BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariffs to Decrease Its Revenues for Electric Service	)))	Case No. ER-2019-0335

AMEREN MISSOURI'S SUGGESTIONS IN OPPOSITION TO SIERRA CLUB'S MOTION TO COMPEL

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") and states the following in response to Sierra Club's Motion to Compel:

1. When Sierra Club first contended that Ameren Missouri should be compelled to produce the 2020 integrated resource plan ("IRP") materials that Ameren Missouri is in the process of developing in anticipation of litigating the 2020 IRP case, Sierra Club said that the reason it was taking up Ameren Missouri's timely objection (6 weeks after it was lodged) was that Ameren Missouri witness Matt Michels had "relied" on the 2020 IRP in his rebuttal testimony.[1] Not true. As Ameren Missouri pointed out in its Response, Mr. Michels placed absolutely no reliance on any results or findings or materials reflected in the in-process IRP materials.[2] At any rate, Sierra Club has abandoned that contention in its Motion to Compel.

2. Instead, Sierra Club repeats or expands other points from its February 4 Statement, claiming for instance that the in-process IRP materials are relevant to the question whether Ameren Missouri's decision to invest in coal plants was prudent. Ameren Missouri need not repeat its prior discussion of the prudence standards applied in Missouri, including that

[1] Sierra Club Statement of Discovery Disagreement or Concern ¶ 3 (Feb. 4, 2020) ("In the rebuttal testimony of Company witness Michels, the Company is now relying on the 2020 IRP as a basis to rebut the recommendations of Sierra Club witness Allison. The ongoing objection to Sierra Club [data request] 6.3 is therefore not reasonable in light of the Company's reliance on its 2020 IRP.") (emphasis in original) (internal citation omitted).
[2] Ameren Missouri's Response to Sierra Club's February 4, 2020 Statement of Discovery Disagreement or Concern ¶ 11 (Feb. 7, 2020).

the Commission does not judge prudence using hindsight; and that analyses done and materials developed by Ameren Missouri after it decided to make those investments would not be relevant to the question of whether those decisions were prudent. Having said that, Ameren Missouri acknowledges that the Commission generally views relevance broadly.

3. The problem for Sierra Club, however, is that it has not even come close to meeting *its* burden to overcome the Company's work product objection. *See State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 368 (Mo. banc 2004) (the party seeking to overcome a work product objection bears the burden to establish both substantial need and undue hardship). In fact, Sierra Club devotes less than a page of its 6-page Motion to Compel to the topic, and ignores the evidence and argument Ameren Missouri put forth in Ameren Missouri's Response to the Sierra Club's February 4, 2020 Statement of Discovery Disagreement or Concern.

4. The relevant part of the work-product rule is set forth in Rule 56.01(b)(3) of the Missouri Rules of Civil Procedure: "[A] party may obtain discovery of documents . . . prepared in anticipation of litigation . . . by . . . another party . . . only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

5. Accordingly, a party is generally not allowed to discover materials prepared by another party in anticipation of litigation. Since the materials pertaining to Ameren Missouri's 2020 IRP are as we speak being produced by Ameren Missouri in anticipation of having to litigate what will no doubt be serious attacks by Sierra Club on the IRP, these documents are simply not discoverable <u>unless and until</u> Sierra Club meets its burden to demonstrate two things: (1) that it has a substantial need for them *in this rate case*, and (2) that it would be unable

without *undue* hardship to obtain the substantial equivalent of the materials by other means. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 368 (Mo. banc 2004).

6. In paragraph 13 of its Motion to Compel, Sierra Club implies that an IRP case does not count as litigation for purposes of the work-product rule because an IRP case does not involve a "contested case" as defined in the Missouri Administrative Procedure Act ("MAPA"). *See* § 536.010, Mo. Rev. Stat. (2016). The undersigned counsel is not aware of any authority for this proposition, and Sierra Club does not cite any. Rather, Sierra Club cites the Commission's December 3, 2019 Revised Order Establishing Special Contemporary Resource Planning Issues, from EO-2020-0047, in which the Commission said, "This is not a contested case," and implies that because an IRP case is not a contested case under MAPA, it cannot count as litigation. There are two significant flaws in Sierra Club's argument.

7. First, the Sierra Club's claim about what the Commission said is not accurate. When the Commission said, "This is not a contested case," the Commission was referring not to an IRP case but to a separate *Special Contemporary Issues docket* (File No. EO-2020-0047) which is now concluded. As a matter of fact, in the very next sentence the Commission said, "The Commission does not need to hear evidence before reaching a decision and does not need to make findings of fact and conclusions of law in announcing that decision."[3] This is consistent with the Commission's rules regarding Special Contemporary Issues dockets: there is never an opportunity for an evidentiary hearing, the Commission never allows discovery, and aside from deciding (on the paper submissions) what issues the utility will study in the next triennial IRP

[3] Revised Order Establishing Special Contemporary Resource Planning Issues, p. 2 (Dec. 3, 2019), In the Matter of a Determination of Special Contemporary Resource Planning Issues to be Addressed by Ameren Missouri in its Next Triennial Compliance Filing or Next Annual Update Report, File No. EO-2020-0047.

case, the Commission does not make any kind of finding at all about whether the utility has complied with the Commission's rules. Ameren Missouri would agree that a Special Contemporary Issues docket would not be litigation for purposes of the work-product rule. But that does not mean that a triennial IRP case isn't.

8. Second, the question of whether an IRP case constitutes litigation does not depend on the MAPA's contested versus non-contested case classification. If it did, then there should be no discovery in IRP dockets, no evidentiary hearings, and no outcomes whereby a utility can be found to have violated the Commission's rules, yet all of these hallmarks of litigation are contemplated by the Commission's rules that *apply to triennial IRP cases.* And these hallmarks of litigation have in fact happened in the past, including in Ameren Missouri's 2011 IRP case.

Indeed, other Commission rules also contemplate that a triennial IRP case is contested, is litigation, whereas a Special Contemporary Issues docket is not. For example, the Commission's communication rules, 20 CSR 4240-4.015–4.030, define a "case" as "[a]ny matter *filed* before the commission for its determination . . . ." (emphasis added). Triennial IRP cases are filed by the utility and they seek the determinations provided for by 20 CSR 4240-22.080(16). Unlike for a Special Contemporary Issues docket, a 60-day notice is required by 20 CSR 4240-4.017(1) before the utility can file its triennial IRP case, because the triennial IRP case is a case as defined by 20 CSR 4240-4.015, not a mere docket. Indeed, Special Contemporary Issues dockets are initiated by a simple notice from the Commission and not a filing from the utility seeking a determination of compliance with the rules.

9. Therefore, ignoring the relevance question, which has nothing to do with the work product protection afforded these materials, the question is whether Sierra Club has met its burden to show substantial need and undue hardship. It hasn't.

10. As earlier noted, given the relatively low bar for discovery, Ameren Missouri would agree that the Commission would have discretion to find that the requested materials are discoverable under Rule 56.01(b)(1). But at the same time, the Commission would also have discretion to conclude otherwise. Documents are not discoverable just because they have some level of logical relevance. In discussing trial judges' "affirmative duty" to prevent the "subversion of [the] pre-trial discovery" process, the Missouri Court of Appeals said:

> Determination of the appropriate boundaries of discovery requests involves the pragmatic task of weighing the conflicting interest of the interrogator and the respondent. Therefore, in ruling upon objections to discovery requests, trial judges must consider not only questions or privilege, work product, relevance and tendency to lead to the discovery of admissible evidence, but they should also balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it. . . . Thus, even though the information sought is properly discoverable, upon objection the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome or less expensive than that designated by the requesting party.

State ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo. App. E.D. 1985) (internal citations and quotation marks omitted). In other words, the discovery standard involves a balancing of interests. Hence the requirement of showing substantial need and undue hardship, neither of which Sierra Club has even attempted to show, apparently because it thought it could rest on the claim in paragraph 13 of its Motion to Compel that because the Ameren Missouri "cited no authority in support of its work product claim," the materials were not work product. As earlier demonstrated, the materials do in fact constitute materials prepared in anticipation of litigation and are therefore work product. Sierra Club has had at least two chances (arguably three, given the opportunity to argue these points at the Discovery Conference) to try to meet its burden of showing substantial need and undue hardship, and Sierra Club has failed to do so. On this basis alone the Motion to Compel should be summarily denied.

11. In any event, Sierra Club can't make a showings of substantial need and undue hardship. Sierra Club has been a party to this case since last August. Since then Sierra Club has propounded ten sets of data requests containing hundreds of questions (several hundred if you count subparts), and Sierra Club has shown that it knows how to ask for the data necessary to perform whatever kinds of analyses it desires in an effort to try to prove its points using Ameren Missouri's data. Indeed, much of the detailed data Sierra Club sought in its very first set of 51 data requests is just the kind of information that one would use to perform analyses not unlike those that are performed for an IRP filling. Nor is Sierra Club at some kind of unfair disadvantage by lacking in resources or expertise. Sierra Club has at least four attorneys working on this case—as many as the Company. In addition, Sierra Club is relying on the services (as it has done in many similar cases across the country) of a large economic consulting firm with "30+ experts in energy and environmental economics."[4] If Sierra Club wanted to model the economic results of different resource plans using whatever set of assumptions it wanted to use in order to make the case that the Ameren Missouri should retire its coal plants early, and that as a result, Ameren Missouri's recent investments might not have been needed, Sierra Club could have done so. It chose not to. Instead, Sierra Club chose to wait until about a month before the evidentiary hearings in this case to try to force Ameren Missouri to turn over work product for the ostensible reason that Ameren Missouri relied on the 2020 IRP results when in fact Ameren Missouri did not.

12. The 2020 IRP materials are being prepared in anticipation of litigation. They are only tangentially relevant in that they constitute after-the-fact (hindsight) information about

[4] Synapse Energy Economics, Inc., *Company Profile,* www.https://www.synapse-energy.com/company-profile (last visited Feb. 17, 2020).

decisions and investments that have already been made. Any "need" for them on Sierra Club's part is minimal, if it exists at all, and in any event, Sierra Club could have come up with equivalent information on its own without undue hardship. The materials are not discoverable. *See* Mo. R. Civ. Pro. 56.01(b)(3); *Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364 at 367–68. Sierra Club's Motion to Compel should be denied.

WHEREFORE, Ameren Missouri prays for a Commission order denying Sierra Club's motion to compel Ameren Missouri to produce documents pertaining to Ameren Missouri's 2020 IRP.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail on counsel for the parties of record in this case on the 18th day of February, 2020.

/s/ James B. Lowery

James B. Lowery