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 RESPONSE TO PUBLIC COUNSEL'S REPLY TO AMERENUE'S SUGGESTIONS IN OPPOSITION TO PUBLIC COUNSEL'S FORMAL MOTION TO COMPEL

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

I. The Supplemental Response Establishes the Existence of the Privilege.

Public Counsel continues to ignore the facts. The Company's Supplemental Response to DR 532 provides as follows:

** _____
_____
_____
_____
_____
_____
_____
_____ **

Mr. Voytas swears, under oath, to the truth of that Supplemental Response as evidenced by his Affidavit attached as Exhibit A to the Company's Motion for Reconsideration filed herein on January 30, 2004.

NP

The Missouri Supreme Court has made clear that the "rule of privilege extends to documents prepared by an agent or employee by direction of the employer for the purpose of obtaining the advice of the attorney ... (emphasis added)." State ex rel. Terminal R. Ass'n of St. Louis v. Flynn, 257 S.W.2d 69, 73 (Mo. banc 1953). The privilege also applies to communications made by the attorney to the client, and this protection is not limited just to the attorney's advice to the client in those communications. State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 384-85 (Mo. banc 1978) ("All of these communications, not just the advice, are essential elements of the attorney-client consultation. All should be protected.").

Public Counsel mischaracterizes the specificity of the Company's Supplemental Response, and consequently misstates the facts, by suggesting that other documents not prepared at the request of counsel or by counsel have been "funneled" through counsel "in an effort to create a privilege." Public Counsel's Reply at ¶ 2. Note how Public Counsel's "theory" is at odds with the specific and now sworn statement of Mr. Voytas, quoted above: that the documents were prepared at the request of Mr. Raybuck, or by Mr. Raybuck. There is no ambiguity here. The documents at issue are not some report or study prepared in the ordinary course of the duties of Mr. Voytas or his staff and then later attached to a memo to Mr. Raybuck, as was at issue in the Spinden case cited (and, we respectfully suggest, mis-cited given that it is at odds with the facts in this case) by Public Counsel.

The Company would agree that if Mr. Voytas wrote a memo or prepared another document to Mr. Nelson relating to plans to modify or eliminate the JDA that was not prepared at counsel's request, or for the purpose of obtaining counsel's advice, then the

Company could not later take that memo, staple it to a later memo to counsel sent at counsel's request, and "create a privilege" with regard to the first memo. There are, however, no "earlier" memos here. There are, as the Supplemental Response quite specifically states, documents that Mr. Raybuck asked Mr. Voytas to prepare, and that Mr. Raybuck himself prepared containing his legal advice and opinions.

II. Litigation Regarding the JDA Was Ongoing When Counsel for AmerenUE Requested the Documents, and Prepared Documents Himself.

That Mr. Raybuck would specifically request that Mr. Voytas prepare documents relating to the JDA so that Mr. Raybuck could advise Mr. Voytas about matters associated with the JDA is not at all surprising given the then-pending litigation before this Commission (clearly involving potential regulatory issues) between the Company and Staff and Public Counsel, not only in the present case but in another as well. For example, in Case No. EO-2003-0271 (AmerenUE's request to join the MISO via a contractual relationship with GridAmerica)[1], a case to which Public Counsel is a party, Staff witness Dr. Michael S. Proctor, in his pre-filed rebuttal testimony, specifically recommended that the Commission require the Company to terminate the JDA as a condition of any approval of the Company's request for permission to participate in the MISO. Proctor Rebuttal at p. 9, l. 17-20; p. 39, l. 24-25; p. 40, l 1-2. While Public Counsel witness Ryan Kind opposed AmerenUE's application in Case No. E0-2003-0271 generally, Mr. Kind supported Dr. Proctor's recommended condition in the event the Commission were inclined to approve AmerenUE's application. Kind Surrebuttal at p. 19, l. 1-11. Staff attempted to make the JDA an issue in the E0-2003-0271 case, as

[1] The E0-2003-0271 case was initiated on February 4, 2003, was pending when the subject documents were prepared, and remains pending. A Stipulation and Agreement in that case was filed on February 9, 2004.

evidenced by the deposition of Mr. Voytas relating to the JDA conducted by Staff, including questioning by Public Counsel, on June 16, 2003.

Staff is attempting to make the JDA an issue in the present case, as evidenced by an entire section of Dr. Proctor's rebuttal testimony supporting Dr. Proctor's contention that the JDA must be amended in connection with this case in order to meet the "not detrimental" standard. See Proctor Rebuttal Testimony at pp. 14-17. Mr. Kind also suggests that the JDA is an issue in the present case. See Kind Rebuttal Testimony at pp. 42-43.

At bottom, Public Counsel, as he did in the EC-2002-1 case[2], continues to improperly seek privileged information relating to the JDA, which itself is a potential issue in two cases currently pending before this Commission to which Public Counsel is a party.

III. Other Issues.

A few other matters in Public Counsel's Reply also require a response, as follows:

a. Public Counsel's suggestion that the Commission was wrong in its prior orders in the EC-2002-1 and EM-2000-753 cases, because the Commission's orders in those cases were never appealed, again ignores the Commission's basis for overruling Public Counsel's previous attempts to obtain privileged documents. Both orders are squarely based on the "well-settled law in Missouri," as this Commission noted.[3] The issue that Public Counsel "disagrees with" has been judicially reviewed and judicially established – a party who has not produced the privileged documents has not waived the privilege regardless of the existence of any 10-day period to lodge other objections.

[2] The Commission's decision with which Public Counsel "continues to respectfully disagree ...." Public Counsel's Reply at ¶ 1.
[3] Commission's Jan. 24, 2002 Order, Case No. EC-2002-1 at p. 3.

b. A "privilege log" has been provided. The Company's Supplemental Response is clear. The privileged documents were prepared in November and December of 2003 by Mr. Voytas and his staff and by Mr. Raybuck

c. With regard to documents sought by Data Request Nos. 571, 572, and 573, which Judge Thompson ruled need not be produced, Public Counsel again misapprehends the issue. The issue is not whether an AmerenUE affiliate has "possession" of a document.[4] The issue is whether non-AmerenUE documents, that do not involve an affiliate transaction between AmerenUE and its affiliates, are discoverable in this case. Public Counsel seeks power supply contract communications from third parties to non-AmerenUE companies in this case, despite the fact that the Company must conduct its resource planning over periods of 20 years or more. See 4 CSR 240-22.060(4). That request, regardless of the fact that is it overbroad in going beyond documents relating to affiliate transactions, is further overbroad because it is not even limited to communications regarding power contracts with terms of 20 or more years which would be the only power supply contracts that potentially might be relevant to resource planning under the Commission's rules.

Public Counsel also suggests that the State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n case (120 S.W.3d 732 (Mo. banc 2003)) now turns every case into a rate case making every conceivable piece of information discoverable in every single case. A full discussion of the AG Processing case is beyond the scope of this discovery dispute. It suffices to state, however, that AG Processing dealt with a very specific issue – a $92,000,000 merger premium (more than 1/3 of the total value of the merger), for which Aquila sought specific Commission approval as part of the specific merger plan that was

[4] Public Counsel's Reply at ¶ 6.

before the Commission for approval. Public Counsel simply seeks to use that case to support its fishing expedition in this one.

In summary, the Company reiterates its request for relief as provided for in its Suggestions filed herein on February 18, 2004.

Respectfully submitted:

SMITH LEWIS, LLP

/s/ James B. Lowery
James B. Lowery, #40503
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918
(573) 443-3141
(573) 442-6686 (Facsimile)
lowery@smithlewis.com

Steven R. Sullivan, Vice President
Regulatory Policy, General Counsel and
Secretary, Mo. Bar. No. 33102
Joseph H. Raybuck, Mo. Bar. No. 31241
Managing Associate General Counsel
Edward C. Fitzhenry
Associate General Counsel
Ameren Services Company
One Ameren Plaza
1901 Chouteau Avenue
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
314-554-4673
314-554-4014 (fax)
ssullivan@ameren.com
jraybuck@ameren.com
efitzhenry@ameren.com
Attorneys for Union Electric Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the following parties of record, on this 25th day of February, 2004, via email at the email addresses set forth below:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102
gencounsel@psc.state.mo.us

Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102
opcservice@ded.state.mo.us

Robert C. Johnson
Lisa C. Langeneckert
720 Olive Street, 24th Floor
St. Louis, MO 63101
bjohnson@blackwellsanders.com
llangeneckert@blackwellsanders.com

Michael A. Rump
Senior Attorney
Kansas City Power & Light Company
1201 Walnut
P.O. Box 418679
Kansas City, MO 64141-9679
mike.rump@kcpl.com

Diana M. Vuylsteke
Bryan Cave, LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102
dmvuylsteke@bryancave.com

/s/James B. Lowery
James B. Lowery