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**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office
in Jefferson City on the 15th
day of March, 1995.

Ahlstrom Development Corporation, and)	
Cottonwood Energy Partners, L.P.,)	
)	
Complainants,)	
)	
v.)	<u>Case No. EC-95-28</u>
)	
The Empire District Electric Company,)	
a corporation,)	
)	
Respondent.)	
)	

ORDER GRANTING MOTION TO COMPEL

On January 13, 1995, Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P. (Ahlstrom) filed a motion to compel The Empire District Electric Company (Empire) to respond to Data Request No. 1-32. Ahlstrom states that Data Request No. 1-32 requests that Empire "list all the reasons Empire has refused to enter into a power purchase agreement with Ahlstrom, and provide Documents relating to Empire's refusal." Attached to the motion to compel is a copy of a letter dated November 7, 1994, from legal counsel representing Empire. Page two of the letter reads as follows, in response to Data Request No. 1-32.

"Empire objects to the form of this question because it uses the term 'refused', and is therefore argumentative, since Ahlstrom has alleged 'refusal' as a legal basis for the relief it seeks in this proceeding. The question may also seek the mental impressions, theories or conclusions of Empire's attorneys."

On January 23, 1995, Empire filed a response to Ahlstrom's motion to compel. Empire's response admits to the above-quoted basis of its objection. Empire's response admits that, by letter dated December 29, 1994, Ahlstrom's counsel stated that they "have not used the term 'refused' in an argumentative

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fashion. The term 'refused' was used in accordance with the dictionary definition thereof -- i.e., 'to decline to do'." Empire states that its answer to the Complaint should have given Ahlstrom notice as to the reasons Empire believes it was not required to enter into a contract with Complainants and the reasons it declined to do so. Empire states that to the extent Data Request No. 1-32 seeks information beyond Empire's answer, it requests mental impressions, conclusions, opinions, and legal theories of Empire's attorneys.

On February 2, 1995, Ahlstrom filed a reply to Empire's response to Ahlstrom's motion to compel. Ahlstrom states that it is not seeking "the mental impressions, theories or conclusions of Empire's attorneys." Instead, Ahlstrom continues, it is seeking the reasons that Empire thus far has chosen not to enter into a long term power purchase agreement with Ahlstrom. Ahlstrom states that it is not seeking privileged information from Empire.

It appears that the parties have already resolved the aspect of this dispute that involves the use of the word "refused" in Data Request No. 1-32. However, in the event that the parties have not fully resolved that aspect of this dispute, the Commission is of the opinion that Empire should deem the data request to have been amended by Ahlstrom as a result of Ahlstrom's letter dated December 29, 1994. Specifically, Empire should deem Data Request No. 1-32 to read:

"List all the reasons Empire has declined to enter into a power purchase agreement with Ahlstrom, and provide Documents relating to Empire's decision to not enter into said agreement."

With regard to the claim of attorney-client privilege, the Commission is of the opinion that the parties, and particularly counsel for Ahlstrom and Empire, should use due diligence to narrow the scope of those items to which the attorney-client privilege applies. To the extent that Empire believes the attorney-client privilege applies, it shall state with specificity its reasons for the application of the privilege.

The Commission suggests that the parties and counsel consider the following dicta from federal cases. In *Upjohn Co. v. United States*, 449 U.S. 383, 395-396, the U.S. Supreme Court, quoting from *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (ED Pa. 1962), pointed out:

"The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

Empire has stated, in paragraph 6 of its response, that its answer to the complaint in this matter contains all information responsive to Ahlstrom's Data Request No. 1-32. The Commission will order Empire to specifically identify those portions of the answer which are responsive to Data Request No. 1-32, as part of its response to the data request. The Commission is of the opinion that the information sought from Empire in Data Request No. 1-32 is important and, therefore, will order Empire to deliver to Ahlstrom, on or before March 27, 1995, those portions of its response to Data Request No. 1-32 for which the attorney-client privilege is not asserted. If Empire determines, after application of the above-cited standard, that the attorney-client privilege applies to certain documents or other information elicited by Data Request No. 1-32 and Empire does not choose to waive the privilege with respect thereto, then Empire shall file a description of the items for which it believes the attorney-client privilege applies and the basis for the application of the privilege with respect thereto. If there is a dispute as to whether a certain document or other item of information is properly subject to the privilege, the Commission will designate another hearing examiner to conduct an *in camera* proceeding to review the documents or information and determine which items are protected by the privilege. The Commission is of the opinion that the trier of fact cannot view or hear documents

or statements, even *in camera*, for which the attorney-client privilege has been claimed. *Friedman v. Provaznik*, 668 S.W.2d 76, 79 (Mo. banc 1984), *In re Kansas City Power & Light Company*, 27 Mo. P.S.C. (N.S.) 524, 525 (1985).

IT IS THEREFORE ORDERED:

1. That the motion to compel filed by Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P., against The Empire District Electric Company be, and is, hereby granted as described in this order.

2. That on or before March 27, 1995, The Empire District Electric Company shall deliver its completed response to Data Request No. 1-32 to Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P., as described in this order.

3. That on or before March 27, 1995, The Empire District Electric Company shall file with the Commission a description of the items for which it believes the attorney-client privilege applies and the basis for the application of the privilege with respect thereto.

4. That this order shall become effective on the date hereof.

BY THE COMMISSION



**David L. Rauch
Executive Secretary**

(S E A L)

Mueller, Chm., Perkins and
Crumpton, CC., concur.
McClure and Kincheloe, CC.,
dissent.