

**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 Permission and Approval and)
Certificates of Public Convenience and) Case No. EA-2024-0237
Necessity Authorizing it to Construct a)
Simple Cycle Natural Gas Generation)
Facility.)

**GRAIN BELT EXPRESS LLC'S SECOND RESPONSE TO AMEREN MISSOURI'S
STATEMENT OF DISCOVERY DISAGREEMENT OR CONCERN**

COMES NOW Grain Belt Express LLC (“Grain Belt Express”), and respectfully files this Second Response to the September 23, 2024 Statement of Discovery Disagreement or Concern (“Statement”) filed by Union Electric Company d/b/a Ameren Missouri (“Ameren”) in this proceeding. This Second Response is filed in accordance with the September 27, 2024 Order Directing Filing, which permits parties to file responses.¹ In support of its Response, Grain Belt Express states as follows:

I. Background

1. On September 23, 2024, Ameren filed a Statement of Discovery Disagreement or Concern (“Statement”), noting that it filed its Statement based upon the certain discovery requests issued to both Renew Missouri Advocates d/b/a Renew Missouri (“Renew Missouri”) and Grain Belt Express.

2. Ameren’s Statement concerned the following discovery requests:

Ameren DR 1.1:

Please identify all persons employed by or associated with Invenergy (including consultants or counsel retained by Invenergy) with whom Emily Piontek or any other persons employed by or associated with Renew Missouri (including

¹ Grain Belt Express filed its first Response on September 25, 2024, but limited that Response to procedural issues related to Ameren’s data requests directed at Grain Belt Express. Grain Belt Express expressly reserved its right to address substantive arguments at a later date.

consultants or counsel retained by Renew Missouri) has communicated regarding the Castle Bluff Project since June 7, 2024, through September 13, 2024. For each person, identify (a) name, (b) job title, (c) the dates of each communication, and (d) the substance of each of those communications. For purposes of this data request and all other data requests from Ameren Missouri to Renew Missouri, “Invenergy” is defined as the entity or entities developing the Grain Belt Express HVDC transmission line project or entities owning or controlling such entity or entities, and “Renew Missouri” is defined as Renew Missouri Advocates or Renew Missouri Action.

Ameren DR 1.2:

Please identify all persons employed by or associated with Invenergy (including consultants or counsel retained by Invenergy) who reviewed or assisted in, or had input into the drafting of, Emily Piontek’s Rebuttal Testimony filed on September 13, 2024. For each person, identify (a) name, (b) job title, (c) portions of the testimony drafted or reviewed, and (d) any edits or changes suggested or made by said person.

Ameren DR 1.3:

Please provide true and correct copies of all documents (e-mails, memos, letters, chats, notes, files, other documentation) that document or reflect the communications identified in response to Data Requests Nos. 1 and 2.

Ameren DR 1.4:

Please provide all documents (e-mails, memos, letters, chats, notes, files, other documentation, workbooks in native format with all formulas intact) shared by any person employed by or associated with Invenergy (including consultants or counsel retained by Invenergy) and any person employed by or associated with Renew Missouri (including consultants or counsel retained by Renew Missouri) between June 7, 2024 through September 13, 2024 that relates or pertains to the developing the Grain Belt Express HVDC transmission line project or the Castle Bluff Project.

Ameren DR 2.1:

If not provided in Ms. Piontek’s workpapers or in executable links embedded in Ms. Piontek’s rebuttal testimony, please provide all documents, files, workbooks, or communications (including e-mails, memos, letters, chats, notes, or other documentation) reviewed and relied upon by Ms. Piontek informing the opinions and inferences reflected in Ms. Piontek’s rebuttal testimony, including from Urlaub Strategies and its employees, consultants, representatives, or agents.

3. On September 25, 2024, Grain Belt Express filed a written response to Ameren’s Statement addressing its procedural deficiencies while reserving Grain Belt Express’ right to respond to Ameren’s substantive arguments at the appropriate time. Grain Belt Express’

arguments in that pleading are incorporated herein by reference and will not be repeated in this Response.

4. On September 26, 2024, Judge Dippell convened a discovery conference to address Ameren's Statement. At the conclusion of the discovery conference, Judge Dippell acknowledged that all parties could file a response to Ameren's Statement by October 1, 2024. Judge Dippell also requested that the parties make the Commission aware of available dates the week of September 30-October 4, 2024 for a second discovery conference.

5. Grain Belt Express files this instant Response to address the arguments in Ameren's Statement pertaining to Renew Missouri's objections based upon the attorney-client, work product, and common interest privileges, and to address specific arguments made by Ameren's counsel during the discovery conference. Grain Belt Express has a particular interest in the discovery dispute regarding Ameren's data requests directed at Renew Missouri because the data requests seek correspondence involving Grain Belt Express.

II. Renew Missouri's Objections to Ameren's Data Requests Are Appropriate and Should be Sustained as Renew Missouri has Properly Asserted Claims of Privilege

6. In response to both Ameren's first and second set of data requests, Renew Missouri made the following objection:²

Renew Missouri objects to this request and each of its subparts on the grounds that it seeks information regarding communications that are protected by attorney-client privilege and the common interest doctrine or the work product doctrine, including "the mental impressions, conclusions, options, or legal theories of an attorney or other representative of a party concerning the litigation" as contemplated by Missouri Rule of Civil Procedure 56.01(b)(5).

[REDACTED]

² The full text of Ameren's discovery requests and Renew Missouri's objections are set forth in Ameren's Statement and will not be repeated herein.

7. Commission Rule 20 CSR 4240-2.090 provides that discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit courts. Missouri Supreme Court Rule 56.01 governs discovery in civil actions and provides generally that

Parties may obtain discovery regarding any matter, *not privileged*, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things”³

Rule 56(b)(1) provides, and this Commission has confirmed, that privileged matters are absolutely non-discoverable.⁴

8. Accordingly, for Ameren to obtain the discovery it seeks from Renew Missouri, such discovery must be relevant and not subject to a privilege. The vast majority of the discovery requests to Renew Missouri pertain to the testimony of Renew Missouri witness Emily Piontek filed in this case. Ameren claims in its Statement that it “is entitled to know the basis of the opinions expressed in her testimony and discover what information she reviewed and relied upon in forming the opinions and providing the testimony.” As discussed further below, rather than seeking information (*e.g.*, documents and materials) Ms. Piontek reviewed and relied upon, Ameren instead is seeking intangible work product, including the mental impressions, conclusions, opinions, and legal theories of counsel for Renew Missouri and Grain Belt Express, which are protected from disclosure.

9. Ameren’s Statement implies that Ms. Piontek has not directed Ameren to the sources she relied upon and that Ms. Piontek is withholding facts or information that she relied

³ Mo. S. Ct. R. 56.01 (emphasis added).

⁴ October 16, 2012 Discovery Order, File Nos. ER-2012-0174 and ER-2012-0175, at 3.

upon. Such implications are baseless upon inspection of Ms. Piontek's Rebuttal Testimony. The assertions made in Ms. Piontek's Rebuttal Testimony are thoroughly supported by credible references and are cited in 92 footnotes. Ms. Piontek relied upon publicly available information, *i.e.*, information available to Ameren, such that the veracity of Ms. Piontek's Rebuttal Testimony can be reviewed and confirmed.

10. Moreover, Ameren has not established a basis for asserting that Ms. Piontek has not provided all documents and materials that she relied upon in drafting her testimony. Ameren has not identified any assertion in Ms. Piontek's testimony that is unsupported or which the basis for such assertion is unknown.

11. Irrespective of Ameren's implications, Ameren is not entitled to obtain discovery of privileged information. Here, Renew Missouri has clearly asserted that the information sought by Ameren is protected by the attorney-client privilege, the work product doctrine, and the common interest doctrine.

12. The work product doctrine is codified in Missouri Rule of Civil Procedure 56.01(b). The work product doctrine protects two types of information from discovery: both tangible and intangible.⁵ Tangible work product consists of documents and materials prepared for trial and is given a qualified protection under Rule 56.01(b)(3) such that its production may be required upon a showing of substantial need.⁶ Intangible work product consists of the mental impressions, conclusions, opinions, and legal theories of an attorney. Intangible work product has absolute protection from discovery.⁷ Missouri Supreme Court Rules extend work product

⁵ *Kenney v. Vansittert*, 277 S.W. 3d 713, 719 (Mo. App. W.D. 2008).

⁶ *Id.*

⁷ *Id.*

protection not only to the party claiming protection, but also to its representatives.⁸ These include attorneys and consultants, among others.⁹

13. As Renew Missouri succinctly explained in its objections to Ameren’s data requests, a substantial part of the information Ameren seeks is subject to *** [REDACTED] [REDACTED] ** and is therefore protected by the joint common interest doctrine. The Eighth Circuit has explained the common interest doctrine as follows:

If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons.¹⁰

14. The common interest doctrine is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party.¹¹ Because it is an exception to waiver, the common interest doctrine “presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work product doctrine.”¹²

15. Ameren data requests 1.1, 1.2, 1.3, 1.4, and 2.1 request information that is clearly not discoverable, such as (1) the substance of all communications between Renew Missouri and Grain Belt Express (including counsel); (2) portions of Ms. Piontek’s testimony drafted or reviewed and any edits or changes suggested or made by either Renew Missouri or Grain Belt

⁸ Mo. Rule of Civ. Pro. 56.01(b)(5).

⁹ Mo. Rule of Civ. Pro. 56.01(b)(5).

¹⁰ *Spring Lake Pork, LLC v. Great Plains Management, LLC*, 2022 WL 2208947 at p. 2 (E. D. Mo. 2022) (citing *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997)).

¹¹ *Id.* (internal citations omitted.)

¹² *Id.*

Express; (3) all documents (including e-mails memos, letters, chats, notes, or other documentation) shared by any person (including counsel) associated with either Grain Belt Express or Renew Missouri; (4) all documents (including e-mails memos, letters, chats, notes, or other documentation) reviewed and relied upon by Ms. Piontek informing the opinions and inferences reflected in Ms. Piontek's rebuttal testimony.¹³

16. While Ameren is entitled to discover facts and data relied upon by Ms. Piontek, it is not entitled to attorney-client communications and intangible work product—*i.e.*, the mental impressions, conclusions, opinions or legal theories concerning the litigation.

17. Rule 56.01(b)(5) provides that “in ordering discovery of such materials [documents and tangible things otherwise discoverable] 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.**”¹⁴ The documents and communications Ameren seeks clearly relate to non-discoverable intangible work product as they request the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the Castle Bluff matter. As such, they are protected both by attorney-client privilege and the work product doctrine. In light of the common interest doctrine, these protections apply to communications between Renew Missouri and Grain Belt Express, and their respective consultants and counsel.

18. During the September 26, 2024 discovery conference, in reliance upon *Stacy ex rel. Tracy v. Dandurand*, counsel for Ameren claimed that under Missouri law, the work product

¹³ See *infra* ¶ 2.

¹⁴ Rule 56.01(b)(5) (emphasis added).

doctrine is waived with regard to materials that an expert witness reviewed in formulating their opinion.¹⁵ *Dandurand* is distinguishable.

19. The Court in *Dandurand* was called upon to resolve a dispute surrounding an insurance company's alleged bad faith failure to settle a resulting wrongful death suit.¹⁶ The Court was presented with one question: "Does a party continue to have an attorney-client privilege as to *documents* that the party has provided to its retained expert witness who is designated to testify?"¹⁷ That framing by the Court highlights the difference in factual circumstances. The dispute in *Dandurand* involved *materials* that had been provided to an expert witness and that the expert witness had inadvertently disclosed to opposing counsel.¹⁸

20. In other words, *Dandurand* does not make mental impressions, conclusions, opinions, or legal theories of attorneys and representatives of other parties discoverable. Rather, it makes clear that *materials, documents, and other tangible things* relied upon by expert witnesses are discoverable.

21. In that case, the court explained that experts retained for litigation typically know nothing about the facts of the controversy until contacted by an attorney.¹⁹ As such, experts are often provided with materials detailing the facts in the case, as was true in the *Dandurand* case.²⁰ The data and materials from which the expert formed the basis of his opinion were the materials that the court ultimately found must be disclosed.

¹⁵ *State ex rel. Tracy v. Dandurand*, 30 S.W. 3d 831, 835 (Mo. 2000).

¹⁶ *Id.* at 832.

¹⁷ *Id.* at 832 (emphasis added).

¹⁸ *Id.* at 833, 835–836.

¹⁹ *Dandurand* at 834.

²⁰ *Id.* at 833.

22. This Commission has previously opined on the application of *Dandurand* and has distinguished that case on grounds substantially similar to what is presented here. As the Commission noted,

There are a number of differences between these matters and the *Dandurand* case. *Dandurand* involved a third-party retained expert, not an employee of the party to the action. The court made clear it was referring to a witness that has no direct knowledge or involvement with the events in controversy who was given materials to review that serve as the only basis for his or her opinion.....[i]n the instant matters, [the witness] is an employee of KCPL. She carries the equivalent status as the party itself—KCPL. She is not an outside retained expert witness who lacks knowledge of the case. She is directly involved and has direct knowledge of the facts associated with this controversy. *Dandurand* does not apply.²¹

23. Here, as in *Dandurand*, Ms. Piontek is an employee of Renew Missouri. She has direct knowledge of and involvement with the Castle Bluff matter. In asserting the applicability of *Dandurand* and touting the alleged waiver of the work product doctrine, the primary basis for Ameren's data requests appears to be that Ms. Piontek is withholding documents, data, or materials that were utilized to form the basis of the opinions in her testimony. Yet, as previously noted, Ms. Piontek's testimony specifically cites to every source she relied upon in preparing her testimony, and Ms. Piontek cites exclusively to publicly available information that is as accessible to Ameren as it is to any other party.

24. Here, Ameren's discovery request is seeking the mental impressions, conclusions, opinions, or legal theories of attorneys and representatives of other parties to this proceeding. Such a discovery request is inappropriate for all of the reasons previously stated.

25. If Ameren's discovery request was tailored to materials, documents, or other tangible things, then Ameren's discovery would be appropriate. But it is not. It goes far beyond that.

²¹ See October 16, 2012 Discovery Order, File Nos. ER-2012-0174 and ER-2012-0175, at 4.

26. Further, here, Ameren has not established a need for materials, documents, or other tangible things other than those relied upon in her testimony. Again, Ms. Piontek's testimony is thoroughly referenced with detailed citations, which provide the basis for her testimony.

27. Additionally, as the privilege log provided by Renew Missouri shows, all of the communications between Grain Belt Express and Renew Missouri fall into the buckets of either attorney-client privilege, intangible work product, or both. And there are no tangible materials, documents, or tangible things included in such communications.

28. Moreover, when weighed against the harm that would be caused by granting Ameren discovery on the mental impressions, conclusions, opinions, or legal theories of attorneys and representatives of other parties to this proceeding, Ameren's request must be denied. The Commission should be cautious when permitting the disclosure of the mental impressions, conclusions, opinions, or legal theories of attorneys and representatives to parties in proceedings before it. Making that information discoverable without establishing a substantial basis and compelling need runs counter to the goals or intended effectiveness of the administrative process. The Commission should not expose protected mental impressions, conclusions, opinions, or legal theories of attorneys and representatives of parties to a proceeding without a substantial basis and compelling need for doing so.

29. In the present case, the Commission does not have a substantial basis or compelling need for doing so, because Ameren has not provided one. As a result, Ameren's request should be denied.

III. Grain Belt Express and Renew Missouri Are Asserting the Common Interest Doctrine on the Basis of a Common Legal Interest Consistent with Commission Precedent

30. Grain Belt Express and Renew Missouri's assertion of the common interest doctrine is fully supported by Commission precedent. The Commission has recognized it is appropriate for two separate parties in a case to share a legal interest. In Case No. EA-2016-0358, the Commission found Grain Belt Express and the Missouri Joint Municipal Electric Utility Commission ("MJMEUC") to have a common legal interest when the Missouri Landowner Association ("MLA") sought to compel the production of privileged documents and communications related to a Transmission Service Agreement between Grain Belt Express and MJMEUC.²² Grain Belt Express and MJMEUC provided limited responses to MLA's data requests on the basis of attorney-client privilege and attorney work product.²³ Further, Grain Belt Express and MJMEUC asserted the common interest doctrine as memorialized in a Joint Prosecution and Defense Agreement executed between the parties.²⁴

31. Based on the terms of the Joint Prosecution and Defense Agreement and the information provided, the Commission concluded that Grain Belt Express and MJMEUC established that attorney-client privilege or attorney work product applied to their communications; that they shared a common interest in Grain Belt Express obtaining a certificate of convenience and necessity from the Commission; that Grain Belt Express and MJMEUC shared communications in confidence regarding that interest; and that Grain Belt Express and

²² See Missouri PSC Docket No. EA-2016-0358, *Order Denying Motion to Compel Regarding Joint Prosecution and Defense Agreement*, p. 1–2 (Feb. 17, 2017) (citing *Ayers Oil Co. v. Am. Bus. Brokers, Inc.*, No. 2:09 CV 02 DDN, 2009 WL 4725297, at 1 (E.D. Mo. 2009) and *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO*, 913 F.2d 544, 556 (8th Cir. 1990)).

²³ *Id.* at p. 2.

²⁴ *Id.* at 3.

MJMEUC had not waived that privilege because they both objected to MLA's data requests.²⁵ Further, while MLA attempted to characterize the Joint Prosecution and Defense Agreement and assertion of attorney-client privilege as an improper attempt to avoid discovery, like Ameren does here, the Commission found there was no evidence of bad faith.²⁶ Therefore, the Commission concluded that common interest between Grain Belt Express and MJMEUC was a legal interest, not merely commercial, so the common interest doctrine applied.²⁷

32. That is the situation here: Grain Belt Express and Renew Missouri are parties to this proceeding; Grain Belt Express and Renew Missouri are asserting *** [REDACTED] [REDACTED] *** attorney-client privilege and common interest doctrine or attorney work product apply to their communications; that they shared a common interest in Ameren considering the Grain Belt Express Project as a supply-side resource; Grain Belt Express and Renew Missouri have shared confidential communications regarding that interest; Grain Belt Express and Renew Missouri have not waived that privilege; and Grain Belt Express and Renew Missouri both object to Ameren's data requests. Further, while Ameren asserts Grain Belt Express and Renew Missouri are making an improper attempt to avoid discovery, there is no evidence of bad faith, despite Ameren's insinuations to the contrary.

33. Therefore, the Commission should conclude that the common interest between Grain Belt Express and Renew Missouri is a legal interest, not merely commercial, and that the common interest doctrine applies.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 4.

IV. Availability for a Second Discovery Conference

33. At the September 26, 2024 discovery conference, Judge Dippell requested that the parties make the Commission aware of available dates the week of September 30-October 4, 2024 for a second discovery conference. Ameren filed a statement on September 30, noting that it is available anytime on Thursday or Friday, October 3 and 4, 2024, respectively, and expressing a preference to avoid 9 a.m. to 1 p.m. on Thursday if possible. Grain Belt Express will be available during the same times as Ameren, and expresses a preference for Thursday afternoon, if that is workable with the Commission's schedule.

34. Grain Belt Express also requests that, if a second discovery conference is requested by Ameren, that Ameren alert the parties as to the basis of its request, whether that be the matters discussed herein or the substantive responses Grain Belt Express provided to Ameren on September 26, 2024, or both.

V. Conclusion

34. Rather than "materials," which would be discoverable, Ameren seeks information clearly related to non-discoverable intangible work product as it requests information concerning the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party. Ameren's attempt should be denied by this Commission.

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WHEREFORE, Grain Belt Express respectfully requests the Commission accept this Response and sustain Renew Missouri's objections to Ameren's data requests.

Respectfully submitted,

/s/ Anne E. Callenbach

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ATTORNEYS FOR GRAIN BELT EXPRESS LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties listed on the official service list by email, 1st day of October, 2024.

/s/ Anne E. Callenbach
Anne E. Callenbach