BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's 2020 Utility Resource Filing Pursuant to 20 CSR 4240 – Chapter 22.	)))	File No. EO-2021-0021

SIERRA CLUB'S SURREPLY TO MOTION FOR PROTECTIVE ORDER

1. Union Electric Company d/b/a Ameren Missouri's ("Ameren" or the "Company") Reply to Sierra Club's Response to Motion for Protective Order ("Ameren's Reply") rehashes a number of arguments, which Sierra Club will not rebut again.[1] But in an attempt to cure its failure to demonstrate harm sufficient to support an unprecedented protective order, Ameren raises a new argument—that Ameren might be harmed because Sierra Club representatives cannot "unlearn" the SCI 1.D materials once reviewed, and thus Sierra Club "will necessarily use that information against Ameren Missouri in later proceedings."[2] This argument is unavailing, and the Commission should reject it.

2. Ameren again fails to identify any precedent supporting its protective order under these circumstances. Rather, Ameren suggests that "[c]ourts have consistently recognized this problem and imposed limitations to address it," followed by misleading and selective quotes from three cases that Ameren did not rely upon in its motion for protective order.[3] Each of those cases is predicated upon how courts deal with litigation among and between business competitors. At issue in *FTC v. Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980), was an order prohibiting corporate counsel from having an attorney-client relationship with

[1] *See* Sierra Club's Response to Motion for Protective Order, File No. EO-2021-0021 (Oct. 7, 2020).

[2] Ameren Reply ¶ 3.

[3] Ameren Reply ¶ 12.

its wholly-owned subsidiary in an administrative proceeding that could have divested the subsidiary from the corporation, thereby leading to a conflict of interest and a "potential violation" of antitrust law. *Id.* at 1349. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992), involved a copyright infringement action in which the court affirmed a protective order, in part, to prevent potential "misuse" of a defendant's trade secrets. *Id.* at 1470. And in *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1 (D.D.C. 2015), the court issued a protective order in a challenge to an allegedly anticompetitive merger where an in-house lawyer had access to a competitor's confidential business decisions, and there was a risk of disclosure of trade secrets. While it may be appropriate in certain circumstances to restrict in-house counsel's access to a *direct competitor's* confidential information, such as business strategy, pricing, marketing information, or trade secrets,[4] none of those circumstance are present here.

3. Even accepting Ameren's misleading and erroneous assertion that Sierra Club might use the SCI 1.D information to stake out a supposedly "contradictory" position in the pending litigation over Ameren's violations of the Clean Air Act, courts have routinely held that in-house counsel cannot be barred from confidential materials solely because of their general role as in-house counsel, or even regular access to sensitive information.[5] Instead, the relevant inquiry is whether access to the confidential information would *necessarily* "create an unacceptable 'risk of inadvertent disclosure'" due to counsel's involvement in competitive

[4] *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (denial of access to competitor's sensitive information may be necessary where in-house counsel is engaged in competitive decisionmaking for its client); *Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, 2011 WL 1791714, *7 (E.D. Mo. May 10, 2011) (in-house counsel should be denied access to competitor's confidential materials if she "participat[es] in decisions about pricing, marketing, etc.").

[5] *Glaxo Inc. v. Genpharm Pharmaceuticals, Inc.*, 796 F.Supp. 872, 874 (E.D. N.C. 1992) (citing *U.S. Steel Corp. v. United States,* 730 F.2d 1465).

decisionmaking processes.[6] Here, Sierra Club is not an Ameren business competitor in any sense. And Ameren cannot identify any concrete or particularized risk of disclosure that would harm the Company's competitive interests. Ameren's desire to avoid the financial consequences of its Clean Air Act violations is insufficient to demonstrate an unacceptable risk of competitive harm.

4. In short, Ameren has not and cannot cite a relevant case in support of its motion because the Company's request is extreme and unprecedented. What is not unprecedented, unfortunately, are allegations that some future parade of horribles may occur if Sierra Club representatives receive access to certain Company information. Ameren argued this same point, among others, before the Chief Judge of the U.S. District Court for the Eastern District of Missouri in the NSR litigation to no avail. This Commission should find Ameren's conjecture and mudslinging inappropriate and, in turn, rule that Ameren's motion for protective order is unnecessary.

/s/ Henry B. Robertson

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[6] *Matsushita Elec. Indus. Co., Ltd. v. United States*, 929 F.2d 1577, 1580 (Fed. Cir. 1991).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was filed on EFIS and sent by email on this 20th day of October, 2020, to all counsel of record.

/s/ Henry B. Robertson
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