

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

In the Matter of the Application of Union Electric)
Company d/b/a Ameren Missouri for Certificates of)
Convenience and Necessity for Solar Facilities.) **File No. EA-2023-0286**

**STAFF’S RESPONSE TO AMEREN MISSOURI’S
MOTION TO COMPEL**

Comes now the Staff of the Missouri Public Service Commission and makes the following response to Ameren Missouri’s Motion to Compel:

On October 19, 2023, Staff filed a Motion for Local Public Hearing. Prior to that filing the Commission had received through its Public Comments website the following comment submitted per the authority of Pike County Commissioner Brock Bailey:

Rural Missouri is being overwhelmed with Solar projects. The Pike County Commission have had discussions with several concerned citizens and local land owners. We do not have planning and zoning and we have little jurisdiction with regards to these projects. • Have any environmental studies been completed by "third party" or government entities? • Where does the responsibility lie if there is an environmental issue? • What happens if governmental subsidies/funding cease at any time during construction and beyond? (Similar to petroleum) • Will there be any public hearings, considering the community impact of these facilities? Thank you for your time and consideration to this matter. We look forward to hearing from you.

In conformity with their duties to the Commission, the Commission’s technical and legal staff consulted with one another on Brock Bailey’s comment; and based on these consultations and taking into consideration Staff’s undersigned lead counsel’s advice, the comment was further investigated. Based on that investigation, which, in turn, was based on Staff counsel’s legal advice, Staff filed its Motion for Local Public Hearing.

The Commission denied Staff’s Motion on November 29, 2023, stating, in part, that Ameren Missouri’s argument that Pike County could have, but did not choose to intervene in these proceedings was “compelling.” One Commissioner, however, did not feel

compelled and dissented, making observations during the hearing about the public's interest in a public forum where they might question and speak to the issues presented in this case.

Following the Commission's order, the Commission's technical and legal staff again consulted on Brock Bailey's request and the Commission's order. Based on these consultations and taking into consideration Staff's undersigned lead counsel's advice, the undersigned lead counsel conducted further investigation. Based on that investigation, on the Commissioner's dissent to the Commission's denial of the Motion for Local Public Hearing, and on decisions made by Staff's Division Heads with legal counsel's advice, Staff counsel took steps to set up a "Town Hall Meeting" in Bowling Green, Missouri. That meeting is scheduled to occur on January 10, 2024, commencing at 6 p.m., in the auditorium of the Bowling Green R1 High School in Bowling Green, Missouri. Ameren Missouri has been invited and it is Staff's understanding that Ameren Missouri plans to attend.

Interlaced in the history set out above is the timeline of the data request which is now the subject of Ameren Missouri's Motion to Compel. On December 6, 2023, one week after the Commission denied the Staff's Motion for Local Public Hearing which recited verbatim Brock Bailey's public comment set out above, in the time frame of Staff's efforts to set up a "town hall," Ameren Missouri propounded the following Data Request 189 to Staff:

1. Please provide all correspondence, meeting notes, notes of telephone conversations, and any other documentation, that has occurred between the Staff of the Commission and any official or representative of Pike County, Missouri, including but not limited to any Pike County Commissioner or the Pike County Clerk, in his/her official or individual capacities, concerning the Bowling Green Solar Project proposed in this docket, and including but not limited to correspondence, meeting notes, notes of telephone conversations, and any other

documentation regarding property taxes or a chapter 100 financing agreement.

2. Please provide all Staff internal correspondence, meeting notes, notes of telephone conversations, and any other documentation concerning the Bowling Green Solar Project proposed in this docket, and including but not limited to correspondence, meeting notes, notes of telephone conversations, and any other documentation regarding property taxes or a chapter 100 financing agreement.

On December 8, 2023, Staff filed the following objection:

Objection: On their face the DRs call for privileged items protected by the Missouri Supreme Court Rule 56.01(3) “documentary work product privilege” with no allegation, as required, that Ameren Missouri has any substantial need for the materials and cannot obtain the sought information from some source other than Staff without undue hardship. (Ameren Missouri is, of course, free to discover the sought information through deposition of the Pike County Commissioner(s)). Further, to the extent that the DRs focus on property taxes or a chapter 100 financing agreement, they are also protected from discovery by the “mental work product privilege” in that discovery will disclose Staff’s investigative processes, mental impressions, conclusions, opinions, strategy planning, and legal theories concerning those issues. See, generally, *State ex rel. State Bd. Of Pharmacy v. Otto*, 866 S.W.2d 480 (Mo. App. W.D. 1993). Specifically, a DR calling for the identity of persons interviewed violates the mental work product privilege per *State ex rel. State Bd. Of Pharmacy v. Otto*, citing and tacitly adopting the thinking in *Board of Education v. Admiral Heating*, 104 F.R.D. 23, 32 (N.D. Ill. 1984), and *Laxalt v. McClatchy*, 116 F.R.D. 438, 443 (D.Nev. 1987). See, generally, *State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. O’Malley*, 898 S.W. 550 (Mo. Banc 1995). Such is “absolutely immune from discovery.” Data Request Objection submitted by Paul Graham (paul.graham@psc.mo.gov)

Nothing further happened until late December, when Staff had taken steps to publish notices of the town hall meeting and had advised Ameren Missouri of the meeting. On January 2, 2024, Ameren Missouri filed its motion to compel, and, after waiting nearly a month after Staff’s December 8, 2023, objections, Ameren Missouri suddenly needed “expedited treatment.” The relationship between the town hall meeting and Ameren Missouri’s “hurry up” is perhaps not just a matter of conjecture.

Staff will expand on the applicability of the mentioned cases below. Before moving into that discussion, the respective procedural duties of parties to a discovery dispute bear stating: A party seeking discovery has the burden of establishing the relevance of

the sought-after materials.¹ If relevance has been established and the opposing party asserts a privilege, then the opposing party bears the burden of showing the privilege applies.² This burden, however, does not pass to the opposing party if the party seeking discovery cannot establish relevance.

Assuming there is relevance and moving forward, then, to the next step: To quote *Kilroy* at length, with some internal citations omitted:

Blanket assertions of work product are insufficient to invoke protection. [citation omitted] In order to invoke work product protection, the party opposing discovery “must establish, via competent evidence, that the materials sought to be protected (1) are documents or tangible things, (2) were prepared in anticipation of litigation or for trial, and (3) were prepared by or for a party or a representative of that party.” [citation omitted] ([The] party challenging privilege must have “sufficient information to assess whether the claimed privilege is applicable”). “Competent evidence” may include a privilege log and affidavits from counsel. [citation omitted]. The privilege log may identify documents individually or by categories if that provides sufficient clarity for the court to rule on the asserted privilege claim. [citation omitted]. Limited discovery by deposition or otherwise regarding work product may be necessary. [citation omitted] Through this process, the parties develop a factual record from which the trial court can render an informed decision. [citation omitted]

Ameren Missouri has filed a Motion to Compel. As a preliminary to Staff’s reply, Staff would observe that it interprets (both parts of) the data request to concern only Staff’s investigation into and possible communications with third parties concerning the public comment posted by Brock Bailey. If Ameren Missouri actually intended the data request to cast a broader net and also capture *Staff’s* entire current position (not Pike County’s position) with respect to property taxes or a chapter 100 financing agreement or

¹ *State ex rel. Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406 (Mo. App. E.D. 2021). Anticipating the next step after the “relevancy” inquiry, Staff would direct the Commission also to *State ex rel. Cummings v. Witthaus*, 219 S.W.2d 383 (Mo. Banc 1949). See *State v. Aubuchon*, 381 S.W.2d 807 (Mo. 1964), stating in a criminal case that before counsel is permitted to inspect a paper, there should be a “showing of the probable materiality of the paper. . .and that a mere fishing expedition is not to be permitted ‘upon the possibility of impeachment’ or for prying into an adversary’s case.”

² *State ex rel. Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406 (Mo. App. E.D. 2021).

Staff's position on the entire Bowling Green project, then that kind of discovery falls into the general domain of the discovery that ordinarily goes back and forth between Staff and utilities in every single case; and Ameren Missouri should proceed accordingly with the kind of data requests that the parties ordinarily exchange without fuss and with the long-standing, unspoken professional courtesy that, as a matter of course, such data requests will always be construed so as not to invade areas protected from discovery.³ Staff assumes that this is the case here, in part, because on Ameren Missouri's initiative the parties are also now discussing arrangements for Ameren Missouri to take Staff's witness's depositions.

Turning now to the data request as Staff understood it, i.e., as an inquiry into what Staff might know about *Pike County's* position on taxes, there is the threshold "relevance" question: Has Ameren Missouri, i.e., the party seeking discovery, sustained its burden to establish the relevance of the sought-after materials?⁴ The answer is quite clearly "no." The data request actually begs the following question: Why does Ameren Missouri need to know what *Staff* knows? What doesn't Ameren Missouri know that it thinks Staff knows? Ameren Missouri has, through its filed testimony, led Staff to believe that Ameren Missouri has a Pike County property tax/Chapter 100 financing agreement in hand, duly approved by Pike County. Ameren Missouri's filings in this case tout this agreement as a factor mitigating the expense overrun of the project for rate payers and at the very least implies that the agreement is a "done deal" or a very likely "done deal." Its filings even put a dollar number down on the value. The precise question begged here, then, is: Is that not true!?! Is the whole thing "up in the air"? Is Ameren Missouri's

³ If such is no longer, as a matter of professional courtesy, the agreement between Ameren Missouri and Staff, Staff would ask Ameren Missouri now to so state.

⁴ *State ex rel. Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406 (Mo. App. E.D. 2021).

question really: Does Staff know something *which Ameren Missouri also knows* and knows is not consistent with its Commission filings?

Staff has no “privilege log,” if by that term one means some kind of a “schedule” of exhibits to be considered here. The purpose of such is, however, to give the tribunal sufficient information upon which to decide whether the discovery requests are objectionable. Staff will provide (actually just repeat) that information in this pleading. As stated in its Motion for Local Public Hearing, which this Commission might treat as Staff’s privilege log, Staff counsel and technical staff have made investigations and spoken to people in Pike County. In that motion Staff stated that certain Pike County residents wanted a local public hearing. Additionally, concerning taxes Staff also stated:

Staff also believes that a local public hearing could benefit the Commission concerning the current status Ameren Missouri’s county tax strategies—as laid out in its testimony--and related discussions between Ameren Missouri and Pike County, Missouri.

At this juncture, a little sidebar might be well-timed: Ameren Missouri has, in its Motion to Compel, alluded to the fact that this Commission denied Staff’s request because of Ameren Missouri’s “compelling” arguments. In fact, the Commission stated that the “compelling” argument was that Pike County had not intervened. With all due respect to the Commission’s order and the Commission’s thinking, Ameren Missouri may have shot itself in the foot with its “compelling” arguments. Staff would respectfully point out something was missed along the way about taxes: At least as far as concerns taxes, Pike County had no need to intervene because it needs no Commission order to refuse to enter into an agreement to waive Ameren Missouri’s property taxes. It does not need to intervene or anything else in order to just say “no.” Staff respectfully suggests that if Ameren Missouri is having trouble getting a Pike County tax agreement in hand, then

perhaps Ameren Missouri's opposition to a local public hearing and its arguments to the Commission were not well thought out. It is certainly an open question as to whether a local public hearing would have helped Ameren Missouri or, instead, have hurt Ameren Missouri on the issue in the minds of Pike County residents and, as a result, their elected officials charged with voting on the question. Maybe Ameren Missouri thought it all through and decided that the "cons outweighed the pros." All that, of course, would be an example of Ameren Missouri's "mental work product." And duly engaged in the same "thinking"—which Ameren Missouri is not entitled to know about, Staff, after consulting with its attorney, is conducting a town hall on January 10.

So with that segue and turning back now from the sidebar to Ameren Missouri's motion before the Commission: Ameren Missouri seems to want to know about what Staff knows about the status of any tax agreement with Pike County. Obviously, *Ameren Missouri* knows what the status is. How, on the other hand, is what *Staff* knows about the status relevant to anything other than Staff counsel's thoughts and Staff's case strategy? *Staff, in fact, does know what the tax agreement status was as of the day this pleading was written.* But Ameren Missouri doesn't know? Why not? If Ameren Missouri cannot tell the Commission what, aside from Staff counsel's thoughts, opinions, mental impressions, and case strategy, Ameren Missouri is fishing for that is relevant, then Ameren Missouri has failed to establish the relevancy of its data requests and Staff has no burden at all here to prove up its privilege. Ameren Missouri's Motion to Compel should be denied right at the front door.

Moving past the relevance inquiry: In the interests of giving the Commission the equivalent of a "privilege log," Staff repeats that its lead counsel and technical staff have investigated this case, which is their duty, and they have spoken to people by phone.

Those facts, in summary, were related already to this Commission in Staff's Motion for Local Public Hearing. Additionally related in that motion was the interest in the tax situation. It was on the basis of those communications that Staff filed its motion and, when the Commission denied the motion, it was on the basis of those communications that Staff set up a "town hall meeting," to occur in Bowling Green, Missouri, on January 10.

The data requests asks for writings and tangible things making records: Without waiving the objection but in the spirit of providing the essence of a "privilege log," Staff states that its legal counsel made no notes on the conversations except to write down telephone numbers for persons who might assist in finding a venue for the town hall meeting; but that technical staff made some notes of telephone conversations. Because of the nature of the privilege here invoked, Staff contends that that is all the Commission needs in the way of a "privilege log" in order to rule on Ameren Missouri's motion. Staff contends that on that basis Ameren Missouri's motion should be denied. Why? To boil it down: Because of the nature of the mental work product privilege, *whom* Staff spoke with, *what* was said, and any notes or other records of those communications are absolutely privileged regardless of what their content may be *because they show a road map of legal counsel's thinking and case strategy*. The following rules and cases make that clear.

Staff called out *State ex rel. State Board of Pharmacy v. Otto*, 866 S.W.2d 480 (Mo. App. W.D. 1993) in its objection. In that case, the State Board of Pharmacy had filed an Administrative Hearing Commission complaint against James E. Drake. Drake propounded an interrogatory to the Board. In part it asked the Board to reveal:

9. Whether or not you have conducted or have cause [sic] to be conducted any investigation or further investigation of Respondent, James E. Drake, after the inspection of April 4, 1988 of Drake's Medical Center Pharmacy, and if so state:
- A. Identify each person conducting each such investigation or further investigation on your behalf;
 - B. Describe in detail each such investigation or further investigation;
 - C. Identify each person contacted during each such investigation or further Investigation the date of each such contract [sic] and identify each person acting on your behalf who contacted each such person on each such date;
 - D. Describe in detail what each person said on each date when he/she was contacted and/or interviewed;
 - E. Describe in detail what was said to each person when he/she was contacted and/or interviewed on each such date;
 - F. Identify and describe in detail each document you obtained during each such investigation or further investigation;
 - G. Identify the person who provided you with each document identified in answer to Interrogatory No. 9G [sic] above; and
 - H. Identify and describe each document prepared during such investigation or further investigation.

The Board objected on the ground that the interrogatory sought the mental impressions, theories or conclusions of the Board's attorney and sought information which constituted opinion work product. The Administrative Hearing Commission overruled the objection and ordered the Board to make its personnel and licensure files available to Drake's attorney for inspection and copying. The Board then sought a writ of prohibition from the Cole County Circuit Court. Cole County issued and then quashed its preliminary writ. The Board appealed the circuit court's order to the Court of Appeals. The Court of Appeals held that Interrogatory 9B's request for a detailed description of the Board's investigation was impermissible because it inquired into the efforts of the Board's attorney to determine relevant facts which, in turn, "leads to the preparation of legal theory, the planning of strategy, and the recording of mental impressions." The Court held that 9C, which called for the identity of each person contacted, was objectionable because from this information, "the opposition would be able to formulate a list of which witnesses counsel considered important and which were not." The Court agreed with and adopted

the reasoning of *Laxalt v. McClatchy*, 116 F.R.D. 438, 443 (D.Nev. 1987), that “this information is the type of mental impression and trial strategy which the work product rule is meant to protect.” The Court held that 9E was objectionable and adopted the reasoning of *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 935 (6th Cir. 1980), citing the following language from that case:

Work product consists of the tangible and intangible material which reflects an attorney's efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions.

The Court of Appeals held that 9H was impermissible in requesting a description of each document prepared because it called for trial preparation material protected from discovery by Rule 56.01(b)(3).

A word about Rule 56.01(b)(3), now Rule 56.01(b)(5): There are actually two work product privileges: One for documents prepared for trial and one for legal counsel's thoughts, be they in documents prepared for trial or anywhere else. Rule 56.01(b)(5) describes the “documents” privilege. It states:

5) *Trial Preparation: Materials*. Subject to the provisions of Rule 56.01(b)(6), a party may obtain discovery of documents and tangible things otherwise discoverable under Rule 56.01(b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including an attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. For purposes of this paragraph, a statement previously made is: (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical,

electrical, audio, video, motion picture or other recording, or a transcription thereof, of the party or of a statement made by the party and contemporaneously recorded.

The two work product privileges are (1) the privilege that protects “documents or tangible things” prepared for use at trial or potentially usable at trial (“documents privilege”) and 2) intangible opinion work product which involves the mental impressions, conclusions opinions or legal theories of an attorney⁵ (“non-documents” or “intangible opinion work product privilege”).⁶ Rule 56.01(b)(5) guards the documents privilege. The protection for intangible opinion work product emanates, not from that rule, but from the decisions in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *State ex re. Spear v. Davis*, 596 S.W.2d 499 (Mo. App. 1980); and is also enshrined in *State ex rel. State Board of Pharmacy v. Otto*, 866 S.W.2d 480 (Mo. App. W.D. 1993); and in *Board of Registration for the Healing Arts v. Spinden*, 798 S.W.2d 472, 476 (Mo. App. W.D. 1990). Per *Spinden*, the latter privilege, applying to information that would reveal the mental impressions, conclusions, opinions and legal theories of an attorney representing a party in litigation, is absolutely sacrosanct. Anything falling within its boundaries is “absolutely immune” from discovery.

Although as stated by Staff above in providing the Commission with “privilege log” information, Staff has at this time no documents and tangible things responsive to the data request which were intended to use at trial (although, of course, they could conceivably be so used), Staff may obtain or prepare such in the future. Staff opposes

⁵ *State ex rel. State Board of Pharmacy v. Otto*, 866 S.w.2d 480 (Mo. App. W.D. 1993).

⁶*State ex rel Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406 (Mo.App. E.D. 2021): “The term ‘work product’ includes two types of work product – ‘tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney’s mental impressions, conclusions, opinions, and legal theories - sometimes called opinion work product).” Citing *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O’Malley*, 898 S.W.2d 550 (Mo. Banc 1995).

Ameren Missouri's motion now in order to nip all that in the bud: Because Ameren Missouri's data requests hypothetically cover such documents, because parties have an ongoing duty to update discovery, and, thus, because Ameren Missouri's data requests, if allowed to stand, would substantially "chill" Staff's ability to conduct needed investigations and prepare documents for use at trial in the future, Staff has objected. The same point applies to documents that point to counsel's thoughts, conclusions, opinions, and strategy. Technical staff must be able to "think," plan, call people, and make notes in order to consult with their attorney, and legal counsel must be able to do the same thing—without Ameren Missouri's being allowed to pull up a chair at Staff counsel's desk.

Ameren Missouri's DR 189 violates both privileges: a) the documents and tangible things privilege, which covers documents (like photographs, video tapes, visual aids, charts and graphs) prepared for use at trial, *even if they do not actually point to counsel's thoughts*; and b) the intangible opinion work product privilege, which covers anything revealing counsel's thoughts (for example, lists of questions counsel might ask a witness), *whether they be in documents prepared for trial or just as notes for Staff counsel's files*.

Both of Ameren's data requests cover documents which could possibly be used at trial (including documents that do not exist now but might in the future). So they all fall under Rule 56.01(b)(5). Accordingly, at the threshold, to obtain such documents Ameren must show that "it is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Ameren Missouri has made no sufficient showing. As mentioned above, the parties are now discussing a schedule for deposing Staff witnesses. Notably, Ameren Missouri could, but has not sought to schedule the deposition of Commissioner Brock Bailey or any other Pike County representative or

official. Manifestly, if Ameren Missouri wants to know the status of *Pike County's* thinking on property taxes, then it is incumbent upon Ameren Missouri to show that it is unable to obtain “the substantial equivalent of the materials” it has requested from Staff “by other means,” i.e., from the “horse’s mouth”: the deposition of Commissioner Brock Bailey.

But just as it did not want a local public hearing, perhaps Ameren Missouri does not (for some reason which is possibly protected by Ameren Missouri’s attorney mental work product privilege?) wish to depose Mr. Bailey (or any other Pike County official)—has talked to him and made that decision? Perhaps Pike County and Ameren Missouri have reached an *impasse* in discussions? That circumstance would still not make the materials sought discoverable if the materials requested reveal Staff counsel’s thoughts, opinions, and case strategy. Staff is not entitled to know what Ameren Missouri’s thinking is on taking Mr. Bailey’s deposition, and Ameren Missouri is not entitled to know Staff’s thinking on the same theme. Rule 56.01(b)(5) still does not carry Ameren Missouri over the finish line. Staff counsel’s *thinking* remains absolutely immune from discovery. Regardless of whether Ameren Missouri can or cannot obtain the information sought in its data requests from other means, Ameren Missouri cannot get it from Staff counsel or Staff technical counsel working under Staff counsel’s advice and direction. Per *Board of Registration for the Healing Arts v. Spinden*, such information is absolutely immune from discovery because, as shown in the history set out at the beginning of this pleading, any notes, etc., showing with whom Staff spoke or what was said, i.e., the results of Staff’s investigations into the status of Pike County’s thinking about whether Pike County will agree to a tax arrangement with Ameren Missouri, will also provide a road map of the mental impressions, conclusions, opinions or legal theories of an attorney representing a party in litigation.

WHEREFORE, Staff respectfully asks the Commission to deny Ameren Missouri's Motion to Compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned by his signature below certifies that the foregoing pleading was served upon all counsel of record on this January 8, 2024, by electronic filing in EFIS, electronic mail, hand-delivery, or U.S. postage prepaid.

/s/ Paul T. Graham