

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY

November 9, 2000

CASE NO: EM-96-149

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Enclosed find certified copy of an **ORDER** in the above-numbered case(s).

Sincerely,



**Dale Hardy Roberts**  
Secretary/Chief Regulatory Law Judge

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 9th  
day of November, 2000.

In the Matter of the Application of Union )  
Electric Company for an Order Authorizing: )  
(1) Certain Merger Transactions Involving )  
Union Electric Company; (2) The Transfer )  
of Certain Assets, Real Estate, Leased ) Case No. EM-96-149  
Property, Easements and Contractual )  
Agreements to Central Illinois Public )  
Service Company; and (3) In Connection )  
Therewith, Certain Other Related )  
Transactions )

**ORDER GRANTING IN PART STAFF'S MOTION TO COMPEL, ORDER  
DENYING IN PART STAFF'S MOTION TO COMPEL AND ORDER  
DENYING AMERENUE'S MOTION FOR RECONSIDERATION**

**Procedural Facts**

On October 25, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a motion to compel discovery and a Motion for Expedited Treatment of Staff's Motion to Compel. On October 27, 2000, the Commission directed Staff to file a copy of the documents containing Union Electric Company d/b/a AmerenUE (AmerenUE)'s written objections no later than 12 p.m. on October 30, 2000. Staff filed its response on October 30, 2000, complying with the Commission's request and adding DRs 88R-107R to its motion to compel. Staff stated that it received AmerenUE's objection to DRs 88R-107R on October 27, 2000, in a letter dated October 26, 2000.

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On October 31, 2000, the Commission issued its order directing AmerenUE to answer Data Requests (DRs) 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 no later than November 10, 2000. The Commission also granted AmerenUE until November 3, 2000, to file a response to the remaining portion of Staff's motion to compel filed October 25, 2000, as amended October 30, 2000.

On November 2, 2000, AmerenUE filed its Motion for Reconsideration of the Commission's Order Granting in Part the Motion to Compel. AmerenUE stated that it should have been given an opportunity to respond to Staff's Motion before the Commission ruled on DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 because its argument was that the discovery procedures applied by the Commission do not apply to the Second EARP.

On November 3, 2000, AmerenUE filed its opposition to Staff's motion to compel.

On November 8, 2000, Staff filed a reply to AmerenUE's suggestions in opposition to Staff's motion to compel and a reply to AmerenUE's motion for reconsideration.

**Motion For Reconsideration of the Commission's Motion  
Granting in Part the Motion to Compel**

AmerenUE alleged in its motion for reconsideration that the Commission, by acting before receiving AmerenUE's response to Staff's Motion to Compel, was unaware of a "procedural ambiguity" regarding the application of the normal discovery procedure to the operation of the Experimental Alternative Regulation Plan (Second EARP). In fact, AmerenUE raised that issue in its general objections filed October 3,

2000. AmerenUE also raised the procedural issue in its objection letters dated October 5, October 9, October 11, October 19, and October 26, 2000. In each of those letters, AmerenUE stated that it did not believe that the normal discovery procedures applied.

If AmerenUE believed that the normal discovery procedures did not apply, when Staff began submitting its DRs pursuant to Commission rule 4 CSR 240-2.090, AmerenUE was nonetheless bound by the rule invoked to respond within 10 days with its objection that the process did not apply. AmerenUE could have requested an extension of time from Staff and set a time by agreement with the parties or AmerenUE could have asked the Commission to extend the time for objections. AmerenUE failed to take any action before the 10 days expired, and therefore, AmerenUE waived its objections for any DR where the objections were not timely filed.

In its motion for reconsideration, AmerenUE stated that the Commission's order issued October 31, 2000, is "particularly unfair" because AmerenUE was required to comply with the time frames established in a rule that AmerenUE claims does not apply "in this context." AmerenUE further stated that the Second EARP contains specific disclosure provision defining the information needed and governing information disclosure in lieu of the usual discovery process. *Motion for Reconsideration, p. 3.* AmerenUE identifies those provisions as Section 7.e. and Section 7.f.iv. of the Second EARP. Section 7.e. sets out the nine categories of reports and data to be provided. AmerenUE specifically notes that the Second EARP states "UE will not be required to develop any new reports." AmerenUE also

points out that Section 7.f.vi. requires AmerenUE to prepare a "preliminary earnings report," followed by a "final earnings report," for each Sharing Period. Therefore, AmerenUE argues that nothing is included in the Second EARP that either adopts or incorporates the familiar data request process.

AmerenUE does not provide any new information that was not already available to the Commission when it rendered its decision on October 31, 2000, when it found that AmerenUE objections to DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 were untimely, and ordered AmerenUE to answer those DRs no later than November 10, 2000. Therefore, the Commission, having considered AmerenUE's additional arguments, finds no reason to change its order issued October 31, 2000.

**General Objection: Applicability of Discovery to Second EARP**

The remaining DRs included in Staff's motion to compel are DRs 59, 61-72, 74-78, 80, 82-107.<sup>1</sup> AmerenUE filed timely objections to DRs 59, 61-72, 74-78, 80, and 82-107. In its letter dated October 3, 2000, AmerenUE stated its general objection that it believed that "the

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<sup>1</sup> DRs 50, 55, 74, 78, 80, 82-87, and 88-107 are marked as such on the data requests as issued but are referred to in Staff's response to Commission Order Directing Filing filed October 30, 2000, and in AmerenUE objection letters as DRs 50R, 55R, 74R, 78R, 80R, 82-87R, and 88R-107R. There is no explanation for addition of the "R" to the original DR number, but it does appear that the DR numbers referred to on the request and the DR number followed by the letter R on the Staff's response and AmerenUE's objection refer to the same DR. This order will refer to the DR by its original number only.

discovery strategy being pursued by Staff is unauthorized by § 7(g), or anything else in the EARP."<sup>2</sup>

AmerenUE pointed out that the Second EARP expressly provided that Staff, Public Counsel and other signatories may not file, encourage or assist others to file a rate reduction case through June 30, 2001, except in certain circumstances. *Second EARP, Section 7(c)*. AmerenUE stated that rate reduction proceedings, including the various forms of discovery that make up much of those proceedings, were not to begin before the conclusion of the Second EARP.

On October 5, 2000, AmerenUE filed a second letter objecting to DRs 59, 61-72, and 74-77, alleging that these DRs "are part of a discovery process that is not mandated or contemplated by the EARP," are not expressly authorized by the Second EARP and are outside the scope of any provision of the EARP. AmerenUE made the same objection to DRs 78, 80, 82-87 and 88-107 in its objection letters dated October 9, October 11, October 19, and October 26, 2000, respectively. In addition, AmerenUE raised two specific objections in regard to DRs 74 and 87 submitted by Staff in its letters dated October 12 and October 19, 2000, respectively, along with its general objection. These specific objections will be addressed in the next section.

In previous decisions, the Commission has not found general objections to data requests acceptable. *In the Matter of Sho-Me Power*

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<sup>2</sup> Section 7(g) refers to the Stipulation and Agreement approved by the Commission in its Report and Order issued in this case on February 21, 1997. (Section 7 of this Stipulation and Agreement was entitled "New Experimental Alternative Regulation Plan (New Plan)." This entire Stipulation and Agreement is referred to as the "Second EARP" for the purposes of this order.)

Corporation, 29 Mo. P.S.C. 409, Case Nos. EA-87-49, EA-87-101 and EA-87-105, June 2, 1987. Objections to discovery requests should specifically set forth the grounds for each objection as found in the Missouri Rules of Civil Procedure (Mo.R.Civ.P.). Commission Rule 4 CSR 240-2.090(1) states that "[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." The standard for discovery is set out in Rule 56.01(b)(1), Mo.R.Civ.P.<sup>3</sup> AmerenUE failed to set forth specific objections to DRs 59, 61-72, 73, 75-78, 80, 82-86 and 88-107 in its letters dated October 3, October 5, October 9, and October 26, 2000.

The Commission has also reviewed AmerenUE's general objection. AmerenUE alleged that "the discovery strategy being pursued by Staff is unauthorized by § 7(g), or anything else in the EARP," which requires the Commission to look at the Second EARP. There are various sections in the Second EARP that lead the Commission to the conclusion that normal discovery procedures do apply in Case No. EM-96-149 like any other case. Section 7(e) of the Second EARP sets out the "monitoring" provisions, including "reports and data identified below." Specifically, Section 7(e) states that

Monitoring of the New Plan will be based on UE supplying to Staff and OPC, on a timely basis, the reports and data identified below. These reports and

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<sup>3</sup> See Rule 56.01(b)(1): Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.



data must be provided as part of the New Plan . . . Staff, OPC and the other signatories participating in the monitoring of the New Plan may follow up with data requests, meetings and interviews, as required, to which UE will respond on a timely basis. UE will not be required to develop any new reports, but information presently being recorded and maintained by UE may be requested. (emphasis added.)

Section 7(e) sets out the reports and data that must be provided on an ongoing basis throughout the three-year period and specifically authorizes data requests.

Section 7(g) states that AmerenUE, Staff, Public Counsel and other signatories must meet to review "the monitoring reports and additional information required to be provided." Section 7(g) does not contain restrictive language that would limit the additional information available to that identified under Section 7(e).

Section 8 of the Second EARP is entitled State Jurisdictional Issues. Under Section 8(a), AmerenUE agrees to make available "all books and records and employees and officers of Ameren, UE and any affiliate or subsidiary of Ameren as provided under applicable law and Commission rules," subject to Ameren's right to object. The applicable law and Commission rules that would apply would be Commission Rule 4 CSR 240-2.090(1) and Rule 56.01(b)(1), Mo.R.Civ.P.

Section 8(b) specifically states "UE, Ameren and any affiliate or subsidiary thereof agree to continue voluntary and cooperative discovery practices." Section 11 of the Second EARP states "Nothing in this Stipulation and Agreement is intended to impinge or restrict in any manner the exercise by the Commission of any statutory right, including the right of access to information, and any statutory

obligation." Reading all of these sections together, the Second EARP does not change the existence or applicability of Commission Rule 4 CSR 240-2.090 regarding discovery. In fact, Section 8(b) of the Second EARP is clearly on point where "UE, Ameren and any affiliate or subsidiary" agree to continue voluntary and cooperative discovery practices.

In its written opposition filed on November 3, 2000, AmerenUE argues that Section 7(e) relating to monitoring reports and Section 7.f.iv. relating to preliminary and final earnings reports provide the Staff with "more than enough information to fulfill every task under the EARP."

In light of Section 8(b), AmerenUE cannot reasonably argue that it did not expect the use of discovery in these Second EARP proceedings. Therefore, the Commission finds that normal discovery procedures as set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and its implementation specifically as it relates to the evaluation of the EARP process pursuant to Section 7(g) of the Second EARP.

AmerenUE failed to file a specific objection to DRs 59, 61-72, 73, 75-78, 80, 82-86, and 88-107, and therefore, the Commission will direct AmerenUE to file its answers to DRs numbers 59, 61-72, 73-78, 80, 82-86, and 88-107 within the time period required by Commission Rule 4 CSR 240-2.090(2), and if the time for answering a DR has passed, the Commission will allow AmerenUE additional time for filing its answer. The Commission finds that, after considering AmerenUE's

general objection, even if the objection had been specific enough, AmerenUE's substantive argument was incorrect.

### **Specific Objections to DRs**

In a letter dated October 12, 2000, AmerenUE raised an additional objection to DR 74 on the grounds that the request made in DR 74 is vague, overly broad, and unduly burdensome. AmerenUE alleges that this request fails to specify any given time frame for the information requested. DR 74 states

**DR 74:** Please describe all actions the Company has undertaken to improve plant efficiency and to reduce fuel costs for each Ameren generating facility. Provide all cost savings or production savings achieved.

DR 74 does lack a time frame for the information requested by Staff. AmerenUE states that it is being asked to "expend many manhours to produce a response containing volumes and volumes of information which would not lead to the discovery of relevant, admissible evidence." Because of the lack of adequate time parameters in DR 74, the Commission will deny Staff's Motion to Compel as the data request is overbroad as written. Staff may issue a DR relating to the same subject matter as long as the request includes a reasonable time frame.

In AmerenUE's objection letter dated October 19, 2000, AmerenUE also objected to DR 87 on the grounds that this request is vague, overly broad and unduly burdensome. DR 87 states

**DR 87:** Provide a copy of all interviews (internal and external) and all internal correspondence from all Ameren employees in relation to the Venice power plant outage. Provide for the period covering the time of the accident through the present.

Unlike its specific objection to DR 74, AmerenUE does not specify why it believes that DR 87 is "vague, overly broad and unduly burdensome." Therefore, the Commission will direct AmerenUE to respond to DR 87.

**IT IS THEREFORE ORDERED:**

1. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is granted in part in that Union Electric Company d/b/a AmerenUE shall answer Data Request numbers 59, 61-72, 73, 75-78, 80 and 82-87 as soon as possible, but in no event later than November 19, 2000.

2. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is granted in part in that Union Electric Company d/b/a AmerenUE shall answer Data Request numbers 88-107 within the time period required by Commission Rule 4 CSR 240-2.090(2).

3. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is denied in part in that Data Request 74 is found to be overly broad because it failed to provide time frames for which the data was requested.

4. That the motion for reconsideration filed by Union Electric Company d/b/a AmerenUE on November 2, 2000, is denied.

5. That this order shall become effective on November 19, 2000.

**BY THE COMMISSION**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

(S E A L)

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur  
Murray, C., dissents with dissenting opinion

Register, Regulatory Law Judge