

**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)	Case No. EO-2009-0126
Plan to Construct and Finance a Second Unit)	
At the Callaway Nuclear Plant Site.)	

**AMERENUE'S RESPONSE TO PUBLIC COUNSEL'S
SECOND MOTION TO COMPEL**

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or Company), and for its Response to Public Counsel's (OPC) *Second Motion to Compel (Motion)*, states as follows:

1. On October 6, 2008, OPC filed its *Petition to Open a Case (Petition)*, alleging there was good cause to open an investigation of how AmerenUE might finance a new nuclear plant.

2. OPC's *Petition* was considered by the Commission at its October 30, 2008 Agenda session, and the Commission was unwilling to open a case as requested by OPC. OPC admits this fact in its *Motion*¹ but glosses over it, suggesting that the Commission's refusal to open the docket OPC seeks is irrelevant to whether it can demand information via data requests in a docket *that has not been opened*.²

3. Since the filing of its *Petition*, OPC has sent AmerenUE 28 data requests, not counting subparts. Of that number, 15 requested information that had been previously provided in response to data requests asked by OPC in either AmerenUE's rate case, Case No. ER-2008-0318, or in AmerenUE's IRP docket, Case No. EO-2007-0409. In fact, 26 of the 28 data

¹ "Because the Commission has not affirmatively acted on Public Counsel's motion to open a case..." EO-2009-0126, January 27, 2009, p. 1, ¶ 3.

² Each of the data requests at issue are denominated as being propounded in Case No. EO-2009-0126, yet Case No. EO-2009-0126 does not exist as a matter of law. Anyone can file a pleading in EFIS and obtain a number, but that does not constitute an open case.

requests are duplicates of data requests asked in other AmerenUE cases before the Commission. The Company interposed objections to those 26 data requests in those cases, and no action has ever been taken in those cases to obtain a Commission ruling on those objections. This raises questions about why OPC has now propounded these same 26 data requests in a “case,” that is, in fact, not a case.

4. Despite having already objected to 26 of the 28 data requests, AmerenUE again timely objected on several grounds. These objections were contained in the objection letter e-mailed to Public Counsel Mills on November 10, 2008, an accurate copy of which is attached to OPC’s *Motion*.

5. More than two months later, on January 22, 2009 (perhaps not coincidentally on the same date that SB 228 was introduced in the Missouri General Assembly³) Public Counsel Mills conferred with AmerenUE counsel about these objections and immediately thereafter requested a conference with Judge Woodruff under Commission Rule 4 CSR 240-2.090(8)(B). This conference was held on January 26, 2009, without resolving the Company’s objections.

6. Continuing his newly found sense of urgency in light of the filing of SB 228, the next day, January 27, 2009, OPC filed this *Motion*, seeking a Commission order requiring responses to 14 of the 28 data requests.

OPC’s Claim

7. Ignoring the fact that the Commission has not found good cause to open the docket as requested, OPC asserts a claim to unfettered and unregulated access to every book and record of every public utility in the state. “Public Counsel must have unfettered access to a

³ SB 228, filed by Senator Delbert Scott, would both allow a return to be earned on construction work in progress for certain generating assets, including a nuclear plant, and would also establish the lawfulness of what is commonly called “credit metrics regulation” or “CMR.” It is sometimes commonly called the “CWIP bill,” but as noted, also enables use of CMR, about which legal questions have previously been raised, including in a recent Empire rate case and indeed by Chairman Clayton himself in his dissent in a recent Kansas City Power & Light Company rate case.

utility's books and records.”⁴ OPC's claim is without merit, and is directly contradicted by statute.

8. Section 386.450, one of the statutes upon which OPC relies, provides in pertinent part as follows:

At the request of the public counsel and upon good cause shown by him, the Commission shall require...the production...of any books, accounts, papers or records....

Any right to access utility books and records does not exist under the statute until first, OPC makes a request, second, establishes good cause, and third, convinces the Commission that good cause exists.

9. OPC ignores the requirements of Section 386.450, and tries to underpin its so-called “unfettered” right to discovery on a string cite of other statutes (which we will demonstrate below provide no such authority) because OPC knows this Commission is already of the opinion that good cause does not exist to open a docket that appears clearly calculated to attack the Company's legitimate right to petition the legislature for a change in the law. Not only did the Commission not open the docket OPC has requested, but the Commission also voted not to open its own investigatory docket (assigned the following case number for purposes of voting at the January 27, 2009 Agenda: EW-2009-0275) regarding these matters just 10 days ago.

10. The Commission should not allow OPC to do an end-run around OPC's failure to convince the Commission that good cause to open the docket OPC has sought since October by now allowing OPC to access Company documents for an investigation the Commission has not seen fit to open.

⁴ *Motion*, ¶ 5.

OPC's String-Cite to Other Statutes

11. OPC also cites three other statutes and claims that they provide it with this unfettered access to the requested information: Sections 386.390, 386.480 and 386.710, RSMo. An examination of these statutes establishes that they afford OPC no such rights.

12. Section 386.390, RSMo specifies how and by whom complaints may be brought against a utility. This ability to file a complaint is not unlimited, and indeed, the complaint must allege the utility committed an act in violation of the law, a Commission regulation or a Commission order or failed to perform an act required by law, regulation, or order. Specifically, this section requires OPC bring a complaint in writing, "...setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission..." Section 396.390.1 RSMo.

OPC's *Petition* does not allege any violation of any law, regulation or order. OPC does not even allege that it is seeking information so that it can bring such a complaint. Even more important, there is not a single word or phrase in Section 386.390 that suggests or implies that it gives any party, including OPC, a right to access utility books and records. Simply stated, Section 386.390 has nothing to do with records access or discovery.

13. OPC next tries to rely upon Section 386.480, RSMo grants OPC "full and complete access to public service commission files and records." The documents OPC seeks are not "public service commission files and records." This statute provides no aid to OPC.

14. Finally, as an apparent fall-back position, OPC asserts that the general statute that prescribes OPC's powers somehow overrides the specific statute that governs OPC's access to utility books and records. OPC argues that Section 386.710, RSMo, which contains a general list of powers and duties, including employing a staff or contractors, representing and protecting the interest of the public in any proceeding, discretion to represent or refrain from representing the public in any proceeding, being served with all tariffs, initial pleadings and applications in all proceedings and a catch-all provision that provides "...shall have all powers necessary or proper to carry out the duties specified in this section," allows OPC to bypass the requirements of Section 386.450, RSMo.

Sections 386.450 and 386.710 are both part of the Public Service Commission Law and clearly relate to the same subject, the regulation of public utilities.⁵ They therefore must be read in *para materia*. See, e.g. *Baldwin v. Dir. of Revenue*, 38 S.W.3d 401, 405 (Mo. 2001). Such statutes must also be read consistently and harmoniously. *Id.* It makes no sense, as OPC invites the Commission to do, to read a catch-all OPC general powers statute that contains not one word about records access in a manner that eviscerates the quite specific and mandatory provisions of Section 386.450, RSMo. which could not be more clear: "upon good cause shown by [Public Counsel] . . ." the Commission can issue an order and serve it on a public utility requiring the production of books and records. OPC's attempt to stretch Section 386.710 beyond its reasonable limits cannot be harmonized with Section 386.450, and must be rejected.

15. There is another reason OPC's reading of Section 386.710 fails to pass muster. The duties of the Public Counsel are clearly laid out in Section 386.710.1. The first, found in Section 386.710.1(1) RSMo, is not relevant to this discussion – the right to employ Staff.

⁵ See Section 386.010, RSMo.

The second and third duties, listed in Section 386.710.1(2) and (3) RSMo, are to represent and protect the interests of the public *in any proceeding* and to exercise his discretion to represent or refrain from representing the public *in any proceeding*. (emphasis added.) There is no proceeding pending at this time. There is only a request for a case before the Commission, but to date, the Commission has not granted that request.

Section 386.710.2 and 3 RSMo require Public Counsel to be served and allow Public Counsel to appeal orders of the Commission. Neither of those powers is relevant to this *Motion* because there is no order and no appeal.

The last portion of this statute – the catch-all provision grants Public Counsel “all powers necessary or proper to carry out *the duties specified in this section*.” (emphasis added.) Access to books and records outside a “proceeding” is not a power necessary to carry out *any* of the duties specified in Section 386.710.

OPC’s Mis-Construction of Prior Commission Orders

16. In addition to attempting to rely on the four statutes discussed above, OPC cites three prior orders cases in which the Commission upheld OPC’s right (but not an unfettered right) of discovery under the particular facts of those cases. It is worth noting that at least two of these cases involved discovery disputes during an actual, active case, rendering those orders inapposite to the issue before the Commission now.

17. One of those orders, in an actual contested proceeding, is a February 2, 2000 order from Case No. WR-2000-281, *In the Matter of Missouri-American Water Company’s Tariff* (Missouri-American Water Order).⁶ AmerenUE notes that this order was issued by delegation and so it appears the full Commission has not discussed or determine the legitimacy of OPC’s extraordinary claim.

⁶ WR-2000-281, *Order Concerning Motions to Compel*, February 15, 2000

Regardless, the Missouri-American Water Order cannot properly be interpreted as broadly as OPC has done. The dispute in that case was centered on data requests propounded by an intervenor (not OPC or the Staff) and objected to by Missouri-American Water. The discussion was about the difference in discovery rights between an intervenor and Staff or OPC, with the conclusion being that Staff and OPC have more discovery rights than an intervenor. However, these greater rights, in OPC's case, were premised on *Section 386.450*.⁷ As already established, good cause does not exist under that statute, and no other statute grants OPC the access it seeks.

18. OPC also cites a Raytown Water Company decision in Case No. WO-94-192. In that dispute, OPC was seeking to determine when new construction was placed in service in order to determine if Raytown Water Company was in compliance with a previous Commission order. As the Commission found, OPC was seeking to conduct an investigation so that it would have the information necessary to file a complaint against Raytown Water Company. As noted, there is no allegation of any violation of any law, regulation or Commission order here. Moreover, the Raytown Water Company decision did not find an "unfettered" right to access to utility records, but instead, only allowed access for good cause shown under Section 386.450.

19. OPC's *Motion* also cites, in a footnote, an order issued in Case No. ER-2007-0002, a previous AmerenUE rate case. In that rate case, the Commission noted that Section 386.450 RSMo does not require OPC to show the requested documents are relevant to any particular issue. However, it would be inappropriate to interpret that statement to mean there is no limit on OPC's right of discovery, especially given the limitation found within the statute itself – the requirement that OPC show good cause and make a request of the Commission to inspect the books or records of the company. The order cited by OPC from that case makes this

⁷ Missouri-American Water Order, n. 22

very point. The order states that Section 386.450 RSMo “...allows *the Commission* to require the production of the requested documents...” *Order Regarding Public Counsel’s Motion to Compel Discovery*, March 15, 2007, p. 3, emphasis added. The Commission may require that production “...upon a showing of good cause by the Public Counsel...” *Id.* Good cause does not exist here, and a finding of good cause would allow OPC to complete the end-run around the Commission’s earlier refusal to open the docket OPC seeks.

20. OPC’s *Motion* also makes the startling claim that to limit its authority to conduct investigations to matters for which a case is already opened would “make Public Counsel subordinate to the Commission.” AmerenUE is not sure what OPC means by “make Public Counsel subordinate.” The statutes that govern the Commission and OPC make clear that OPC *is* subordinate to the Commission in several respects, in that while OPC can file a complaint as to certain matters, it is the Commission who decides if the complaint has merit. Section 396.390. Moreover, *only* the Commission can file certain kinds of complaints⁸ (*Id.*), and as already established, only the Commission can grant access to records under Section 386.450.

Putting aside the question of which entity is subordinate, AmerenUE is not making the claim that OPC can never conduct investigations into matters for which a case has not been opened. But OPC’s right of discovery is not without limitation, however much OPC might desire otherwise. This Commission has no authority to allow OPC to act in a manner inconsistent with state law.

21. Certainly, despite the orders cited by OPC and even in situations where data request disputes arose in an actual case, the Commission has not allowed discovery by OPC without limitation. In previous orders, issued by the Commission rather than by an RLJ, and

⁸ The Commission is the sole agency vested with the power and authority to decide if any utilities rates are just and reasonable, whether a utility is providing sufficient and efficient service, whether certain regulations should be adopted to govern utility actions, etc.

issued *after* the Missouri-American Water Order, when resolving discovery disputes over OPC issued data requests, the Commission has held that “...the scope of discovery is the same as in civil cases generally under Supreme Court Rule 56.01(b)(1)...” Case No. EO-2004-0108, *Order on Reconsideration Concerning Discovery*, February 26, 2004, p. 4. The Commission, as part of its decision making process on this issue, determined whether a specific data request was relevant, stating in part, “Relevant evidence, in turn, is that which tends to prove or disprove a fact o[r] consequence to the pending matter...discoverable matter need not be admissible, but must always be relevant.” *Id.*, p. 5. In Case No. EC-2002-1, the Commission denied OPC’s Second Motion to Compel because, “The Commission is not persuaded that the information...has any relevance to this case or would be likely to lead to the discovery of relevant information.” *Order Denying Second Motion to Compel*, June 27, 2002, p. 2.

Requests for Privileged Information

22. Of the 14 data requests which are the subject of this Motion, two seek information which OPC attempted to access during the evidentiary hearings in Case No. ER-2008-0318, as part of his cross-examination of AmerenUE witness Ajay Arora. The bench sustained AmerenUE’s objection to production of this information on attorney-client privilege grounds.⁹ The two data requests at issue are OPC 7004 and OPC 7005. As Mr. Lowery stated in making his objection, the analyses OPC continues to seek were prepared at the request of the Company’s attorneys in order to advise the Company’s management on legal issues around CMR financing and other financing issues relating to a possible Callaway II unit. That information has not been shared except by the Company’s attorneys with the Company’s management, and thus remains privileged. *See, e.g., Order Denying Motion to Compel*, Case No. EC-2002-1, 2002 WL 1311615. In that case, OPC claimed that the Company had waived the attorney-client privilege

⁹ Case No. ER-2008-0138, Tr. (Vol. 19- in camera), P. 1343, L. 6 to P. 1344, L. 17.

by not objecting on attorney-client privilege grounds within the normal 10-day objection period provided for by the Commission's rules. In this case, the Company did timely object. Regardless, even if the Company had not objected, "it is well-settled law in Missouri, since 1926, that an objection based upon privilege is not waived unless an answer has already been given" (*Rock v. Keller*, 278 S.W. 759, 766 (Mo. 1926)). The reason an attorney-client privilege objection is not waived, even if timely objection is not made, is because unless and until the privileged information is actually provided to a third party, the privilege remains. OPC has no right to this information, regardless of the scope of its access rights to other Company books and records, as the bench already ruled during the evidentiary hearings in the Company's rate case.

WHEREFORE, AmerenUE respectfully requests that the Commission deny the Office of Public Counsel's Second Motion to Compel.

Respectfully submitted,

UNION ELECTRIC COMPANY,
d/b/a AmerenUE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response to Public Counsel's Second Motion to Compel was served on the following parties via electronic mail (e-mail) on this 6th day of February, 2009.

/s/ Wendy K. Tatro

Wendy K. Tatro