BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a AmerenUE for an Order Authorizing the Sale, Transfer an Assignment of Certain Assets, Real Estate Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company d/b/a AmerenCIPS, and in Connection Therewith, Certain Other Related Transactions.	))))))))	**Case No. EO-2004-0108**

AMERENUE'S SUGGESTIONS IN OPPOSITION TO PUBLIC COUNSEL'S FORMAL MOTION TO COMPEL AND RESPONSE TO UNION ELECTRIC COMPANY'S MOTION FOR RECONSIDERATION

COMES NOW Union Electric Company d/b/a AmerenUE ("AmerenUE" or the "Company"), by and through counsel, and submits these Suggestions in Opposition to Public Counsel's Formal Motion to Compel and Response to Union Electric Company's Motion for Reconsideration.

Summary of Argument

As this Commission has twice ruled in the past two years in other cases involving Public Counsel motions to compel, AmerenUE (a) cannot be compelled to produce privileged documents sought by Public Counsel Data Request Nos. 532, 535, or 536; and (b) was not required to object to those Data Requests on the basis of privilege within the 10-day objection period provided for by Commission rule, because the 10-day objection period does not apply with respect to documents protected by privilege. Judge Thompson's January 23, 2004 interlocutory Order Concerning Discovery Conference (the "Discovery Order") is therefore unlawful in this respect. Public Counsel's Formal Motion to Compel with respect to Data Request Nos. 532, 535, and 536 must therefore be

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overruled. These Data Requests are addressed in detail in Part I of the Argument section of these Suggestions.

Furthermore, Public Counsel Data Request Nos. 571, 572, and 573 seek documents reflecting communications from third parties that were not directed to AmerenUE, but which were instead directed to unregulated affiliates of AmerenUE.[1] Documents sent by third parties to unregulated affiliates, which do not pertain to affiliate transactions between AmerenUE and an affiliate, are simply not within the proper scope of this asset transfer case under the legal standards applicable to the exercise of the Commission's authority in such cases. Judge Thompson's interlocutory Discovery Order that denied Public Counsel access to such documents was therefore correct. These Data Requests are addressed in detail in Part II of the Argument section of these Suggestions.

Introduction/Procedural History

This case involves the Company's request to transfer its Illinois service area to an affiliate, Central Illinois Public Service Company d/b/a AmerenCIPS.

On November 26, 2003, Public Counsel sent AmerenUE Data Request Nos. 532, 535, and 536. In summary, these three Data Requests sought information about the Joint Dispatch Agreement ("JDA"), to which the Company is a party.

By responses dated December 10, 2003, Mr. Richard Voytas, Manager of Corporate Analysis, responded to the November 26 Data Requests as follows:

> Ameren Services is currently in the process of completing a study of the Joint Dispatch Agreement. This analysis is materially complete and currently awaits

[1] If the documents are within the scope of these Data Requests and if they were directed to AmerenUE, the Company has produced them.

> the review and approval of Ameren senior management. Once this is complete, a meeting will be scheduled with MPSC Staff and OPC to discuss the results.[2]

The JDA analysis was finalized and reviewed and approved by senior management on January 12, 2004. Just three days later, on January 15, 2004, Mr. Craig D. Nelson, Vice President of Corporate Planning and Mr. Voytas and members of their staff, along with Joseph H. Raybuck and counsel for Staff, met with Staff and Public Counsel (Public Counsel elected to participate by telephone) to address the JDA analysis, as the Company had previously committed to do. At the January 15 meeting, the Company provided information concerning the JDA analysis and discussed those results at length.

The next day (January 16, 2003), at Public Counsel's request, a Discovery Conference was convened before Judge Thompson pursuant to 4 CSR 240.090(8). Public Counsel indicated that he was not sure the Public Counsel's office had received all responsive documents and indicated he was "making a motion to compel to make sure we are getting everything. . ." Discovery Conf. Tr. at p. 10, l. 1-2. Mr. Joseph H. Raybuck, one of AmerenUE's attorneys in the present case, advised Public Counsel and Judge Thompson that a supplemental response to Data Requests 532, 535, and 536 had been prepared, but that he had not had time to send it out before the Discovery Conference. Id. at p. 10, l. 8-10. Mr. Raybuck also advised Public Counsel and Judge Thompson that with the exception of voluminous documents (i.e. documents in excess of 150 pages) relating to the JDA that would be produced at the Company's offices in accordance with the Protective Order entered in this case, all other responsive documents that were not

[2] Mr. Voytas's response, quoted herein, is to Data Request No. 532. Responses to Data Requests 535 and 536 were the same, and therefore simply referenced the text of Mr. Voytas's response to Data Request 532. Copies of Mr. Voytas's responses are attached to these Suggestions as Attachment 1.

privileged had been or would be produced. Mr. Raybuck also advised Judge Thompson that the supplemental response would reflect that any other JDA-related documents sought by Public Counsel were protected by the attorney-client and work-product privileges. Id. at p. 11, l. 11-16.

Judge Thompson responded that he understood that "there were not timely objection letters." Id. at p. 11, l. 24-25. After Public Counsel indicated "that's correct" (Id. at p. 12, l. 1), Judge Thompson made the following statement: "Okay. Because there were no timely objection letters, the privileges are waived . . .." Id. at p. 12, l. 2-3.

Mr. Raybuck, while indicating that he respected Judge Thompson's ruling, argued that the privileges had not been waived. Id. at p. 12, l. 14-15. After further discussion, Judge Thompson indicated that he would stick with his prior ruling which was based upon a purported waiver of the privileges, a waiver Judge Thompson (incorrectly, as discussed below) believed occurred because of the lack of a specific objection within the 10-day objection period provided for by Commission rules. Judge Thompson also noted that the full Commission could reconsider his ruling. Id. at p. 14, l. 3-7.

After the Discovery Conference, the Company provided its Supplemental Response (dated January 23, 2004) that summarized the documents that had been provided to Public Counsel in response to Data Requests 532, 535, and 536. A copy of the Supplemental Response is attached to these Suggestions as Attachment 2.

The Supplemental Response also provided as follows:

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In his Discovery Order, Judge Thompson essentially explained and confirmed his verbal rulings at the Discovery Conference. Specifically, the Discovery Order provides as follows with regard to Data Requests 532, 535, and 536:

> All claims of privilege, however, are waived because they were not raised in a timely objection letter as required by Commission rule [referring to the 10-day objection requirement of 4 CSR 240-2.090(8)].

The Company sought reconsideration of the Discovery Order with regard to Data Request Nos. 532, 535, and 536 by Motion for Reconsideration filed January 30, 2004.

Thereafter, on February 10, 2004, Public Counsel filed the present Formal Motion to Compel. Public Counsel's Motion asked the Commission to reaffirm Judge Thompson's Discovery Order with regard to Data Request Nos. 532, 535, and 536,[3] and asked the Commission to overturn Judge Thompson's Discovery Order regarding Data Request Nos. 571, 572, and 573.[4] By Order Staying Portion of Order Concerning Discovery Conference and Directing Filing dated February 11, 2004, Judge Thompson stayed the Discovery Order with regard to Data Requests 532, 535, and 536. Judge Thompson's February 11 Order also required responses to Public Counsel's Formal Motion to Compel by February 18, 2004.[5]

[3] Public Counsel does not take issue with the sequence of events relating to these Data Requests, but rather, bases his Formal Motion to Compel on the lack of an objection based upon privileges within 10 days – an argument that, as discussed in detail below, is incorrect as a matter of law.

[4] Other Data Requests were previously at issue, but those issues have been resolved between the Company and Public Counsel and are not the subject of any present motion before the Commission.

[5] Although the Commission rules, specifically 4 CSR 240-2.090, contemplate that the Commission will only rule upon and issue orders based upon written motions to compel, Judge Thompson issued the Discovery Order which, by its terms, ordered the Company to produce privileged documents responsive to Data Request Nos. 532, 535, and 536. Because the Discovery Order was issued, and to ensure that others did not argue that it waived any privilege or that it surrendered any legal defenses to enforcement of the Discovery Order, the Company filed its Motion for Reconsideration of Discovery Order. For the

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Argument

I. Data Request Nos. 532, 535, and 536

a. This Commission has previously ruled that the 10-day objection period provided for by Commission rule does not, and cannot, apply to documents protected by privilege.

Respectfully, Judge Thompson's ruling with regard to Data Request Nos. 532, 535, and 536 is incorrect and contrary to well-established law as reflected by this Commission's prior rulings.

This Commission has, on at least two recent occasions, faced a nearly identical situation involving motions to compel filed by Public Counsel. In each case, this Commission has held that the privileges were not waived and that the 10-day objection period of 4 CSR 240-2.090(2) does not apply to claims of privilege. Yet, the Discovery Order purports to force the Company to produce privileged documents based upon application of the 10-day objection period. The Discovery Order, to the extent it purports to require AmerenUE to produce privileged documents, is therefore unlawful and unenforceable.

In the Commission's January 30, 2001 Order Regarding Motion to Compel in Case No. EM-2000-753 (the KCPL holding company case)[6], this Commission ruled on a motion to compel filed by Public Counsel which sought documents which KCPL asserted were "protected by the attorney-client privilege or work product doctrine." Order, EM-2000-753 at p. 2. Like the Company in the present case, KCPL had not objected to the

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Commission's convenience, insofar as a written motion to compel is now before the Commission addressing Data Request Nos. 532, 535, and 536 as well as Data Request Nos. 571, 572 and 573, the Company addresses in this one document all issues that remain unresolved from the Discovery Conference and which were addressed by Public Counsel in its Formal Motion to Compel. Some of the points discussed herein were also addressed in the Company's Motion for Reconsideration. To the extent a point addressed in the Company's Motion for Reconsideration is not specifically addressed herein, the Company's Motion for Reconsideration is hereby incorporated herein by this reference.

[6] Attached to these Suggestions as Attachment 3.

data requests at issue on the basis of privilege within the 10 days prescribed by 4 CSR 240-2.090(2). In holding that the 10-day period did not apply, this Commission stated as follows:

> Indeed, in its response, KCPL insists that it has never objected to the requested data requests and states that it has provided Public Counsel with all requested documents except those that are protected by the attorney-client privilege or work product doctrine.

Specifically, this Commission held that "the requirement that such written objection be filed within 10 days does not, and cannot, apply to privilege claims . . ." (emphasis added). Id. at p. 3. This Commission continued: "[t]he Commission holds that claims of privilege relating to the disclosure of specific documents need not be asserted within ten days of service of a data request." Id.

Despite the absolute clarity of the Commission's ruling on Public Counsel's similar motion to compel in the KCPL case, Public Counsel took another bite of the apple on this issue by ignoring the Commission's prior ruling in the KCPL case and asserting that the 10-day objection period applied to privileged documents in AmerenUE's recent rate case (EC-2002-1), which was resolved by Stipulation and Agreement in July of 2002. In this Commission's February 3, 2002 Order Denying Motion to Compel Data Requests 554 and 555 in EC-2002-1,[7] this Commission again rebuked Public Counsel's attempt to obtain privileged documents. In fact, this Commission made specific note of Public Counsel's failure to recognize the Commission's prior ruling on this issue, stating as follows:

> In spite of the duty of candor, which requires an attorney to inform the tribunal of contrary authority, Public Counsel did not mention [in his motion to compel or

[7] Attached to these Suggestions as Attachment 4.

otherwise] the situation [the EM-2000-753 KCPL case] where the Commission had ruled against it on similar facts.[8]

Indeed, the facts in the KCPL case, the EC-2002-1 case, and the present case are nearly identical. In the EC-2002-1 case, Public Counsel, as here, was after privileged documents dealing with the JDA. As here, Public Counsel filed a motion to compel arguing that "because UE did not plead its attorney-client privilege within the ten-day period established by rule, the privilege is waived." Order, EC-2002-1 at p. 2. But, as noted above, just approximately one year earlier, this Commission had ruled -- and had specifically told Public Counsel -- that the 10-day requirement does not apply to assertions of privilege. As the Commission's EC-2002-1 Order provides, if the Commission were to follow Public Counsel's argument "information which is protected by the attorney-client privilege on the 10th day will not be protected by the attorney-client privilege on the 11th day, simply due to the stroke of midnight on day ten." Id. at p. 2.

b. Privileged documents are not within the scope of discovery unless the documents at issue have, in fact, already been produced for disclosure.

The Commission's ruling in the KCPL case and the EC-2002-1 case are both necessitated by applicable law, as also recognized by the Commission. An "objection based upon privilege is not waived unless the answer has already been given [i.e. unless the privileged documents have already been produced]." Order, EC-2002-1 at p. 3 (citing Rock v. Keller, 312 Mo. 458, 278 S.W. 759, 766[4] (1926) ("the proper time for objection is when a question calling for a disclosure of privileged matter is asked and

[8] The Company assumes that during the Discovery Conference Public Counsel simply failed to recall the Commission's prior rulings in this regard, or simply picked up on Judge Thompson's comments about the lack of an objection based on privileges within the 10-day period without making the connection between the Commission's prior rulings and the present case. Public Counsel persists, however, in his written Formal Motion to Compel, to rely upon the inapplicable 10-day objection period in arguing that the privileges were waived. In any event, the law holds otherwise.

before it is answered" (emphasis added))). See also State ex rel. Cain v. Barker, 540 S.W.2d 50, 52 (Mo. 1976), where the Missouri Supreme Court affirmed the rule in Rock v. Keller, noting that an objection based on privilege is timely if raised "before the request was answered or complied with by furnishing the documents for inspection." The Company has never furnished the privileged documents for inspection and therefore no waiver has occurred.

The Missouri Rules of Civil Procedure, which apply to Commission proceedings as provided for in 4 CSR 240-2.090(1), recognize the principles enunciated in Rock and in Cain. Missouri Rule of Civil Procedure 56.01(b)(1) allows discovery of "any matter, not privileged, that is relevant . . ." (emphasis added). Rule 58.01(a) provides for discovery of documents and things that are "within the scope of Rule 56.01(b)." The scope of Rule 56.01(b) is limited to non-privileged materials. As Rock Island and Cain hold, there is no waiver unless the documents have in fact been produced for inspection. Thus, neither 4 CSR 240-2.090 nor Rule 56.01(b)(1) provide any basis for granting Public Counsel's Formal Motion to Compel. In fact, they dictate that Public Counsel's motion be overruled.

c. Although no objection within the 10-day period was required, the Company asserted privilege as soon as it was able to do so.

The Company does not mean to suggest that it is proper to hold back the assertion of privilege until the last possible moment before the documents would otherwise be produced. However, it was not possible in this case to determine the documents to which privilege attached or for which it was appropriate to assert privilege. The documents at issue were in the process of being prepared by Mr. Voytas and his staff for the purpose of providing them to counsel (Mr. Raybuck), pursuant to his request that they be prepared,

so that he could give his client legal counsel and advice about the subject matter of the documents – the JDA and the legal and regulatory implications relating to the JDA. Other documents at issue were being prepared by Mr. Raybuck or other lawyers for the Company relating to the JDA. In short, documents were developed by management and provided to its counsel, or developed by counsel and provided to management, once those back-and-forth attorney-client communications were completed (in mid-January around the time Mr. Raybuck met with senior management to discuss the JDA analysis), was the Company able to determine if an assertion of privilege was appropriate. Public Counsel was not then, nor has he been now, furnished with any such documents and therefore the privilege has not been waived and remains intact.

d. Further, there as no waiver of privilege for any other reason.

Nor did the Company waive any privilege for any other reason other than timeliness relating to the purported application of the 10-day objection period, discussed above.

The attorney-client privilege is established by statute in Missouri. Section 491.060, RSMo. The privilege protects "confidential communications between an attorney and client concerning the representation of the client." In re Marriage of Hershewe, 931 S.W.2d 198, 202 (Mo. App. 1996). The policy is fundamental and disclosure is the exception to it" (emphasis added). State ex rel. Missouri v. Timmons, 956 S.W.2d 277, 285 (Mo. App. 1997). In Timmons, the Court of Appeals discussed how a waiver of the attorney-client privilege could occur:

> The attorney-client privilege belongs to the client [citations omitted]. An attorney is incompetent to testify "concerning any communication made to him by his clients in that relation or his advice thereon without the consent of such client." . . . A client consents to disclosure by voluntarily revealing the protected

> information, . . . or by placing the subject matter of the privileged communication in issue in the litigation. [. . .] In addition, waiver of the privilege may occur where proof of the elements of a party's claim necessarily entail proof of the contents of an attorney-client communication. 956 S.W.2d at 285 (citations omitted).

None of the bases which under certain circumstances could result in a waiver are present here. First, the client has not consented to any disclosure of the privileged documents.[9] Second, the client has not placed the subject matter of any privileged communications at issue in this case. The Company is not requesting any ruling on the JDA, and is not using any of the privileged communications to prove its case. Third, the Company need not prove the contents of the privileged documents to prove any "element" of the Company's "claim" in this case.

II. Data Request Nos. 571, 572, and 573.

Public Counsel is not entitled to production of documents reflecting transactions between unregulated affiliates and third parties in an asset transfer case.

These Data Requests (attached to Public Counsel's Formal Motion to Compel as Attachment 2) seek communications from entities that are not affiliated with AmerenUE or any of its affiliates that are directed not only to AmerenUE, but also to all of AmerenUE's affiliates. As Mr. Raybuck indicated during the Discovery Conference, to the extent that they are within the scope of the Data Requests at issue, AmerenUE does not object to providing copies of communications made by third parties to AmerenUE, nor does AmerenUE object to providing copies of such communications from an AmerenUE affiliate to AmerenUE. For example, if AmerenUE received a power supply

[9] Corporate managers, such as Mr. Voytas and Mr. Nelson, are "clients" for purposes of the attorney-client privilege. State ex rel. Polytech v. Voorhees, 895 S.W.2d 13, 14 (Mo. banc 1995). Thus, the documents prepared by Mr. Voytas and his staff for communication to Mr. Raybuck, and vice-versa, are privileged, and that privilege has not been waived.

agreement offer from a third party, AmerenUE does not object to producing it. Similarly, if Ameren Energy Marketing sent such a communication to AmerenUE, AmerenUE has no objection to its production. In the latter case, the communication would concern a transaction between AmerenUE and its affiliate (i.e. an "affiliate transaction").

Public Counsel's requests, however, go much further, Public Counsel is asking this Commission to require AmerenUE to produce documents of its affiliates that have nothing to do with transactions between AmerenUE and those affiliates (i.e. that do not pertain to affiliate transactions). In support of this attempt, Public Counsel cites ratemaking cases, such as State ex rel. Associated Natural Gas Company v. Public Service Commission, 706 S.W.2d 870 (Mo. App. 1986) ("ANG"), and argues that they stand for the proposition that records of affiliates cannot be "shielded" by a corporate structure. What Public Counsel fails to point out, however, is that ANG and the other cases relied upon by Public Counsel are rate cases where the allocation of affiliate costs were relevant to the cost of service to be determined in the rate case. The present case is not a rate case – it is simply a Section 393.190 asset transfer case.

For example, ANG involved a request for a rate increase by ANG and, specifically, involved whether the debt structure of ANG's parent (the holding company) must be considered in setting ANG's rates. The Court held that the debt structure (the concept of double-leveraging) should be considered. Thus, the financial data of the holding company was subject to disclosure because the holding company's cost of capital in effect flowed through to the regulated utility and was therefore a component that was to be considered in setting the rates for which ANG had sought an increase. Public Counsel is correct that the Court indicated that the holding company structure would not

shield the holding company's financial data from the Commission, as alleged at page 7 of Public Counsel's Formal Motion to Compel. However, the Court also stated that "once the utility asks for higher rates, a commission may inquire into the utility's capital structure . . ." [and, if relevant, the utility's parent capital structure], as was the case in the ANG case. The "utility" in the present case, AmerenUE, is not asking for higher rates in this case.

Public Counsel also cites a Commission order in a 1998 Missouri Gas Energy rate case wherein the Commission granted a Staff motion to compel certain records of MGE affiliates. Again, the basis for the Commission's order was because the records that were sought contained or might contain information relating to whether affiliate costs were, or were not, being properly allocated to MGE, the regulated utility. Expressions of interest to an unregulated affiliate in a non-rate case which seeks no rate treatment of costs and that will not set or change rates, are wholly different from the documents ordered produced in the MGE case or which were at issue in the ANG case.

The other case cited by Public Counsel is also inapplicable for the similar reasons. State ex rel. Atmos Energy Corporation v. Public Service Commission, 103 S.W.2d 753 (Mo. banc 2003), dealt with the Commission's affiliate transactions rules. Those rules are directed at – not surprisingly – affiliate transactions (transactions between the regulated utility and its unregulated affiliates). Those rules do not and could not apply to a transaction between an unregulated affiliate and third parties who deal with those affiliates.

Public Counsel's apparent "theory" for seeking documents in this asset transfer case that pertain to dealings between unregulated affiliates and third parties is that there

might be something detrimental to the rate paying public (i.e. that there might be some future rate impact associated with generation resource options involving AmerenUE affiliates), therefore entitling Public Counsel to the documents it seeks in this asset transfer approval case. Public Counsel's comments during the Discovery Conference confirm that the aim of seeking these documents is to examine the issue of whether there might be future rate increases for Missouri customers as a result of the asset transfer. Discovery Conf. Tr. at p. 26, l. 19 – 25.

The scope of discovery is measured by the pleadings in a given case. State ex rel. Kawasaki Motors Corp., USA v. Ryan, 777 S.W.2d 247-, 253-54 (Mo. App. 1989). This case seeks an order allowing a transfer of the "pipes and wires" currently used by AmerenUE to serve customers in Illinois. Before the transfer, AmerenUE's rates are set by the tariffs that it filed in compliance with the settlement of its last rate case (EC-2002-1), and a rate moratorium is in effect. Except in limited circumstances that could occur as provided for in the Commission's order approving the Stipulation in the EC-2002-1 case, the rate moratorium means that those rates will not change until at least June 1, 2006. After the transfer, AmerenUE's rates will remain the same unless and until changed in a subsequent (and, most likely, in a post-June 1, 2006) rate case order.

In an asset transfer case, the Commission's task, and the extent of its authority, is to determine whether or not the transfer is "detrimental to the public." A transfer is not detrimental to the public unless there is "compelling evidence" of a "direct and present public detriment." See, e.g., Re: Laclede Gas Company, 2001 WL 1448586 at *2 (Mo. P.S.C.) (August 25, 2001). That standard, in this case, does not entitle Public Counsel to go on a fishing expedition to support arguments that it might want to make about

possible, future, and speculative ratemaking impacts that might or might not ever occur, that would not occur until after June 1, 2006 in any event, and for which Public Counsel and all other interested parties will have the opportunity to address in the Company's next ratemaking case.

Conclusion

The Company has not disclosed any privileged documents sought by Data Requests 532, 535, or 536, and the 10-day period for objections does not apply to claims of privilege. Therefore, Public Counsel's Formal Motion to Compel with respect to said Data Requests must be overruled. To the extent necessary, Judge Thompson's interlocutory Discovery Order, which initially compelled production of privileged documents (and which was since stayed by Judge Thompson), should also be vacated.

Data Requests 571, 572, and 573 do not deal with affiliate transactions. Public Counsel is not entitled to production of documents dealing with non-affiliate transactions in this case because Public Counsel is simply engaged in a fishing expedition directed at trying to argue about some possible, future, and speculative rate impact of the asset transfer at issue in this case. Public Counsel's Formal Motion to Compel with respect to these Data Requests should therefore be overruled.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the following parties of record, on this 18th day of February, 2004, via email at the email addresses set forth below:

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AmerenUE's Response to
MPSC Staff Data Request
MPSC Case No. EO-2004-0108
AmerenUE's Application to Transfer Assets to AmerenCIPS

No. 532:

Request From: Ryan Kind

Please provide a copy of all documents that have been created by or for Ameren or its affiliates within the last three years that contain descriptions or analysis of, or references to, possible plans for modifying or eliminating the JDA (joint dispatch agreement) ratepayer payment terms (e.g. the terms under which a portion of Ameren Energy trading margins are credited to UE's cost of service.) If AmerenUE's response to this DR does not include all documents within the scope of those requested due to AmerenUE's belief that the excluded documents are covered by attorney client privilege or the attorney work product doctrine or some other objection, please provide the following information regarding each excluded document: the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege cited.

Response:

Ameren Services is currently in the process of completing a study of the Joint Dispatch Agreement. This analysis is materially complete and currently awaits the review and approval of Ameren senior management. Once this is complete, a meeting will be scheduled with MPSC Staff and OPC to discuss the results.

Prepared By: Rick A. Voytas
Title: Manager Corporate Analysis
Date : December 10, 2003

Attachment 1

AmerenUE's Response to
MPSC Staff Data Request
MPSC Case No. EO-2004-0108
AmerenUE's Application to Transfer Assets to AmerenCIPS

No. 535:

Request From: Ryan Kind

Please provide a copy of all documents created by or for AmerenUE or its affiliates in the last three years that contain descriptions (e.g. scope or timing of possible studies) of, or references to, any studies that may be conducted to analyze the advantages or disadvantages of terminating or modifying the JDA.. If AmerenUE's response to this DR does not include all documents within the scope of those requested due to AmerenUE's belief that the excluded documents are covered by attorney client privilege or the attorney work product doctrine or some other objection, please provide the following information regarding each excluded document: the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege cited.

Response:

Please see the response to OPC DR# 532.

Prepared By: Rick A. Voytas
Title: Manager Corporate Analysis
Date : December 10, 2003

AmerenUE's Response to
MPSC Staff Data Request
MPSC Case No. EO-2004-0108
AmerenUE's Application to Transfer Assets to AmerenCIPS

No. 536:

Request From: Ryan Kind

Please provide a copy of all documents created by or for AmerenUE or its affiliates in the last three years that either contain the results (or descriptions of the results) of any studies that have been conducted by or for AmerenUE or its affiliates to analyze the advantages or disadvantages of terminating or modifying the JDA. If AmerenUE's response to this DR does not include all documents within the scope of those requested due to AmerenUE's belief that the excluded documents are covered by attorney client privilege or the attorney work product doctrine or some other objection, please provide the following information regarding each excluded document: the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege cited.

Response:

Please see the response to OPC DR# 532.

Prepared By: Rick A. Voytas
Title: Manager Corporate Analysis
Date : December 10, 2003

ATTACHMENT 2 HAS BEEN DEEMED

HIGHLY CONFIDENTIAL IN ITS ENTIRETY

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service Commission held at its office in Jefferson City on the 30th day of January, 2001.

In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing the Transfer of Certain Electrical Generation Assets Used to Provide Electric Service to Customers in Missouri and Other Relief Associated with Kansas City Power & Light Company's Plan To Restructure Itself into a Holding Company, Competitive Generation Company, Regulated Utility Company and Unregulated Subsidiary	)	**Case No. EM-2000-753**

ORDER REGARDING MOTION TO COMPEL

On December 22, 2000, the Office of the Public Counsel (Public Counsel) filed a motion asking the Commission to compel Kansas City Power & Light Company (KCPL) to answer certain data requests. Public Counsel's motion indicates that counsel for Public Counsel has complied with the requirements of 4 CSR 240-2.090(8) by conferring with counsel for KCPL concerning this discovery dispute and that a conference regarding this dispute has been conducted with the presiding officer and counsel for Public Counsel and KCPL. Public Counsel indicates that it has been unable to reach a resolution of the dispute and asks the Commission to order KCPL to produce all documents within the scope of the disputed data requests. KCPL filed its response to Public Counsel's motion on January 2, 2001, and Public Counsel filed a reply to KCPL's response on January 16.

Public Counsel presented data requests numbers 516, 520, 526 and 533

to KCPL on October 5, 2000. Those data requests ask that KCPL produce copies of broad categories of internal documents relating to KCPL's plans to restructure itself. Commission rule 4 CSR 240-2.090(2) provides in part that:

> The party to whom data requests are presented shall answer the requests within twenty (20) days after receipt unless otherwise agreed by the parties to the data requests. If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within ten (10) days after receipt of the data requests unless otherwise ordered by the Commission.

KCPL did not object in writing to any of the submitted data requests within the ten days permitted by the regulation. Indeed, in its response, KCPL insists that it has never objected to the requested data requests and states that it has provided Public Counsel with all requested documents except those that are protected by attorney-client privilege or work product doctrine. KCPL has provided Public Counsel with a "privilege log" that lists the date, author, recipients and subject of twenty-five documents that KCPL asserts are protected from disclosure. Apparently it is these documents that are the subject of the discovery dispute.

Public Counsel does not assert any reason why these particular documents are not subject to protection from disclosure. Instead, Public Counsel argues that KCPL waived any objection to the disclosure of all of these documents when it failed to make a timely written objection to their disclosure within the ten days allowed by the Commission's regulation. Public Counsel's argument is not persuasive.

4 CSR 240-2.090(2) requires the recipient of a data request to make written objection to such data request within ten days after receiving the data request. The purpose of this requirement is to ensure that the discovery process proceeds promptly. Ten days is generally a sufficient amount of time to allow a party to examine and consider the data request and to formulate any appropriate objection to the data request. If a party

believes that ten days is not enough time to make an objection it may request that the Commission grant it additional time to file its objections. The Commission does not wish to make any change in that ten-day requirement. However, in this case, KCPL does not object to the data requests. Instead it indicates that certain documents that would otherwise be turned over to Public Counsel in response to the data requests are protected from disclosure by either the attorney-client privilege or as attorney work product.

A party must comply with 4 CSR 240-2.090(2) by making a timely objection to a data request. Thus, for example, if a data request is vague, overly broad or unduly burdensome, or if, on its face, a data request calls for the production of documents that would be protected by the attorney-client or work product privilege, then the responding party must make its written objection to the data request within ten days as required by the rule. However, the requirement that such written objection be filed within ten days does not, and cannot, apply to privilege claims relating to specific documents to be disclosed under otherwise unobjectionable data requests. The Commission holds that claims of privilege relating to the disclosure of specific documents need not be asserted within ten days of service of a data request. Public Counsel's Motion to Compel will be denied.[1]

In its January 16 reply to KCPL's response, Public Counsel requests, if the Commission denies the relief sought in its motion to compel, that the Commission establish a special procedure to determine the merits of KCPL's claim of privilege for specified documents that it has refused to

produce in response to Public Counsel's data requests. The relief sought by Public Counsel in its January 16th reply is very different from the relief it sought in its motion to compel. KCPL has not had an opportunity to respond to that request and consideration of the requested relief in this order would only create confusion. Consequently, the Commission will make no finding on the appropriateness of any special procedure to review the particular documents for which KCPL claims a privilege. If Public Counsel wishes to further pursue such relief it may file an appropriate motion requesting such relief.

IT IS THEREFORE ORDERED:

1. That the Motion to Compel, filed by the Office of the Public Counsel on December 22, 2000, is denied.

2. That this order shall become effective on February 9, 2001.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Drainer, Murray, Schemenauer,
and Simmons, CC., concur

Woodruff, Senior Regulatory Law Judge

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[1] The Commission is able to rule on Public Counsel's motion without reference to KCPL's argument regarding a alleged October 16 agreement between itself and Public Counsel. The Commission makes no finding regarding that issue.

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service Commission held at its office in Jefferson City on the 24th day of January, 2002.

Staff of the Missouri Public Service Commission,

Complainant,

v.

Union Electric Company, d/b/a AmerenUE,

Respondent.

Case No. EC-2002-1

ORDER DENYING MOTION TO COMPEL DATA REQUESTS 554 AND 555

This is an order denying the Office of Public Counsel's Motion to Compel Respondent UE to produce documents corresponding to Public Counsel's Data Request Nos. 554 and 555. The controlling rule is found at 4 CSR 240-2.090(2) and states, in pertinent part, that if a recipient objects to data requests, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within 10 days after receipt of the data request.

This discovery dispute began with Public Counsel's filing of its motion to compel on November 30, 2001. UE timely filed its response to that motion on December 7.

Attorney-Client Privilege Objection to Data Requests Nos. 554 and 555

Public Counsel is requesting correspondence and other legal documents relating to the Joint Dispatch Agreement which allocates off-system sales revenues to company ratepayers.

UE provided a partial response to data requests No. 554 and 555 and, along with its response, UE raised the objection that the other data sought was protected by the attorney-client privilege. UE noted that it could not ascertain the fact that this data would be protected by the attorney-client privilege until it actually researched and recovered the data. This process took more than the 10 days which is provided for objection in the Commission's rule. UE objected as soon as it became aware of the exact nature of the data.

Public Counsel argues that because UE did not plead its attorney-client privilege within the ten-day period established by rule, the privilege is waived. Public Counsel cites Gipson v. Target Stores[1] in support of this argument. The Gipson decision states, "The proper time for objection is when the question calling for disclosure of privileged matters is asked and before it is answered."(*Emphasis added*)[2] Under the present circumstances, Public Counsel applies this principle incorrectly. In fact, the case cited by Public Counsel actually supports UE's contention that there has been no waiver inasmuch as UE objected when the question calling for disclosure of privileged matters was asked, and before it was answered.

In its motion to compel, Public Counsel has also argued that, by virtue of missing the 10-day objection period, UE's waiver of its objection is virtually automatic. Following Public Counsel's argument, information which is protected by the attorney-client privilege on the 10th day will not be protected by the attorney-client privilege on the 11th day, simply due to the stroke of midnight on day ten.

In further support of its argument, the Public Counsel cites a Commission order in which a party missed the 10-day deadline for objection and was subsequently compelled to provide the requested information.[3] The order referred to by Public Counsel did indeed order a respondent to provide data after it had missed the 10-day objection deadline. However, Public Counsel did not make any showing that the order cited is relevant in this case. There is no indication that the order cited dealt with any privilege and Public Counsel did not assert that there was any such relevance.

Conversely, in circumstances dealing with privilege, the Commission has issued orders in which it denied a motion to compel even though the respondent missed the 10-day

deadline. In fact, Public Counsel was the party for whom the motion to compel was denied. The Commission would refer the parties to an order regarding motion to compel issued in Case No. EM-2000-753 in which the Commission held:

> The requirement that such written objection be filed within 10 days does not, and cannot, apply to privilege claims relating to specific documents to be disclosed under otherwise objectionable data requests. The Commission holds that claims of privilege relating to the disclosure of specific documents need not be asserted within 10 days of service of a data request.

In spite of the duty of candor, which requires an attorney to inform the tribunal of contrary authority, Public Counsel did not mention the situation where the Commission had ruled against it on similar facts.

Admittedly, UE did not object within the 10 days established by the Commission's rule. If UE was aware that the information requested was privileged, it should have objected within 10 days of receiving that request. Timely objection to data requests is always important, and particularly so in this case.

Nevertheless, it has been well-settled law in Missouri, since 1926, that an objection based upon privilege is not waived unless the answer has already been given.[4] According to the privilege log, the documents sought appear to be documents exchanged between UE attorneys and their subject matter experts. That log is attached. The documents requested by Public Counsel for Data Request Nos. 554 and 555 remain under UE's attorney-client privilege, and therefore need not be produced. The importance of maintaining the protected confidentiality in attorney-client relationships dictates this result. Therefore, in keeping with its previous rulings, the Commission will deny Public Counsel's motion to compel.

Lastly, as a possible alternative, Public Counsel requested that if the commission were to deny its motion to compel it should either require production of the attorney-client documents in a redacted form or appoint a special master. After initially considering this matter the Commission offered the parties an opportunity to provide additional support for their respective positions. Public Counsel, AmerenUE, and Staff each filed a response. Public Counsel made a lengthy argument as to the relevancy of the data sought. Relevance of

attorney-client communications does not make them discoverable. There has been no evidence, nor even suggestion, that UE is somehow using the privilege to shield information which does not fall within the privilege. Absent any such evidence, the Commission cannot justify any such invasive and time-consuming procedures. Based upon the responses of Public Counsel, Staff, UE, and the research the Commission has performed, the Commission finds that the attorney-client privilege properly applies and Public Counsel's request for production of redacted documents or for the appointment of a Special Master will also be denied.

IT IS THEREFORE ORDERED:

1. That the Motion to Compel filed by the Office of the Public Counsel is denied as to its Data Requests Nos. 554 and 555, and AmerenUE shall not be required to respond to those data requests.
2. That this order shall become effective on February 3, 2002.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Simmons, Ch., Murray, Lumpe, Gaw,
Forbis, CC., Concur.

Dale Hardy Roberts, Chief Judge

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[1] Gipson v. Target Stores 630 S.W.2d 107 (Mo.App. 1981) (QuotingRock v. Keller 278 S.W. 759, 766 (1926)).

[2] Gipson at 109.

[3] See Order Denying Motion to Expedite and Order Granting In Part the Motion to Compel, Case No.

EM-96-149, October 31, 2000.

[4] Rock v. Keller, 312 Mo. 458, 278 S.W. 759, 766(4) (1926).