

July 19, 1999

VIA HAND DELIVERY

FILED

JUL 19 1999

Missouri Public
Service Commission



Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Truman Building
301 West High Street, 7-N
Jefferson City, MO 65101

Re: MPSC Case No. ^{EX-}~~EX~~-99-442

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter are an original and fourteen (14) copies of the Response to Motion to Compel.

Kindly acknowledge receipt of this filing by stamping as filed a copy of this letter and returning it to the undersigned in the enclosed envelope.

Sincerely,

William J. Niehoff /sh

William J. Niehoff
Attorney-at-Law

WJN:rld
Enclosures
cc: Office of the Public Counsel

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

FILED

JUL 19 1999

Missouri Public
Service Commission

In the matter of 4 CSR 240-20.015)
Proposed Rule, Electric Affiliate) Case No. EX-99-442
Transaction Rules)

RESPONSE TO MOTION TO COMPEL

COMES NOW Union Electric Company, d/b/a AmerenUE, by counsel and responds to the Motion to Compel responses to data requests numbers 507, 508 and 511 filed by the Office of Public Counsel ("OPC"), as follows:

**AmerenUE has in Good Faith Voluntarily Responded
to a Significant Number of Data Requests**

1. Even the Motion to Compel concedes that AmerenUE fully responded to the vast majority of data requests within the initial 20 days. AmerenUE voluntarily provided this information even though it observed that the OPC was taking inconsistent positions regarding whether the use of contested procedures was appropriate. Thus, AmerenUE voluntarily provided OPC with written responses and documentary material approximately three inches thick.
2. Following its determination to voluntarily provide information OPC believes it needs to prepare comments, though, as set forth below, the relevance of this information is seriously in doubt, AmerenUE has today provided supplemental responses to that portion of DR 507 seeking information regarding regulated operations and to DR 511.¹ This voluntary action renders moot those portions of the Motion to Compel directed to those data requests. Accordingly, the Motion to Compel is now directed to only that portion of DR 507 and DR 508, which seek information regarding "strategic" business plans for each of the utility's "unregulated" units or affiliates.

¹ AmerenUE notes that no other party, including the Missouri Public Service Commission Staff, believed it necessary to serve data requests.

3. AmerenUE provided the substantial information identified above on a voluntary basis to the OPC since there is no agreement among the parties as to the appropriateness of using contested case procedures in this rulemaking.

Ameren's Objections To DR 507 and 508

4. In pertinent part, DR 507 seeks the Company's [AmerenUE's] two most recent strategic plans for ... overall non-regulated electric operations." Likewise, DR 508 seeks a copy of the "Company's [AmerenUE's] most recent strategic plans for each of its unregulated business units and affiliates."

5. AmerenUE timely filed objections to the data requests. AmerenUE noted the disagreement as to whether contested case proceedings applied, objected to providing information regarding non-regulated affiliates since no jurisdiction existed with regard to such entities, and further objected that any such information was relevant to the case at hand.

Data Requests Are Inappropriate Unless Full Contested Case Procedures Are Used.

6. In a separate pleading filed with this Commission, the OPC has denied that the present rulemaking justifies use of contested case procedures. (Public Counsel's Response in Opposition to Implement or Adopt Contested Case Procedures, pp. 2, pars 3-4). In its Response, the OPC stated that "rulemaking proceedings are not "contested cases" pursuant to Missouri law...". (Id., par. 3). OPC further denied that the present rulemaking affected the rights or privileges of "specific parties." (Id. par. 4).

7. OPC's posture that contested case proceedings are not authorized in the present matter is fatally inconsistent with its attempt to invoke those very procedures to force discovery responses from AmerenUE. The Commission's rules authorize discovery only by parties to a case. (4 CSR 240-2.090(1), (2)). If there are no parties to this rulemaking, as argued by OPC,

then by its plain terms, 4 CSR 240-2.090 cannot authorize the use of data requests nor a motion to compel to enforce those data requests. OPC cited only one source of authority for the use of data requests, claiming that the Order Adopting Protective Order in this matter dated June 25, 1999 stated that data requests are appropriate “even though there is no contested proceeding or case *per se*.” (Motion to Compel, par. 2). Therein, the Order cites Section 386.450 as support for the OPC authority to issue data requests. However, this section, which is titled “Inspection of out of state records,” does not by its terms apply to rulemakings, and certainly provides no support for the proposition that by use of this provision the OPC could obtain an order requiring the production of any document by any person or corporation in Missouri, whether regulated by this Commission or not.

8. Thus, OPC is left to argue selectively that when it determines that the use of one contested procedure (data requests) would benefit its litigation position, it is free to use that device and to invoke the enforcement powers of the Commission to compel responses. At the same time, the OPC strenuously denies that any other party should be permitted to use any other of the full range of contested procedures to protect their rights. Quite simply, OPC’s denial that contested procedures are appropriate is fatal to the Motion to Compel, and for that reason alone, it should be denied.

No Basis In Law Exists To Compel Production Of The Material Sought

9. OPC has failed to cite any law which justifies its right to demand production of strategic plans from unregulated companies. The very words contained in the data request demonstrate that the material sought is beyond the OPC’s legitimate reach. DR 507 seeks strategic plans from “non-regulated” operations and DR 508 seeks strategic plans from “unregulated” affiliates and others. Use of the prefixes “non” and “un” demonstrate that the

information sought is beyond the grasp of the OPC, whose authority is limited to regulated companies.

10. Even more significant than the failure of the OPC to cite any law supporting its request for protected information is its failure to cite existing law that affirmatively protects such material from discovery in this proceeding. Subsection (12) of Section 393.140 RSMo provides that if a utility is engaged in carrying on any other business than the utility business:

Which other business is not otherwise subject to the jurisdiction of the Commission, and is so conducted that its operations are to be substantially separate and apart from the owning, operating, managing or controlling of such gas plant, electric plant, water system or sewer system, said corporation in respect to such other business shall not be subject to any of the provisions of this chapter and shall not be required to procure the consent or authorization of the commission to take any act in such other business or to make any report in respect thereof.

Thus, Missouri law does not authorize the wholesale investigation of non-regulated activities of utilities. Even less support exists to conduct an investigation of non-regulated activities of affiliates of a utility, as OPC here attempts. Accordingly, the Motion to Compel should be denied.

The Requests Are Irrelevant To Any Issue In The Present Rulemaking

11. The OPC claims that with its objectionable requests it “hoped” to illustrate the current trend toward diversification and provide examples of activity that should be covered by rules. (Motion to Compel, par. 1). AmerenUE’s extensive responses to all other data requests provide whatever information is appropriate or necessary given the scope of the proceedings. A scatter-shot approach that “hopes” to turn up something useful is clearly not appropriate.

12. It is not clear, nor has OPC made any effort to demonstrate, how requests for information pertaining exclusively to “unregulated” activity can further the debate as to what rules might be necessary that would affect only “regulated” companies. Moreover, in the

electric, steam and gas cases, the Commission expressly stated that the purpose of the rules would be to prevent regulated utilities from subsidizing their non-regulated operations. (See, e.g., Proposed Rule, 4 CSR 240-20.015). Thus, requests for information from affiliates of the utilities are clearly beyond the scope of the these proceedings, are irrelevant, and the Motion to Compel should be denied.

WHEREFORE AmerenUE respectfully requests that the Commission deny the Motion to Compel and for such other and further relief as may be appropriate under the circumstances.

Respectfully submitted,

UNION ELECTRIC COMPANY

William J. Niehoff /sh
William J. Niehoff, MBE#36448
Ameren Services Company
One Ameren Plaza
1901 Chouteau Avenue
P.O. Box 66149
St. Louis, Missouri 63166-6149
(314) 554-2514 (voice)
(314) 554-4014 (fax)
william_j_niehoff@ameren.com

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above pleading has been served on the Office of Public Counsel and the Staff of the Missouri Public Service Commission by facsimile, hand-delivery, or first-class mail this 19th day of July, 1999.

William J. Niehoff /sh