

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

**PUBLIC COUNSEL’S FORMAL MOTION TO COMPEL AND
RESPONSE TO UNION ELECTRIC COMPANY’S
MOTION FOR RECONSIDERATION**

COMES NOW the Office of the Public Counsel (Public Counsel) pursuant to 4 CSR 240-2.090, Commission Rule 4 CSR 240-2.160, Rule of Civil Procedure 56.01 and Section 386.240 RSMo. 2000 and for its Formal Motion to Compel and Response to Union Electric Company’s Motion for Reconsideration states as follows:

On January 16, 2004, a discovery conference regarding discovery disputes between Public Counsel and Union Electric Company d/b/a AmerenUE (Company) was held with Regulatory Law Judge Kevin Thompson, and was transcribed. Several contested Public Counsel data requests were discussed and oral motions to compel were made on the record. On January 23, 2004, Judge Thompson issued an Order Concerning Discovery Conference (Judge Thompson’s Order), reiterating decisions he made during the discovery conference. During the Prehearing Conference held in this case on February 9, 2004, Judge Thompson suggested that written motions to compel should also be filed with regard to any discovery matter that remains disputed following Judge Thompson’s Order.

This Formal Motion to Compel asks the full Public Service Commission (Commission) to review Judge Thompson's Order with regard to two sets of these data requests.

The first set of data requests propounded (Nos. 532, 535 and 536) the Joint Dispatch Agreement. Company lodged no timely objection to these data requests, but it has requested reconsideration of Judge Thompson's Order which compel these responses.

The second set of data requests (Nos. 572, 572 and 573) seek to discover the full range of resource planning options available to Company and its affiliates. Company objected to providing any information in response to this second set of data requests as they relate to its affiliates, and Judge Thompson denied a motion to compel based on that objection. As Public Counsel explains herein, the information regarding the resource planning options available to Company and its affiliates is reasonably calculated to lead to relevant evidence and is essential to Public Counsel's ability to present its recommendations to the Commission in this case.

Motion to Compel Public Counsel Data Requests Nos. 532, 535 and 536.

Page 5 of Judge Thompson's Order compelled compliance with Public Counsel Data Requests Nos. 532, 535 and 536 which refer to the Joint Dispatch Agreement (JDA). Judge Thompson correctly pointed out that Union Electric did not raise any timely objections to these data requests. On January 30, 2004, Company filed a Motion of Union Electric Company for Reconsideration of Discovery Order (Company's Motion), protesting Judge Thompson's order which stated that all claims of privilege were waived by Company because they were not raised in a timely objection letter as required by

Commission Rule 4 CSR 240-2.090(2). The data requests at issue and Company “responses” are attached to Company’s Motion as Attachments B and C.

Company’s Motion refers to a response that was sent to Public Counsel on or about December 12, 2003, which stated:

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 Office of the Public Counsel to discuss the results.

Attachment B-1 to Company’s Motion.

Company’s Motion is generally correct regarding the sequence of events regarding these data requests; however, it is important to recognize that the Company’s December 12, 2004 “response” mentioned no objection, no claim of privilege, and did not even request an extension of time to decide what objections might be asserted. The statement that Company analysis awaited “review and approval of Ameren Senior Management” is not a recognized objection and did not imply that these documents were being reviewed by counsel to determine if any privileges applied. Public Counsel believes that AmerenUE should be required to supply a full and complete response to these three data requests which relate to an important issue in this case.

It is also noteworthy, despite the fact that Company now asserts certain privileges, that Company has not even supplied Public Counsel with a privilege log, even though all three data requests asked for such if any privileges were to be asserted.

Motion to Compel Public Counsel Data Requests Nos. 571, 572 and 573

Judge Thompson’s Order Concerning Discovery Conference also denied an oral motion to compel Public Counsel Data Requests Nos. 571, 572, 573, 576 and 578,

which relate to various purchase power and generation asset purchase options available to Company and its affiliates. Company raised a timely objection to these data requests on December 8, 2003 claiming that they seek information “not relevant to any of the issues in the case and not likely to lead to the discovery of admissible evidence as far as information relating to AmerenUE’s affiliates.” (Attached as Attachment 1).

Judge Thompson’s Order stated as follows:

Public Counsel’s motion to compel is denied with respect to DRs 571, 572, 573, 576, and 578. The requested material is not relevant and Public Counsel has not shown that it is likely to lead to admissible evidence. Unlike certain DRs discussed earlier in this order, Public Counsel has not shown that resource-planning decisions for the Ameren family are made by Union Electric’s employees or agents. Therefore, the motion to compel must be denied. However, a more narrowly drawn DR, inquiring whether any of Union Electric’s affiliates have purchased-power contracts or opportunities at more advantageous terms than Union Electric, would be permitted.

Id. p. 9.

Public Counsel respectfully disagrees with this decision. The decision is unjust and unreasonable in that it does not accurately reflect how resource planning decisions are made for Company.

Although Public Counsel is not continuing to pursue Data Requests Nos. 576 and 578, Public Counsel believes that the information requested in Data Requests Nos. 571, 572 and 573 (attached as Attachment 2) is essential to analyze whether the proposed transfer is detrimental to the public interest.

In order to understand the essential nature of the information requested in Public Counsel Data Requests Nos. 571, 572 and 573, it is important to understand how the Illinois transfer at issue in this case came to be proposed. ** _____

_____ ** In fact, the Chief Operating Officer of AmerenUE, Gary Rainwater, is also the Chief Operating Officer of the holding company, Ameren Corporation. Company has acknowledged in response to Public Counsel Data Request that resource planning decisions are ultimately made by Mr. Rainwater. (Attached as Attachment 3).

Moreover, the two witnesses offered by Company in this case to support the proposed transfer are not AmerenUE employees, rather they are employees of Ameren Services Company (AMS) an affiliate which provides shared support services to the parent corporation Ameren Corporation and its affiliates, both regulated and unregulated. As Commission Staff witness Janis Fischer stated in her prepared rebuttal testimony:

The fact that AMS employees performed all of the analysis and negotiations on behalf of AmerenUE and AmerenCIPS show that the Metro East transfer is not an arms-length-transaction. The best interests of AmerenUE cannot be presumed to be carried out by employees of AMS, who also are acting as agents for the other party of the agreement, AmerenCIPS.

Ibid., p. 7.

NP

The Staff believes the principal factor that caused this transaction to occur was a decision at the holding company level, based upon the advice of AMS, that **Ameren's overall corporate holdings** would be better served if AmerenUE were no longer a public utility operating in the state of Illinois.

Ibid., p. 9 [emphasis added]

In other words, when purchased power decisions are made for AmerenUE, there are no AmerenUE decision-makers that are distinct and separate from the holding company management. The AMS employees who act as agents of AmerenUE also act as agents for other affiliates within the Ameren family.

It also noteworthy that when the parties reached a Stipulation and Agreement in the case that created the current Ameren holding company structure, Case No. EM-96-149, Company acknowledged in that document that discovery relating to all of the various affiliates and subsidiaries of this holding company structure was anticipated with regard to Commission cases:

b. Voluntary and Cooperative Discovery Practices. UE, Ameren and any affiliate or subsidiary thereof agree to continue voluntary and cooperative discovery practices.

Report and Order, adopting Stipulation and Agreement in Case No. EM-96-149, issued on February 21, 1997, Attachment 1, p. 26.

The Commission's authority to review information relating to affiliates is well established. The Commission's authority to inquire into a public utility's affiliate relationships has been affirmed by the Missouri Supreme Court. State ex rel. Atmos Energy Corporation v. PSC, 103 S.W.3d 753 (Mo. banc 2003).

The Western District Court of Appeals has stated that the corporate structure chosen by the utility should not be used to frustrate valid discovery:

The conscious and voluntary corporate business decision that resulted in the hierarchy as exists here should not and cannot shield pertinent financial data from the Commission's scrutiny just because the ultimate owner does not provide the same service as the applicant and is not regulated.

State ex rel. Associated Natural Gas Co. v. Public Service Com'n of Missouri, 706 S.W.3d 870, 881 (Mo. App. W.D. 1985).

See also the following past Commission decisions relating to proper discovery over affiliates: "Order Granting Motion to Compel Data Requests and for Expedited Consideration," issued on February 26, 1998 in Re: Missouri Gas Energy, Case No. GR-98-140; "Order Denying Motion," issued on September 12, 1989 in Re: GTE, Case No. TR-89-182.

If the Commission denies this motion to compel, then the ability to confirm whether or not the proposed Illinois transfer is in fact "the least cost option" available will be denied, severely restricting Public Counsel's discovery rights. If denied, Public Counsel's ability to present relevant evidence in this case will be seriously curtailed.

It is entirely unreasonable for Company to be permitted to limit the information that may be reviewed by Public Counsel to the extent that it cannot determine what resource options were available to the decision-makers as an alternative to the proposed Illinois transfer. The Commission deserves an opportunity to review all of the information that was available to the decision-makers who proposed the Illinois transfer so as to determine whether or not this option is truly "not detrimental" as compared with other alternatives. The data requested in Data Requests Nos. 571, 572 and 573 is absolutely essential to Public Counsel's ability to make an informed analysis regarding whether the proposed transfer is detrimental to the ratepaying public.

Judge Thompson's decision which denied Public Counsel's motion to compel with regard to Data Requests Nos. 571, 572 and 573 was also inconsistent with his decision to compel other data requests relating to AmerenUE's affiliates. See pps. 5-7 of Judge Thompson's Order.

WHEREFORE, Public Counsel respectfully requests that the Commission issue an order that:

- a. Reaffirms Judge Thompson's decision granting Public Counsel motion to compel Public Counsel's Data Requests Nos. 532, 535 and 536,
- b. Compels Company to supply a full and complete response to Public Counsel Data Requests Nos. 571, 572, and 573 relating to purchase power options available to AmerenUE's affiliates, overturning Judge Thompson's preliminary decision on those discovery disputes, and
- c. Directs Company to comply with these data requests immediately, in light of the fact that prepared surrebuttal testimony is due on March 1, 2004.

Respectfully submitted,

OFFFICE OF THE Public Counsel

/s/ John B. Coffman

By: _____
John B. Coffman (#36591)
Public Counsel
P O Box 2230
Jefferson City, MO 65102
(573) 751-5560
(573) 751-5562 FAX
jcoffman@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 10th day of February 2004:

Steven R Sullivan
AmerenUE
1901 Chouteau Avenue
PO Box 66149 (MC 1310)
St Louis MO 63166
srsullivan@ameren.com

General Counsel
Missouri Public Service Commission
P O Box 360
Jefferson City MO 65102

Robert C Johnson
Blackwell Sanders Peper & Martin
720 Olive Street
Suite 2400
St Louis MO 63101
rjohnson@bspmlaw.com
Missouri Energy Group

Diana M Vuylsteke
Bryan Cave
211 N Broadway
Suite 3600
St Louis MO 63102-2750
dmvuylsteke@bryancave.com
MO Industrial Energy Consumers

Michael Rump
Kansas City Power & Light Company
1201 Walnut
Kansas City MO 64106
mike.rump@kcpl.com

/s/ John B Coffman
