BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area.	)))))	**Case No. ER-2010-0036**

MOTION TO COMPEL AMERENUE TO RESPOND TO DATA REQUESTS

COMES NOW the Office of the Public Counsel and for its Motion to Compel AmerenUE to Respond to Data Requests states as follows:

1. Through this motion, Public Counsel requests an order of the Commission compelling AmerenUE to fully respond to a series of data request (DRs) to which AmerenUE has objected. The data requests ask for invoices of outside experts and outside counsel, the costs of which AmerenUE seeks to recover from its customers through the rates to be established in this case. Public Counsel argues that AmerenUE has waived its claims of privilege by taking affirmative action to put the recovery of costs associated with the allegedly privileged information at issue in this case.

2. On December 21, 2008 Public Counsel submitted DRs 1008-1014 to AmerenUE. AmerenUE objected to 1008, 1010, 1011, and 1012[1] "to the extent they seek information protected by the attorney-client privilege and work product privileges."[2] AmerenUE's objection letter goes on to state that, notwithstanding the objection, AmerenUE would provide summaries

[1] DRs 1008, 1010, 1011, and 1012 are attached hereto as Exhibit 1. Although DR 1008 is marked as "Highly Confidential," AmerenUE subsequently removed that designation.
[2] The objection letter is attached hereto as Exhibit 2.

of the invoices. After some discussion, AmerenUE agreed to provide the actual invoices with portions redacted.[3]

3. AmerenUE seeks recovery from customers for all of the costs of the activities – both redacted and unredacted – shown on the invoices at issue here. (Direct Testimony of AmerenUE witness Gary Weiss, filed on July 24, 2009, page 24). By seeking recovery of these costs, AmerenUE is asserting that they have been prudently incurred and that they are costs necessary to pursue this rate case. As a result, AmerenUE has put the issue of the prudence and necessity of all of these costs "in play."

4. As a general rule, communications made in confidence between a client and an attorney about pending or anticipated litigation are privileged. This privilege can of course be expressly waived, but it can also be waived by implication. There are a number of situations in which implied waiver or exceptions to the attorney-client privilege and/or work-product privilege can arise. In Hearn v. Rhay,[4] the United States District Court for the Eastern District of Washington provides a widely-cited and lengthy discussion of exceptions to the claim of attorney-client privilege, and concludes with the following observation:

> All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the

[3] The invoices responsive to DR 1008 are attached hereto as Exhibit 3. The invoices responsive to DR 1010 are attached hereto as Exhibit 4. The invoices responsive to DR 1011 are attached hereto as Exhibit 5. The invoices responsive to DR 1012 are attached hereto as Exhibit 6. All of the invoices have been designated by AmerenUE as "Highly Confidential" and Public Counsel

[4] Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975)

> privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.

5. Missouri courts have followed cases citing Hearn v. Rhay. In Sappington v. Miller, the Western District Court of Appeals stated that "A waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communication in issue."[5] This principle noted by the court in Sappington v. Miller was attributed to a New York decision that expressly followed Hearn v. Rhay:

> A waiver may also be found where the client places the subject matter of the privileged communication in issue (see, e.g., People v Edney, 39 NY2d 620) or where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information (Connell v Bernstein-Macaulay, Inc., 407 F Supp 420; Hearn v Rhay, 68 FRD 574)."[6]

6. Thus there are three findings required to establish that AmerenUE has impliedly waived the attorney-client privilege. First, that AmerenUE (the party asserting the privilege) placed the information at issue through its own affirmative action. Second, that AmerenUE put the protected information at issue by making it relevant to the case. Third, that application of the privilege would deny Public Counsel access to information vital to make his case. The next three paragraphs will very quickly address and resolve each of these points in turn.

7. The first required finding is that AmerenUE took an affirmative action that placed the information at issue. There can be no argument about this point: but for AmerenUE taking the affirmative action of filing a rate case, this issue would not have ever arisen.

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[5] Sappington v. Miller, 821 S.W.2d 901, 904 (Mo. Ct. App. 1992), citing from Jakobleff v. Cerrato, Sweeney and Cohn, 97 A.D.2d 834, 468 N.Y.S.2d 895 (App. 1983).

[6] Jakobleff, *supra*, at 897.

8. The second required finding is that the protected information at issue has been made relevant to the case by AmerenUE's actions. Again, there can be argument about this point: but for AmerenUE's request for rate recovery of the costs associated with the information asserted to be privileged, there would be no issue about its disclosure. It is only because AmerenUE is spending what amounts to ratepayer money that Public Counsel is concerned with the expenditures. If AmerenUE was spending shareholder money, Public Counsel would be hard pressed to demonstrate a need to see the information, much less a reason to make an exception to the attorney-client privilege to get it.

9. The third required finding is that the information is vital to Public Counsel's case. As with the first two, there can be no argument that the instant situation meets this requirement. By seeking recovery in rates, AmerenUE asserts that the costs of the activities have been prudently incurred and are necessary to pursue this rate increase case. The Western District court of Appeals (citing the Commission's Report and Order in Case No. ER-2007-0002) noted:

> While [UE] has the overall burden of prov[ing] that the rates it is proposing are just and reasonable, a slightly different rule applies when a party alleges the utility has been imprudent in some manner. The party alleging imprudence has the burden of creating a serious doubt as to the prudence of an expenditure. If that is accomplished, then the company has the burden of proving the expenditure was in fact prudent.[7]

Public Counsel may want to challenge AmerenUE's prudence of incurring the cost of the activities that have been redacted, or the appropriateness of considering them to be rate case expense. Because the nature of the activity has been completely obliterated, Public Counsel has absolutely no way of raising serious doubt about these expenditures. Thus it is vital to Public Counsel's ability to try this issue to have access to the information.

[7] State ex rel. Nixon v. PSC (State ex rel. Public Counsel), 274 S.W.3d 569, 577 (Mo. Ct. App. 2009)

10. In the recent Report and Order in Case No. GR-2009-0355, the Commission thoughtfully considered Public Counsel's position on rate case expense. Although it did not adopt that position, it stated:

> Unfortunately, in this case, the parties have not fully developed the record on this point. More detailed cost study, comparisons to other jurisdictions, and other testimony on the nature and propriety of certain rate case expenses may be helpful in determining how to apportion rate case expense. Such information is encouraged and would be welcomed by this Commission.

Without knowing specifically what activities AmerenUE was paying its outside experts and outside counsel for, it will be impossible for Public Counsel to raise doubts about the prudence of the expenditures, and it will be impossible to fully develop the record on these expenditures.

WHEREFORE, Public Counsel respectfully requests that the Commission compel AmerenUE to provide unredacted copies of invoices in response to Data Requests 1008, 1010, 1011, and 1012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 4th day of March 2010.

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