

**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 |) | <u>Case No. EO-2009-0126</u> |
| Plan to Construct and Finance a Second Unit |) | |
| At the Callaway Nuclear Plant Site |) | |

PUBLIC COUNSEL'S SECOND MOTION TO COMPEL

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

1. On October 31, 2008, Public Counsel submitted data requests (DRs) 7001-7005 to AmerenUE, copies of which are attached as Attachment 1. These DRs generally asked for information concerning analysis that AmerenUE had conducted regarding the financing of a second generating unit at the Callaway nuclear station.

2. On November 3, 2008, Public Counsel submitted data requests (DRs) 2002-2010 to AmerenUE, copies of which are attached as Attachment 2. These DRs generally asked for information concerning analysis that AmerenUE had conducted regarding the financing of a second generating unit at the Callaway nuclear station, including information filed at federal agencies and supporting documentation.

3. On November 10, 2008, AmerenUE objected to all of these DRs, by way of a letter which is attached as Attachment 3.¹ The gravamen of AmerenUE's objection is that it believes Public Counsel does not have investigative authority outside of a particular case. Because the Commission has not affirmatively acted on Public Counsel's

¹ Public Counsel submitted more DRs on November 3, 2008 (to which AmerenUE also objected) than are the subject of this motion. Public Counsel received some of the information sought in DRs 2011-2024 through separate discovery in Case No. ER-2008-0318, and does not seek to compel production of responses to DRs 2011-2024 through this motion.

motion to open a case, AmerenUE contends that Public Counsel has no right to investigate the targeted aspects of AmerenUE's operations.

4. 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 January 22, 2009, Public Counsel conferred by telephone with Wendy Tatro, an attorney for AmerenUE. 4 CSR 240-2.090(8)(B) requires a conference call with the presiding officer after counsel have conferred. Public Counsel, along with Tom Byrne representing AmerenUE, conducted such a conference on January 26, 2009.

5. AmerenUE fails to identify any specific objection to the subject DRs. 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 386.390, 386.450, 386.480 and 386.710 RSMo 2000 (among others) conclusively prove that assertion to be wrong, as the Commission has repeatedly recognized.² In order to adequately represent and protect the

² 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 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.

public interest as required 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 even if they are kept out of state. 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."

6. To limit Public Counsel's authority to conduct investigations to matters for which the Commission itself has already opened a case would totally gut Public Counsel's independence and make Public Counsel subordinate to the Commission. The Commission does not believe that an investigation into costs and financing options for Callaway 2 is needed now, but Public Counsel does. This is precisely the type of situation in which Public Counsel's independent right to determine areas to investigate and independent right to conduct such an investigation are so critical. Public Counsel believes it must begin an investigation now to comply with its broad responsibility under Section 386.710 RSMo 2000. AmerenUE has no grounds to object to such an investigation, and the Commission has no grounds to prevent such an investigation.

WHEREFORE Public Counsel respectfully requests that the Commission compel AmerenUE to fully respond to data requests 7001-7005 and 2002-2010.

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

/s/ Lewis R. Mills, Jr.

By:_____

Lewis R. Mills, Jr. (#35275)

Public Counsel

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 27th day of January 2009:

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Tatro Wendy
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/s/ Lewis R. Mills, Jr.

PUBLIC COUNSEL DATA REQUEST

NUMBER 7001

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

REQUESTED BY: Lewis Mills

REQUESTED FROM: Mary Hoyt

DATE OF REQUEST: OCTOBER 31, 2008

Information Requested: Please provide a copy of all documents (e.g. memos, emails, PowerPoint presentations, etc.) created by or for UE or its affiliates since January 1, 2007. that contain descriptions or analysis of difficulties that UE or Ameren may face in financing all or part of a new nuclear plant.

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:

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: _____

PUBLIC COUNSEL DATA REQUEST

NUMBER 7002

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

REQUESTED BY: Lewis Mills
REQUESTED FROM: Mary Hoyt
DATE OF REQUEST: OCTOBER 31, 2008

Information Requested: Please provide a copy of all documents (e.g. memos, emails, PowerPoint presentations, etc.) created by or for UE or its affiliates since January 1, 2007 that contain descriptions or analysis of possible plans for addressing any difficulties that UE or Ameren may face in financing all or part of a new nuclear plant.

THIS RESPONSE INCLUDES:

☐ Printed Materials _____ Total Pages ☐ Magnetic Media _____ Number of disks or tapes
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PUBLIC COUNSEL DATA REQUEST

NUMBER 7003

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

REQUESTED BY: Lewis Mills

REQUESTED FROM: Mary Hoyt

DATE OF REQUEST: OCTOBER 31, 2008

Information Requested: A number of recent press articles (e.g., St. Louis Post Dispatch - June 9, 2008, MissouriNet - June 29, 2008, Columbia Daily Tribune - June 9, 2008 and July 10, 2008) contain AmerenUE's estimate that a new nuclear plant could cost about \$6,000,000,000 and that the cost could reach a total of \$9,000,000,000 when the cost of financing (AFUDC) is included. Please provide a copy of all documents (e.g. memos, spreadsheets, emails, PowerPoint presentations, etc.) created by or for UE or its affiliates since January 1, 2007 that contain descriptions or analysis of the costs for a new nuclear plant (including financing costs) if the current prohibition on CWIP is no longer in effect.

THIS RESPONSE INCLUDES:

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TITLE: _____

PUBLIC COUNSEL DATA REQUEST

NUMBER 7004

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

REQUESTED BY: Lewis Mills

REQUESTED FROM: Mary Hoyt

DATE OF REQUEST: OCTOBER 31, 2008

Information Requested: Has AmerenUE reviewed the analysis attached to Public Counsel's motion to open a case? Does it disagree with that analysis? If so, with what specific aspects does it disagree?

THIS RESPONSE INCLUDES:

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SIGNED BY: _____

TITLE: _____

PUBLIC COUNSEL DATA REQUEST

NUMBER 7005

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

REQUESTED BY: Lewis Mills

REQUESTED FROM: Mary Hoyt

DATE OF REQUEST: OCTOBER 31, 2008

Information Requested: Has AmerenUE undertaken any analysis that compares "Cash Metrics" regulation (or a similar use of accelerated depreciation) with regulation that allows recovery of CWIP? If so, please provide that analysis.

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DATE RECEIVED: _____ SIGNED BY: _____

TITLE: _____

PUBLIC COUNSEL DATA REQUEST

NUMBER 2002

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

REQUESTED BY: Ryan Kind

REQUESTED FROM: Tom Byrne

DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: Please provide a complete unredacted copy (in electronic format such as a pdf file) of the Application for Combined License for Callaway Plant Unit 2, submitted via ALNRC 00004, dated July 24, 2008.

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

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TITLE: _____

PUBLIC COUNSEL DATA REQUEST

NUMBER 2003

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

REQUESTED BY: Ryan Kind

REQUESTED FROM: Tom Byrne

DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: Please provide a copy of the analysis that was performed by or for UE or its affiliates to calculate the six figures that appear in the table entitled "Callaway Plant Unit 2 Projected Project Cost (\$millions)" that appears on page 1-12 of Part 1 of UE's COLA for Callaway 2.

THIS RESPONSE INCLUDES:

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PUBLIC COUNSEL DATA REQUEST

NUMBER 2004

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

REQUESTED BY: Ryan Kind
REQUESTED FROM: Tom Byrne
DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: Please provide a complete unredacted copy (in electronic format such as a pdf file) of UE's Part I application for loan guarantees for Callaway 2 from the DOE loan guarantee program under Title XVII of the Energy Policy Act of 2005.

THIS RESPONSE INCLUDES:

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PUBLIC COUNSEL DATA REQUEST

NUMBER 2005

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

REQUESTED BY: Ryan Kind
REQUESTED FROM: Tom Byrne
DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: Please provide a complete unredacted copy (in electronic format such as a pdf file) of UE's Part II application for loan guarantees for Callaway 2 from the DOE loan guarantee program under Title XVII of the Energy Policy Act of 2005. If UE has not yet filed a Part II application, please provide a statement to that effect.

THIS RESPONSE INCLUDES:

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TITLE: _____

PUBLIC COUNSEL DATA REQUEST

NUMBER 2006

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

REQUESTED BY: Ryan Kind
REQUESTED FROM: Tom Byrne
DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: UE's COLA for Callaway 2 states on page 1-13 of Part 1 that "an acceptable federal loan guarantee program must be accompanied by approval of the Missouri Public Service Commission to fully recover AmerenUE's costs as well as any associated contractual payment obligations that it assumes related to the project." Please fully explain why UE believes that "an acceptable federal loan guarantee program must be accompanied by approval of the Missouri Public Service Commission to fully recover AmerenUE's costs as well as any associated contractual payment obligations that it assumes related to the project."

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TITLE: _____

PUBLIC COUNSEL DATA REQUEST

NUMBER 2007

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

REQUESTED BY: Ryan Kind

REQUESTED FROM: Tom Byrne

DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: UE's COLA for Callaway 2 states on page 1-13 of Part 1 that "an acceptable federal loan guarantee program must be accompanied by approval of the Missouri Public Service Commission to fully recover AmerenUE's costs as well as any associated contractual payment obligations that it assumes related to the project." Please specify the timing of the Missouri PSC "approval" that is referenced in the preceding quote. In particular, would UE seek this "approval" prior to making a decision about whether to build Callaway unit 2?

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PUBLIC COUNSEL DATA REQUEST

NUMBER 2008

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

REQUESTED BY: Ryan Kind

REQUESTED FROM: Tom Byrne

DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: Please provide a copy of UE's current plan for financing construction of the Callaway 2 plant. If no such plan exists, please provide a statement to that effect.

THIS RESPONSE INCLUDES:

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PUBLIC COUNSEL DATA REQUEST

NUMBER 2009

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

REQUESTED BY: Ryan Kind

REQUESTED FROM: Tom Byrne

DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: Please provide a copy of UE's current business plan for the construction and/or operation of the Callaway 2 plant. If no such plan exists, please provide a statement to that effect.

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TITLE: _____

PUBLIC COUNSEL DATA REQUEST

NUMBER 2010

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

REQUESTED BY: Ryan Kind

REQUESTED FROM: Tom Byrne

DATE OF REQUEST: NOVEMBER 3, 2008

Information Requested: Please specify any pre-approvals of the prudence of costs associated with the planning or construction of Callaway 2 that UE believes will be necessary before UE decides to proceed with construction of the Callaway 2 project.

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DATE RECEIVED: _____

SIGNED BY: _____

TITLE: _____

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 AmerentUE 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 AmerentUE in the future.

Please call if you wish to discuss this letter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Wendy K. Tatro", written over a horizontal line.

Wendy K. Tatro
Associate General Counsel