

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

In the Matter of Public Counsel's Petition	)	
To Open a Case to Investigate AmerenUE's	)	<b><u>Case No. EO-2009-0126</u></b>
Plan to Construct and Finance a Second Unit	)	
At the Callaway Nuclear Plant Site	)	

**MOTION TO COMPEL AND REQUEST FOR WAIVER**

COMES NOW the Office of the Public Counsel and for its Motion to Compel and Request for Waiver states as follows:

1. On October 16, 2008, Public Counsel submitted a data request (DR) to AmerenUE, a copy of which is attached as Attachment 1. The DR asked for nothing more than a copy of a document that had already been produced in another case.

2. Commission rule 4 CSR 240-2.135(16) provides that:

All persons who have access to information under this rule must keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided. This rule shall not prevent the commission's staff or the Office of the Public Counsel from using highly confidential or proprietary information obtained under this rule as the basis for additional investigations or complaints against any utility company.

In the rulemaking case in which 4 CSR 240-2.135 was adopted, Public Counsel argued that – for Public Counsel and the Staff – strictly limiting the use of discovery to the case in which it was obtained would hinder the ability of Public Counsel and the Staff to perform their duties. The Commission disagreed, and is presented here with an example of how a utility can use the provisions of the rule to hinder Public Counsel's ability to do its job.

3. The response to DR 2115 in Case No. ER-2008-0318 had already been provided to Public Counsel when the DR at issue here was submitted in this case. It would have taken virtually no time or effort on the part of AmerenUE to re-send the response, or simply refer to the response already provided in ER-2008-0318. Instead AmerenUE refused to provide a response, and then refused to confer in good faith about its refusal to respond (discussed in more detail below in paragraph 6). Public Counsel is thus stymied in its efforts to provide information to the Commission by the operation of the Commission's rule and the refusal of a utility to provide information.

4. The response to DR 2115 in Case No. ER-2008-0318 includes information that Public Counsel believes the Commission would have found helpful while it was deliberating Public Counsel's motion to open an investigation.<sup>1</sup> But because the Commission's rules prevent Public Counsel from using the information obtained in Case No. ER-2008-0318 in this case, and because AmerenUE has refused to provide it in this case, Public Counsel has so far been unable to bring it to the Commission's attention. Although the Commission's initial determination was to not grant Public Counsel's motion to open a case, Public Counsel intends to continue to pursue discovery. Information obtained in discovery may allow Public Counsel to convince the Commission that an investigation is indeed warranted. Whether or not the Commission agrees that an investigation is needed now, Public Counsel intends to proceed with its

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<sup>1</sup> The Commission deliberated on that motion at its October 30 Agenda meeting, and while not taking a formal vote, determined that no action was needed. Of course, such a determination by the Commission does not prevent an investigation from going forward under the auspices of a Commissioner. Section 386.130 RSMo 2000 provides in relevant part that: "Any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner."

own investigation pursuant to its broad authority under Section 386.450 RSMo 2000 and its broad responsibility under Section 386.710 RSMo 2000.

5. The response to DR 2115 in Case No. ER-2008-0318 was designated Highly Confidential by AmerenUE, so Public Counsel will describe it only in vague general terms herein. The DR response includes descriptions of the steps that AmerenUE plans to take and the amount of money it plans to spend on Callaway 2 in the interval between when Public Counsel wants the Commission to begin an investigation (now) and when AmerenUE wants the Commission to begin an investigation (the end of 2009). Without revealing confidential information, suffice it to say that much will already have been done and enormous sums of money will have already been spent by the time the Commission would even begin an investigation under AmerenUE's proposed timetable.

6. Commission rule 4 CSR 240-2.090(8)(A) requires a party, as a first step in seeking to compel responses to discovery, to confer or attempt to confer with opposing counsel. On November 6, 2006, Public Counsel sent an email to three of AmerenUE's attorneys in an attempt to begin the process (a copy of the email is attached as Attachment 2). To date, none have directly responded.<sup>2</sup> 4 CSR 240-2.090(8)(B) requires a conference call with the presiding officer after counsel have conferred. Inasmuch as AmerenUE: 1) did not timely object to DR 2001; 2) never objected specifically to that DR; 3) is unwilling to recognize Public Counsel's broad right to conduct discovery, the conferences otherwise required by 4 CSR 240-2.090 should be waived.

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<sup>2</sup> Public Counsel did receive via email a letter purporting to object to the DRs that have been submitted in this proceeding. A copy of that letter is attached as Attachment 3. This letter and its complete lack of legal analysis is discussed in more detail in paragraphs 7 and 8.

7. As noted above, DR 2001 was submitted to AmerenUE on October 16, 2008. 4 CSR 240-2.090(2) requires that objections to DRs be served within 10 days of receipt. Any objection to DR 2001 must have been lodged no later than October 26. Ameren UE made no response to DR 2001 until November 10 – more than two weeks after objections were due and four days after Public Counsel began the process described in 4 CSR 240-2.090(8). By failing to timely file its objection by more than two weeks, AmerenUE has waived it.<sup>3</sup> But even if it allowed to lodge an objection so far out of time, AmerenUE’s objection must be overruled.

8. AmerenUE fails to identify any specific objection to DR 2001. It simply argues generally that some of the DRs the Public Counsel has submitted may be objectionable for some vague reasons, none of which are persuasive. AmerenUE’s general premise on which its vague objections are based is faulty. AmerenUE incorrectly asserts that Public Counsel’s ability to discover information from regulated utilities is limited to contested proceedings. Sections 386.450, 386.390 and 386.710 (among others) conclusively prove that assertion to be wrong, as the Commission has repeatedly recognized.<sup>4</sup> In order to adequately represent and protect the public interest as required

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<sup>3</sup> In Case No. EO-2003-0271, an AmerenUE case, the Commission stated in an order issued on April 15, 2003: “The Commission agrees, as a general rule, that a party that does not timely object to a discovery request has waived its objection. Exceptions to this general rule may exist if the information sought is protected by privilege, or if the responding party is able to demonstrate good cause for not timely objecting.” AmerenUE did not assert privilege, nor did it in any way seek to explain its failure to timely object.

<sup>4</sup> In Case No. WO-94-192, Raytown Water Company’s objected to Public Counsel DRs for reasons very similar to those raised by AmerenUE here. In an order issued January 5, 1994, the Commission overruled the company’s objections and ordered it to respond to the DRs. In Case No. WR-2000-281, the Commission cited the Raytown Water ruling and expanded upon it:

[T]he Staff of the Commission and the Public Counsel enjoy broader discovery powers than other litigants. Section 386.450, RSMo, authorizes

by 386.710, Public Counsel must have unfettered access to a utility's books and records. In order to evaluate whether complaint should be brought pursuant to 386.390, Public Counsel must have unfettered access to a utility's books and records. Section 386.450 gives Public Counsel unfettered access to a utility's books and records. Section 386.710.4 gives Public Counsel "all powers necessary or proper" to carry out Public Counsel's duties. None of this authority depends, as AmerenUE alleges, on the existence "of some pending action."

WHEREFORE Public Counsel respectfully requests that the Commission compel AmerenUE to respond to data request 2001 submitted on October 16, 2009, and waive the provisions of 4 CSR 240-2.090(8)(B) requiring a conference call with the presiding officer.

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the Commission and the Public Counsel to examine "books, accounts, papers or records" in the hands of "any corporation, person or public utility," "kept . . . in any office or place within or without this state[.]" The Commission has interpreted this statute to authorize Public Counsel to serve DRs on regulated entities, and the Commission to compel responses to those DRs, even in the absence of a pending proceeding.

...  
Likewise, this authority is not conditioned on considerations of relevance under Rule 56.01(b)(1), Mo. R. Civ. Pro., made applicable to Commission proceedings by Section 536.073.2, RSMo, and Commission Rule 4 CSR 240-2.090(1).

More recently, in Case No. ER-2007-0002 (another case with which AmerenUE should be familiar), in an order issued March 15, 2007, the Commission noted with respect to Section 386.450: "That statute does not require Public Counsel to show that the requested documents are relevant to any particular issue in a contested case. Indeed, the statute allows the Commission to require the production of the requested documents even if there were no contested case in existence."

Respectfully submitted,  
OFFICE OF THE PUBLIC COUNSEL

By: /s/ Lewis R. Mills, Jr.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to all parties in Case No. EO-2007-0409 this 17th day of November 2008.

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By: /s/ Lewis R. Mills, Jr.



**PUBLIC COUNSEL DATA REQUEST**

**NUMBER 2001**

**UNION ELECTRIC COMPANY**  
**CASE NO.: EO-2009-0126**

REQUESTED BY: Ryan Kind

REQUESTED FROM: Tom Byrne

DATE OF REQUEST: OCTOBER 16, 2008

Information Requested: Please provide a copy of UE's response to OPC DR No. 2115 in Case No. ER-2008-0318.

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THIS RESPONSE INCLUDES:

☐ Printed Materials \_\_\_\_\_ Total Pages      ☐ Magnetic Media \_\_\_\_\_ Number of disks or tapes  
Please number each section of multiple pages as:      File formats for data: \_\_\_\_\_

# of Total #

LIST PRINTED MATERIALS AND/OR FILES INCLUDED:

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The information provided to the Office of the Public Counsel in response to the above information request is accurate and complete, and contains no material misrepresentations or omissions based upon present known facts to the undersigned. The undersigned agrees to immediately inform the Office of the Public Counsel if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

DATE RECEIVED: \_\_\_\_\_ SIGNED BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

**Mills, Lewis**

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**From:** Mills, Lewis  
**Sent:** Thursday, November 06, 2008 3:29 PM  
**To:** Jim Lowery; 'Byrne, Thomas M'; 'Tatro, Wendy K'  
**Subject:** discovery issues in EO-2009-0126

Hi,  
Which of you should I contact about discovery issues (late DR responses)?  
Thanks,  
Lewis

Attachment 2

11/14/2008

November 10, 2008

Lewis Mills  
Public Counsel  
200 Madison Street, Ste 650  
Jefferson City, MO 65102

RE: EO-2009-0126  
Data Requests 2001- 2024 and 7001-7005



Dear Mr. Mills:

I write regarding the three sets of "data requests" identified as pertaining to docket number EO-2009-0126.

In my opinion, these data requests are not authorized by the statutes and rules governing discovery. Data requests, like other discovery tools, are available "as in civil actions in the circuit court." 4 CSR 240-2.090(1). Data requests do not exist in a vacuum; they must be related to some pending action. There is no civil or even administrative contested proceeding pending. The Commission did not sustain your motion to open an investigatory docket. The fact that a docket number exists in EFIS does not constitute a pending action. The docket number is simply the result of the Office of Public Council submitting a pleading in EFIS, which by its nature automatically creates a number.

With regard to these data requests, we believe most of them would be objectionable in any event, depending in part of the precise nature and scope of any proper case in which they might be made. I would note in this regard that no one knows for sure whether there will ever be a proper case in which discovery is appropriate or what its scope would be, a fact that itself points out the problem with requests such as these. Assuming, however, that the scope of some hypothetical proper case might exist and that the scope would be something similar to that proposed in your initial pleading, the following objections apply:

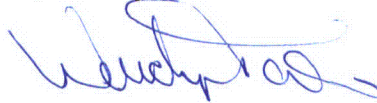
General Objection to all data requests issued: The requests are objectionable because some or all of them are overly broad, unreasonable, and wholly unauthorized by any applicable statute or rule relating to discovery, and because they seek to impose upon the Company burdens in addition to those imposed under Missouri law and procedure. They are also unduly burdensome and overbroad in light of the apparent scope of your requested investigation. Out of the thirty data

requests received to date, approximately one-fifth may relate to the issue of potential financing methods for a second Callaway nuclear plant. The remaining four-fifths of the data requests relate to OPC's desire to prove its assertion that AmerenUE has already made a firm decision to build Callaway II (which, of course, it has not).

Even the data requests which ask for information related to the issue of how to finance a potential second nuclear plant are objectionable. Besides the objections listed above, one or more of the data requests seek information that is privileged or otherwise protected from disclosure because of attorney-client privilege or because it seeks legal analysis or strategy to be employed by AmerenUE in the future.

Please call if you wish to discuss this letter.

Sincerely,



Wendy K. Tatro  
Associate General Counsel