

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

In the Matter of Public Counsel's Petition)	
To Open a Case to Investigate AmerenUE's)	<u>Case No. EO-2009-0126</u>
Plan to Construct and Finance a Second Unit)	
At the Callaway Nuclear Plant Site)	

PUBLIC COUNSEL'S REPLY TO AMERENUE'S RESPONSE

COMES NOW the Office of the Public Counsel and for its Reply to AmerenUE's Response states as follows:

1. Public Counsel does not want to unduly burden the Commission with unnecessary replies and sur-replies, but Public Counsel must correct the mistaken emphasis on Section 386.450 in AmerenUE's response. AmerenUE, with little explanation, repeatedly asserts that the source of Public Counsel's discovery rights is Section 386.450 RSMo 2000. That section, as its title clearly shows, has to do with the production of **out-of-state records**. Public Counsel has no reason to believe that any of the information it seeks through the instant motion to compel is held by AmerenUE out of state, nor has AmerenUE asserted that it is.

2. Section 386.450 predates the creation of Public Counsel. Before 1977, it read:

The Commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place without this state, or, at its option, verified copies in lieu thereof, so that an

examination thereof may be made by the commission or under its direction.¹

With the passage of House Bills 42 and 157 in 1977, the previous language was revised to read:

At the request of the public counsel and upon good cause shown by him the commission shall require or on its own initiative the commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place **within or** without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made **by the public counsel when the order is issued at his request or** by the commission or under its direction.²

The change to 386.450 is to make clear that Public Counsel, as well as the Commission, can get access to out-of-state records. 386.450 is not the **source** of Public Counsel's discovery powers; those were necessarily given to the Public Counsel when the duty to represent the public was transferred from the Commission's general counsel to the Public Counsel in 1974. Section 386.450 is simply an indication that the legislature intended Public Counsel's discovery powers to be as broad as those of the Commission, extending even to records kept outside of Missouri.

3. The entity now known as the Office of the Public Counsel was created by the Omnibus State Reorganization Act of 1974, which stated:

The powers, duties and functions vested in the general counsel to the public service commission, chapter 386 RSMO and others, are transferred by Type II transfer to the department of consumer affairs, regulation and licensing. The general counsel shall be appointed by the director of the department and all other employees of the office, except the general counsel and his secretary, shall be selected by the counsel in accord with chapter 33 RSMO. Funding for the general counsel's office shall be by

¹ Section 386.450 RSMo 1959.

² Section 386.450 RSMo 2000. [Emphasis shows language added in 1977.]

general revenue. (Omnibus State Reorganization Act of 1974, Section 4.5 Mo. Rev. Stat. Appendix B (Supp. 1975))

The Omnibus Act as cited above referred to the Public Counsel as the new “general counsel” of a new agency, but did not name the new agency; it was designated the “Office of the Public Counsel” by the executive department.³

4. Public Counsel has never asserted that Section 386.450 is the sole basis, or even the primary basis, for its right to conduct discovery. That right is based on its duty to represent the public in all proceedings, its right to file complaints, and the general grant of all powers necessary to effectively do its job. It makes no sense to limit those broad powers, as AmerenUE would have the Commission do, to allow the Public Counsel to “protect the interests of the public in any proceeding”⁴ but only if the Commission wants to hear from the Public Counsel in that proceeding. It makes no sense to require the Commission to agree with Public Counsel that a certain aspect of a utility’s business merits investigation, and to allow the Commission to stymie any Public Counsel investigation that the Commission is not interested in.

5. Moreover, how could the Public Counsel convince the Commission that it should be interested in an investigation unless the Public Counsel can conduct discovery and show the Commission facts? AmerenUE’s position necessarily supposes that the Commission is omniscient, and that it should be the arbiter of what Public Counsel can and cannot investigate in the complete absence of any facts that might be obtained in discovery. Since its creation, the Office of the Public Counsel was expected to

³ William M. Barvick, *Public Advocacy before the Missouri Public Service Commission*, 46 UMKC Law Review 181, at 195.

⁴ Section 386.710.1(2) RSMo 2000.

occasionally challenge the Commission's view of the world and to spur the Commission to take action when it otherwise might not have:

[Public Counsel] should act as a catalyst, bringing new ideas and approaches to the Commission. It should concentrate its efforts in seeking out significant issues that were either neglected by the Commission or decided to the detriment of the consuming public....

...

The Office of the Public Counsel provides an independent source of regulatory expertise in utility regulation that can propose alternative legislative or regulatory solutions to courses of action or non-action by either the Commission or the utilities.⁵

6. Section 386.440.3 RSMo, like Section 386.450, was amended in 1977 to make clear the powers and duties of the then-new Public Counsel. It provides in its entirety:

It shall be the duty of every public officer, without exacting or receiving charge or fee of any kind, to furnish to the commission, or the public counsel, upon application, a certified copy of any document or part thereof, on file in his office, and no public officer shall be entitled to receive from the commission or the public counsel any fee for entering, filing, docketing or recording any document required or authorized by law to be filed in his office.

The 1977 amendments to Section 386.440, like those to Section 386.450, make clear that Public Counsel's authority to investigate is commensurate with the Commission's and to make clear that all the powers and duties to represent the public that resided in the Commission's general counsel before 1974 were transferred to the Public Counsel. Neither of these sections are the source of Public Counsel's discovery authority, but both are indicative of its breadth.

7. AmerenUE repeatedly refers to 26 data requests and 28 data requests at paragraphs 3 and 4 of its reply. For clarification, there are only 14 data requests at issue in this case. AmerenUE also makes a vague claim that two of these 14 data requests

⁵ Barvick, *supra*, at 205, 211.

might be protected by its assertion of attorney-client privilege in another case. If the Commission is inclined to consider this claim, it can order those two responses be produced to a discovery judge or special master who can decide whether they should be protected.

WHEREFORE Public Counsel respectfully requests that the Commission affirm Public Counsel's right to discovery and compel AmerenUE to fully respond to data requests 7001-7005 and 2002-2010.

Respectfully submitted,
OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties in Case No. EO-2007-0409 this 10th day of February 2009.

By: _____