

January 9, 2002

VIA HAND DELIVERY



Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
Jefferson City, MO 65101

FILED²
JAN 09 2002
Missouri Public
Service Commission

Re: MPSC Case No. EC-2002-1

Dear Mr. Roberts:

Enclosed for filing on behalf of Union Electric Company, d/b/a AmerenUE, in the above matter, please find an original and eight (8) copies of **Union Electric Company's Brief in Response to Order Directing Filing Response Regarding Discovery.**

Kindly acknowledge receipt of this filing by stamping a copy of the enclosed letter and returning it to me in the enclosed self-addressed envelope.

Very truly yours,

James J. Cook / sh

James J. Cook
Managing Associate General Counsel

JJC/mlh
Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²
JAN 09 2002

Missouri Public
Service Commission

The Staff of the Missouri Public
Service Commission,

Complainant,

v.

Union Electric Company, d/b/a
AmerenUE,

Respondent.

Case No. EC-2002-1

**UNION ELECTRIC COMPANY'S BRIEF
IN RESPONSE TO ORDER DIRECTING
FILING RESPONSE REGARDING DISCOVERY**

Union Electric Company ("UE") respectfully submits this brief in response to the Commission's Order Directing Filing Response Regarding Discovery, dated January 8, 2002. In that Order, the Commission invited the parties to submit additional authority that may govern a current discovery dispute over UE's claim of the attorney-client privilege in response to Data Requests Nos. 554 and 555 from the Office of Public Counsel ("OPC").

In proceedings before the Commission, the attorney-client privilege arises from 4 CSR 240-2.130 (5), which provides that "The rules of privilege shall be effective to the same extent that they are now or may hereafter be in civil actions." Thus the law and practice governing the claim of the attorney-client privilege before the Commission is identical to that in civil practice in Missouri's courts. The Commission itself has explicitly recognized this fact in *In the matter of Kansas City Power & Light Company*,

Case Nos. ER-85-128 and EO-85-185, 1985 Mo. PSC LEXIS 43 (May 17, 1985). In addition, the Commission noted, in the face of a claim of attorney-client privilege for some corporate documents, that "[s]ince this matter involves a corporate client and there appear to be no Missouri cases outlining how the privilege applies to a corporate client, the parties should follow the U.S. Supreme Court decision of *Upjohn v. U.S.*, 101 S. Ct. 677 (1981)¹, as well as Missouri case law concerning the privilege." 1985 Mo. PSC LEXIS 43 at *6-7. The Commission also specifically noted the key Missouri decisions relating to the privilege:

Based upon the decision of the Missouri Supreme Court in *State ex rel. Great American Insurance Company v. Smith*, 574 S.W. 2d 379 (Mo. banc 1978), the documents for which attorney-client privilege is claimed will not be viewed unless the documents come within the exception established in *State ex rel. Friedman v. Provaznik*, 668 S.W. 2d 76, 79 (Mo. banc 1984).

Id. at *5.

The *Great American* case is the seminal modern case on the attorney-client privilege in Missouri, adopting an expansive view of the scope of the privilege, rejecting the notion in earlier precedents that the attorney-client privilege was an exception to a policy of disclosure of all evidence. In *Great American*, the Missouri Supreme Court expressly adopted the view of the "confidentiality of communications between attorney and client as the more fundamental policy, to which disclosure is the exception."

574 S.W.2d at 383. The Court went on:

The nature and complexity of our present system of justice and the relationships among people and between the people and their government make the preservation of the attorney-client privilege even more essential. If this is to be accomplished, when one undertakes to confer in confidence with an attorney whom he employs in connection with the particular

¹ The Supreme Court Reports cite for *Upjohn* is 449 U.S. 383 (1981), which we will use for our citations to that case in this brief.

matter at hand, it is vital that all of what the client says to the lawyer *and* what the lawyer says to the client be treated as confidential and protected by the attorney-client privilege.

Id. See also *Friedman*, 668 S.W. 2d. at 78 (“In . . . *Great American* . . . this Court adopted an approach to the attorney-client privilege that recognizes the confidentiality of communications between attorney and client as a fundamental societal policy, to which disclosure is an exception.”).

This expansive understanding of the privilege by the Missouri Supreme Court reflects the other precedent cited by the Commission, that of the U.S. Supreme Court in *Upjohn*. In *Upjohn*, the U.S. Supreme Court rejected the notion that the attorney-client privilege only applies to a lawyer’s communications with the “control group” of a corporation, that is, the individuals who can legally bind the corporation. As the Court explained:

Such a view [limiting the privilege to control group communications], we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. . . . The first step in the resolution of any legal problem is ascertaining the factual background sifting through the facts with an eye to the legally relevant.

449 U.S. at 390-91.

This investigation and development of the facts rarely rests on communications solely with the top executives of a corporation, as the Court underscored:

In the corporate context . . . it will frequently be employees below the control group . . . who will possess the information needed by the corporation’s lawyers. Middle-level – and indeed lower-level – employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate

counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Id. at 391.

Thus, the attorney-client privilege in Missouri is expansive in scope, and is triggered under a quite straightforward test, as described by the Western District Court of Appeals:

This test is as follows: (1) the attorney-client relationship must have existed at the time the communication was made or advice given; (2) the attorney-client relationship must have existed as to the subject matter of the communication or advice, or (3) the communication must have been made to the attorney in his professional capacity and on account of the attorney-client relationship.

In re: Board of Registration for the Healing Arts v. Spinden, 798 S.W. 2d 472, 475 (Mo. App., W.D. 1990).

Attached to this pleading is an affidavit of James J. Cook, Managing Associate General Counsel for Ameren. In that affidavit, the three prongs of the test set out above are addressed. Moreover, a review of the Privilege Log, attached to OPC's Motion to Compel, as Attachment C, describes each document and the author and recipient(s).

By reviewing the log and the affidavit, it is clear that each document is covered by the privilege. Each is a form of communication either from or to an attorney, seeking legal advice, providing legal advice, or discussing that legal advice. Some documents are clearly designated as "Legal Memorandum...." Others are "e-mails" between attorneys and their clients concerning the matters that are covered in the Legal Memoranda. Some are e-mail messages forwarding a copy of the Legal Memorandum.

Concerning the test set out in *In re: Board of Registration...*, the items listed on the log are clearly communications made at the time an attorney-client relationship

existed; that relationship existed as to the communication or advice; and the communication was made to or from the attorney in his or her professional capacity and on account of that relationship. On their faces, these documents are protected by the attorney-client privilege. As discussed below, no further inquiry is needed or allowed.

In its Order of January 8, 2002 the Commission inquired about the use of *in camera* review of the documents for which the privilege is claimed to verify the accuracy of the privilege claim. Indeed, in the *Kansas City Power & Light* matter cited above, the Commission expressly followed the Missouri Supreme Court's holding in *Great American*, determining that "the hearing examiner would **not** view the documents for which attorney-client privilege is claimed in the in camera proceeding unless the document comes within the exception established by the Friedman case." *In the Matter of Kansas City Power & Light Company*, Case Nos. ER-85-128 and EO-85-185 (Order Denying Reconsideration) (May 23, 1985), 1985 Mo. PSC LEXIS 42, *3 (emphasis added)

The Missouri Supreme Court in *Friedman* explained:

In *Great American*, the letters sought to be discovered were on their faces protected by the attorney-client privilege; an in camera proceeding was not necessary to reach that determination. (Case cite omitted.) In this case, no determination of the extent to which the subpoenaed materials reflect privileged communications can be made without an in camera inspection.

Kansas City Power & Light, 1985 Mo. PSC 42, *3 (quoting *Friedman*, 668 S.W.2d at 80).

This Commission emphasized "the documents will not be looked at, viewed, observed or read unless the document is not clearly an attorney-client communication and is of such importance justice requires a review of the document itself by the hearing

examiner.” 1985 Mo. PSC 42, *3-4. *See also United States v. Zolin*, 491 U.S. 554, 571 (1989) (“There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents.”).

The eighteen documents at issue here were clearly described in the privilege log indicating the date, author, recipient, and a brief description of the communication. “[O]n their faces” they are “protected by the attorney-client privilege,” and cannot be reviewed *in camera* under the express holdings of the Missouri Supreme Court as well as this Commission’s past practice.² To order an *in camera* proceeding for the documents included in this motion to compel, would render the clear directions of the Commission and the Missouri Supreme Court meaningless. Every document would be subject to the *in camera* proceeding merely upon the request of any party. This is not the result the Commission nor the Court had in mind when they set out the standard for such review.

The Commission, in its Order of January 8, 2002, noted that “[n]either of the parties cited legal authority which is controlling....” The Company suggests that the legal authority cited herein is controlling and directs the dismissal of the OPC’s Motion to Compel. The Commission also noted that “... nor did either party demonstrate a compelling reason why the Commission should grant or deny the motion.” The Company suggests that the Company has clearly and compellingly shown that the documents at issue here are rightfully covered by the attorney-client privilege, and that there is no compelling reason that the OPC can offer that can defeat that privilege.

² Indeed, we note that the Staff has produced a privilege log in support of its claim of the attorney-client privilege to withhold documents in response to UE’s discovery in this case. That log covers 170 items. If OPC is successful in securing *in camera* review of the UE documents at issue here without much more

Likewise, the OPC has not shown, and cannot show, any compelling reason to require the production of redacted documents or the appointment of a special master. The precedent cited above makes that clear. Moreover, that precedent also sets forth the "standard by which the Commission should review this matter," as requested in the January 8, 2002 Order. That standard dictates that the documents at issue here are clearly protected and no further inquiry is appropriate.

WHEREFORE, for the reasons stated above, Union Electric Company respectfully requests this Commission to deny this portion of the Office of Public Counsel's Motion to Compel.

January 9, 2002

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a AmerenUE

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support for such a course than they have offered to date, then surely UE would be entitled to trigger an *in camera* review of all these Staff documents that are allegedly protected by privilege.

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Case No. EC-2002-1

My Commission expires:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class U.S. mail, postage prepaid, on this 9th day of January, 2002, on the following parties of record:

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