

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 24th day of January, 2024.

In the Matter of the Application of Union Electric)
Company d/b/a Ameren Missouri for Permission)
and Approval and Certificates of Public)
Convenience and Necessity Authorizing It to)
Construct Renewable Generation Facilities)

File No. EA-2023-0286

ORDER REGARDING MOTION TO COMPEL

Issue Date: January 24, 2024

Effective Date: January 24, 2024

Union Electric Company d/b/a Ameren Missouri has filed an application with the Commission seeking an order granting Certificates of Convenience and Necessity (CCNs) for solar generation facilities in Cass County, Illinois and the Missouri counties of Warren, Audrain, and Pike. Ameren’s application states that it is pursuing a Chapter 100 financing arrangement¹ with each of the Missouri counties. Under such an arrangement, title to the generating facility would be owned by the county, who would then lease it to Ameren Missouri or a third-party facility operator. That facility operator would make payments in lieu of taxes to the county over the life of the project lower than the actual taxes that would have been assessed had the facility not been tax exempt.²

On January 2, 2024, Ameren Missouri filed a *Motion to Compel and Request for Expedited Treatment*. In its motion, as background, Ameren states that, on November 15, 2023, the Staff of the Commission (Staff) submitted Data Request (DR) 185.0 to Ameren Missouri seeking information and documentation regarding the

¹ Chapter 100, RSMo.

² *Application*, pp. 6-11, filed June 16, 2023.

existence or status of Chapter 100 agreements between Ameren Missouri and Warren, Audrain, and Pike Counties. Ameren Missouri provided Staff with “dozens of responsive documents”, but, for 12 other documents, provided a privilege log listing objections to disclosure of those documents based on attorney-client and attorney work product privileges.

Per Commission Rule 20 CSR 4240-2.090(1), discovery in Commission cases may be obtained by the same means and under the same conditions as in civil actions in circuit court. Thus, the Missouri Rules of Civil Procedure regarding discovery matters apply. Under those rules, generally, parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. The information need not be admissible in evidence to be discoverable if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The party seeking discovery bears the burden of establishing relevance.³

If information is withheld because of an objection, then each reason for the objection shall be stated. If a privilege or the work product doctrine is asserted as a reason for withholding information, then, without revealing the protected information, the objecting party shall state information that will permit others – such as the regulatory law judge presiding over the case – to assess the applicability of the privilege or work product doctrine.⁴

A party may obtain discovery of materials otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party 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

³ Missouri Rules of Civil Procedure Rule 56.01(b)(1).

⁴ Missouri Rules of Civil Procedure Rule 57.01(c)(3).

substantial equivalent of the materials by other means. If the judge finds that that burden has been met and orders disclosure of such materials, disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation shall be protected.⁵

According to Ameren Missouri's *Motion to Compel*, following Staff's submission of DR 185.0, Ameren Missouri served Staff with DR 189.0 on December 6, 2023, which sought information on communications between Staff and Pike County representatives on the Bowling Green Solar Project (proposed to be built in Pike County), including any communications regarding property taxes or a Chapter 100 financing agreement. On December 8, 2023, Staff objected to DR 189.0 in total, stating that it calls for items protected under the Rule 56.01(b)(5) work product privilege with no allegation by Ameren Missouri that it has a substantial need for the materials and cannot obtain the information from some source other than Staff without undue hardship. Staff also objected that materials related to communications with Pike County about property taxes or a Chapter 100 agreement are privileged in that they would disclose Staff's "investigative processes, mental impressions, conclusions, opinions, strategy planning, and legal theories" on those issues. Ameren Missouri's motion states that Staff did not provide a privilege log or other information that would permit others to assess the applicability of the privileges or work product doctrine asserted.

The motion asks the Commission to order Staff to (a) promptly provide Ameren Missouri with a proper privilege log and/or other competent information that will permit others to assess the applicability of the work product doctrine, and (b) assemble all documents that are responsive to DR 189.0 so that if, based on the information

⁵ Missouri Rules of Civil Procedure Rule 57.01(b)(5).

provided to Ameren Missouri by Staff, Ameren Missouri believes that the objection is not well-taken or that the information is insufficient to assess the applicability of the work product privilege, the documents will be available for the regulatory law judge presiding over the case to promptly examine them *in camera* and make a ruling on disclosure.

Staff filed its *Response to Ameren Missouri's Motion to Compel* on January 8, 2024. In its *Response*, Staff argues that Ameren Missouri has not established that the materials it seeks are relevant. Absent a showing of relevance, Staff argues, it has no burden to show that the work product privilege it asserts applies.

In its *Response*, Staff states that Ameren Missouri's prefiled testimony leads it to believe that Ameren Missouri and Pike County have reached a Chapter 100 financing agreement. Therefore, Staff believes that Ameren is seeking information on what Staff knows about the status of any Chapter 100 agreement between Ameren Missouri and Pike County, which, Staff argues, can only be relevant to Staff's thoughts and case strategy and protected by work product privilege.

In lieu of a privilege log supporting its objection to DR 189.0, in its *Response*, Staff offers that Staff counsel and technical staff have made investigations and spoken to people in Pike County. Staff counsel made no notes on the conversations, but technical staff made some notes of telephone conversations.

While Staff is correct that Ameren Missouri has not established the relevance of the materials requested from Staff, the Commission finds that Staff made materials related to communications between Staff and Pike County about a Chapter 100 agreement relevant by seeking related information in its DR 185.0 to Ameren Missouri. However, Ameren Missouri has not provided information demonstrating that it has a

substantial need of the materials in preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

The Commission will direct Ameren Missouri to respond to this order, making a showing that it has a substantial need of the materials in preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. The Commission will direct Staff to provide to the regulatory law judge presiding over this case all documents responsive to DR 189.0, identifying any document for which it asserts a privilege and the rationale behind its assertion, to examine *in camera*. The Commission will delegate authority to the regulatory law judge presiding over this case to make a ruling on disclosure of the materials.

THE COMMISSION ORDERS THAT:

1. No later than January 26, 2024, Ameren Missouri shall file a response to this order that shows that it has a substantial need of the materials requested in its DR 189.0 in preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

2. No later than January 26, 2024, Staff shall provide to the regulatory law judge presiding over this case all documents responsive to DR 189.0 to examine *in camera*. Staff shall identify any document for which it asserts a privilege and the rationale behind its assertion.

3. The regulatory law judge presiding over this case is delegated authority to rule on Ameren Missouri's response to this order, review Staff's documents responsive to DR 189.0 *in camera*, and rule on their disclosure.

4. This order shall be effective when issued.



BY THE COMMISSION

Nancy Dippell

Nancy Dippell
Secretary

Rupp, Chm., Coleman, Holsman, Kolkmeier
and Hahn CC., concur.

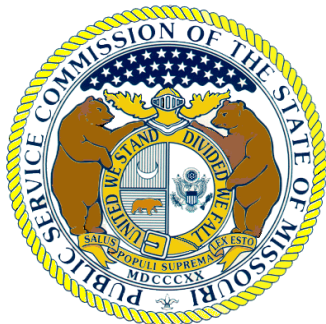
Seyer, Regulatory Law Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 24th day of January 2024.



Nancy Dippell

Nancy Dippell
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

January 24, 2024

File/Case No. EA-2023-0286

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Nancy Dippell
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.