Lowery
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 10th day of September, 2012.

/s/James B. Lowery
James B. Lowery