

1 BEFORE THE PUBLIC SERVICE COMMISSION

2 STATE OF MISSOURI

3
4 TRANSCRIPT OF PROCEEDINGS

5 DISCOVERY CONFERENCE

6
7 In the matter of the Application)
8 of Union Electric Company d/b/a)
9 Ameren Missouri for Permission)
10 and Approval and Certificates of) File No. EA-2024-0237
11 Public Convenience and Necessity)
12 Authorizing it to Construct a)
13 Simple Cycle Natural Gas)
14 Generation Facility.)

15 THURSDAY, SEPTEMBER 26, 2024

16 2:00 p.m.

17 Jefferson City, MO 65101

18 via WebEx

19
20 VOLUME 3

21
22 NANCY DIPPELL, Presiding
23 CHIEF REGULATORY LAW JUDGE

24 Reported by: Melissa Eicken

25

1 LAW JUDGE DIPPELL: So let's officially go
2 on the record. Ms. Walthers is recording this, and we
3 will have it transcribed, if needed, and put in the
4 record.

5 So this is case number EA-2024-0237 in the
6 matter of the application of Union Electric Company,
7 doing business as Ameren Missouri for permission and
8 approval and certificates of public convenience and
9 necessity authorizing it to construct a simple cycle
10 natural gas generation facility, and as I said before
11 we went online, I am Nancy Dippell, and I am presiding
12 over this discovery conference in Judge Fewell's place
13 today, and with that being said, I am not as
14 conversant on all of the issues in this case as Judge
15 Fewell. And, so I will most likely not be making any
16 firm rulings today. We'll let him make those after --
17 after this, but I do want to hear what you all have to
18 say, and I have some questions to ask.

19 So first, I'll let you guys make your
20 entries of appearance. Can we begin with the company?
21 Ameren, that is.

22 MR. LOWERY: Thank you, Judge. Jim Lowery
23 appearing on behalf of Ameren Missouri, and also, Mike
24 Tripp appearing on behalf of Ameren Missouri.

25 LAW JUDGE DIPPELL: And I'm sorry, I didn't

1 catch the name.

2 MR. LOWERY: Mike Tripp, T-R-I-P-P.

3 LAW JUDGE DIPPELL: Tripp. Thank you. We
4 can go then to staff.

5 MR. GRAHAM: Yes. This is Paul Graham
6 representing the staff of the commission in this
7 matter.

8 LAW JUDGE DIPPELL: And Grain Belt Express.

9 MS. CALLENBACH: Thank you, Judge. Anne
10 Callenbach for Grain Belt Express, and also, actually,
11 in my office is Andrew Schulte and Jared Jevons.

12 LAW JUDGE DIPPELL: And Renew Missouri.

13 MR. OWEN: Thank you, Your Honor. This is
14 James Owen. I am attorney for Renew Missouri
15 Advocates, doing business as Renew Missouri.

16 LAW JUDGE DIPPELL: And I don't see -- did
17 anyone know if the Office of the Public Counsel have
18 intended to appear?

19 MR. LOWERY: Judge --

20 LAW JUDGE DIPPELL: Or --

21 MR. LOWERY: -- this is Jim Lowery. I
22 don't know, but they haven't filed testimony and --
23 and haven't conducted any discovery in the case, so.
24 That might suggest they're not appearing.

25 LAW JUDGE DIPPELL: They are probably

1 otherwise occupied. Also, Midwest Energy Consumers
2 Group, did anyone know if they had intended to appear?

3 MR. OWEN: Your Honor, I talked to
4 Mr. Opitz this morning. I did not get the indication
5 that he was going to appear at this today.

6 LAW JUDGE DIPPELL: All right. Thank you.
7 And just for the record, we -- we did have a little
8 confusion. The order setting the discovery conference
9 apparently says both that it will be in person and
10 online, so. I wanted to make sure that no one was
11 in-person that -- and wondering why none of us were in
12 the room, so. I have left a note on the door, on
13 Room 305, just in case to have people call me if they
14 appeared in -- in for the conference. But it looks
15 like we've got everybody, so we can go ahead, then,
16 and get started. If you would, Mr. Lowery or
17 Mr. Tripp, would you just brief me on your -- your
18 discovery issue?

19 MR. LOWERY: Yes. I'll be happy to do
20 that, Judge. Before we get into the specific data
21 request and objections, and there are, I believe, six
22 data requests at issue with Renew Missouri, and
23 they're -- potentially, there was 22 data requests at
24 issue with Grain Belt, but more into that, we've had
25 some discussions with Grain Belt's counsel. While we

1 don't believe their objections are well taken, they
2 have indicated that they are going to provide subsidy
3 responses to DR numbers 1, 13 and 19 to 22, and we
4 expect to get those, I believe, yet today. There may
5 be some remaining issues about parts of numbers 21 and
6 22, but it's our intention to have some further
7 discussions with them about that. And, so we're not
8 going to ask the commission -- and I know -- I know,
9 Judge, you indicated you weren't going to make any
10 rulings anyway today, but I'm also not going to
11 formally ask Judge Fewell to make any specific rulings
12 on the Grain Belt DRs in connection with this
13 particular conference pending those further
14 discussions.

15 We're also in discussions with Grain Belt's
16 counsel on numbers 14 to 18, and we intend to have
17 some further discussion, so I'm not going to ask for a
18 ruling on those as well. However, once we get the
19 responses to line, a share of these that we expect and
20 pending further discussions on a few of these, it's --
21 it is certainly possible we will feel that their
22 responses are not fully responsive given the
23 objections that they've made, and I was going to ask
24 if the commission could provisionally set another
25 discovery conference for next week between, say,

1 Wednesday and Friday. We won't have to have it if we
2 don't have disputes. We may have -- we may have it
3 all resolved, but if we -- we do have a dispute that
4 allows us to give notice, a day before that, that we
5 do still have some disputes, and then on those limited
6 number that we might have some disputes on, we can
7 take those up and dispense with the delay, et cetera,
8 that would occasion, you know, go through a motion to
9 compel process and be -- we have depositions of
10 Ms. Piontek -- I probably -- James, I apologize, I
11 probably didn't pronounce her name correctly -- on
12 October 17th. The hearing is only about a month away.
13 So as you can appreciate, Judge, we'd like to get
14 these discovery issues resolved, so. Not asking for a
15 ruling on the Grain Belt ones today. But I would ask
16 that provisionally a discovery conference be set where
17 we can take up any remaining issues next week.

18 LAW JUDGE DIPPELL: Okay.

19 MR. LOWERY: And we can talk about Renew
20 Missouri, but that's on Grain Belt, as I think where
21 we are.

22 LAW JUDGE DIPPELL: Mr. Owen, you --

23 MR. OWEN: I mean, again, I don't know how
24 much of that would involve us. I would note that I do
25 not know how everything's going to shake out on the

1 Every West hearing that's set for next week and the
2 week after. If that is set, I cannot guarantee that
3 we wouldn't have a conflict with the time that the
4 Court or that the tribunal here sets that, so that's
5 something that we have to keep in mind is that there's
6 a pretty lengthy rate case that has not been resolved
7 and that it -- I'm an entered attorney on that case as
8 well.

9 MR. LOWERY: Judge, I can certainly
10 appreciate that, but, you know, Renew Missouri has two
11 lawyers entered on this case, and we have a case that
12 has a schedule as well, and you know, that's going
13 forward to discovery and hearing. So I think we would
14 need -- I would suggest we would need to find a way to
15 find something that would mutually work if -- if
16 possible.

17 LAW JUDGE DIPPELL: Well, again, that --
18 I'll take that under advisement. I don't want to
19 schedule something today for Judge Fewell who --
20 who -- but tomorrow, he can -- can take that into
21 consideration and that after we finish our discussions
22 here today, he can -- can figure out if there's a time
23 we can reserve. Perhaps -- well, Mr. Owen, you said
24 you were involved in the rate case next week, so. I
25 guess that's pretty much every day you --

1 MR. OWEN: Your Honor, I would note, I
2 mean, it is very possible there are going to be times
3 during then that I will not need to be in that
4 hearing. I just -- I can't say -- we have not really
5 scheduled -- we have -- I mean, we have one issue in
6 that case. I don't know when it's going to be brought
7 up, if it's not going to get resolved. It might get
8 resolved. But I just -- I would just have to let the
9 tribunal know that has got to be a consideration for
10 me and picking this, and yes, we do have two lawyers,
11 but one of my lawyers is a -- is just a contract for
12 me. She has other clients. I have -- I don't have
13 her schedule. I couldn't say what her schedule or
14 availability is next week either, so.

15 LAW JUDGE DIPPELL: Okay. Thank you. Did
16 you have anything further, then, Mr. Lowery, on --

17 MR. LOWERY: Not on the Grain Belt
18 objections, but I do on the Renew Missouri ones.

19 LAW JUDGE DIPPELL: Okay. Go ahead with
20 Renew.

21 MR. LOWERY: Which we do need to take up
22 today. Renew Missouri's witness, Ms. Piontek, if I'm
23 pronouncing that correctly, assuming that she's
24 qualified to text -- to provide expert testimony at
25 all, and I'll assume for the purposes of this

1 discussion that she is, is necessarily offering expert
2 testimony in this case. She doesn't have any
3 firsthand knowledge about Castle Bluff project.
4 Anything what she knows has been provided to either
5 through her testimony or however she got information.
6 So she's clearly acting as an expert witness here.
7 And that's important as I'll discuss in a moment.

8 Now, there are six data requests at issue,
9 five of which are directed at the discovery respecting
10 the degree to which the expert testimony she has filed
11 is or is not her own and what the basis that underlies
12 that expert testimony. As our filing discusses, and
13 as the Missouri Supreme Court has ruled in the
14 Dandurand case, which I expect, Your Honor, you're
15 familiar with. Once an expert's designated to
16 testify, a work product does not protect the basis of
17 the expert's opinions. Documents that were used by
18 the expert are not protected by work product.
19 Materials that the expert reviewed are not protected.
20 They are subject to production even if they otherwise
21 would be work product, and even if the expert didn't
22 rely on documents, if they reviewed them, if they
23 reviewed information, that, too, is subject to
24 discovery even if otherwise it would be covered by
25 work product. And the -- and -- and even going a step

1 further, the attorney/client privilege under that case
2 as the Court made clear, it only protects
3 attorney/client communications that would be advice,
4 essentially, or questions seeking advice. It doesn't
5 protect the fact that information was reviewed by the
6 witness, and the privilege may be waived if the expert
7 provided documents which form the basis of the
8 expert's testimony.

9 So these assertions of privilege -- and
10 that's the only assertions that have been made by
11 Renew Missouri, say, one caveat, Renew Missouri today
12 attempted to amend their objections. I think it's a
13 week beyond the deadline for filing objections, and as
14 the filing I made this morning, which you may or may
15 not have seen, Judge, I did provide it to Judge Fewell
16 simultaneously with filing it, didn't realize you were
17 covering this hearing. As the file I made this
18 morning indicates, when you miss the objection
19 deadline, and I have lived with this rule myself for
20 the last 25 years, you waive the objection unless the
21 objection is privileged, and you haven't -- you
22 haven't, you know, revealed the privilege information.
23 Commission has been very consistent over the years in
24 ruling that, that objection is waived. And, so I -- I
25 don't believe they can amend their objection to add a

1 relevancy objection. I would contend these -- this is
2 material and relevant in any event, but I don't
3 believe that objection should even be at issue here.
4 We also received a privilege log this morning, which I
5 submitted along with that filing. The privilege log
6 makes crystal clear what we suspected when we sent
7 some of these questions; that is, that Grain Belt's
8 counsel and Invenergy's senior vice president,
9 regulatory affairs Nicole Luckey has communicated
10 extensively with Renew Missouri about Ms. Piontek's
11 testimony, and in fact, with Ms. Piontek herself
12 provided suggestions on testimony, and we don't really
13 know what else because all we have is a privilege log
14 (inaudible) but I guess to summarize the point, the
15 things that she reviewed, whether she relied on them
16 or not, that information is subject to discovery. So
17 we can test her credibility as an expert, the
18 credibility of the opinions, the basis of the
19 opinions, and then agree to which the opinions are her
20 own opinions. And -- and work product or
21 attorney/client privilege simply does not protect that
22 information, and the objection is not well taken, and
23 those objections on that basis should be overruled.

24 One other thing, and then I'll -- I'll go
25 through the six DRs briefly, and then -- and then let

1 others speak. They also asserted -- I think they
2 might have called it a common interest privilege, and
3 if they didn't, that's my mistake, but they certainly
4 raised the common interest doctrine, and I -- I
5 suspect, Your Honor, you have heard of it and may not
6 know something about it, but the common interest
7 doctrine itself is not a privilege. What the common
8 interest doctrine does is, if a privilege otherwise
9 exists, it may, under certain circumstances, extend
10 that privilege to parties that have a common interest.
11 It's Renew Missouri's burden to establish whether that
12 common interest exists, and I would submit they've
13 willfully fallen short of meeting that burden at this
14 point. They -- they refuse to produce an alleged
15 common interest agreement which would show the date of
16 the agreement, might show the scope of the common
17 interest, but -- but in any event, whether there is or
18 is not a common interest, frankly, is irrelevant with
19 respect to most of the communications that are
20 probably at issue here because, again, if Ms. Piontek
21 reviewed relied upon, et cetera, the information from
22 Grain Belt, then we're entitled to that regardless of
23 the privilege, because you can't seal that information
24 under the work product privilege. So if you apply
25 those basic principles to the DRs at issue, Judge --

1 have you even -- have you seen or even reviewed the
2 DRs? Have you? Okay.

3 LAW JUDGE DIPPELL: I have seen them. I
4 won't say that I am -- I've reviewed them briefly, let
5 me put it that way.

6 MR. LOWERY: Well, I'll try to shorthand
7 this as much as I can. So data request number one
8 seeks, essentially, the identity of persons employed
9 or associated with Grain Belt or Invenergy, as I -- as
10 I noted. We know that Invenergy, Nicole Luckey, has
11 communicated with Ms. Piontek in Renew Missouri when
12 Grain Belt filed its intervention application. In
13 this case, they made clear that they are -- they are
14 affiliates with some other Invenergy entities, and
15 they are an Invenergy entity, and in fact, their
16 witnesses -- some of their witnesses in the Grain Belt
17 CCN case that you might be familiar with, it was
18 decided in the amendment a couple years ago where, in
19 fact, Invenergy were, in fact, Invenergy employees.
20 But it seeks communications that took place. The
21 privilege log does answer -- I think it answers A, B,
22 and C, essentially, of the -- of the -- of data
23 request number one, but it doesn't provide the
24 substance of those communications. And for the
25 reasons I gave, the substance of those communications

1 to the extent that Ms. Piontek was -- was either a
2 party to those or provided those or those documents or
3 whatever, otherwise, those are discoverable for the
4 reasons that I gave, and we're entitled to a full
5 response and that should be compelled. DR number two
6 is essentially a question about what assistance or
7 review or input, et cetera, Invenergy folks had in the
8 drafting of Ms. Piontek's rebuttal. Parts A and B,
9 the name and job title, I think we have that
10 information, but we ask for the portions of the
11 testimony drafted or reviewed. So what do -- what did
12 you have input on, Invenergy, and any edits or
13 suggestions made by those persons. Again, that is
14 fair game to see, is this testimony of Ms. Piontek's,
15 is it somebody else's testimony, what ideas was she
16 given, what did she review? She also reviewed edits
17 or suggestions before that expert testimony was
18 provided and that, too, is discoverable and fair game
19 for the reasons I gave.

20 And then number three, essentially, I
21 would -- I guess I would call it a catchall in case we
22 didn't cover everything in one and two. Any documents
23 that would have gone along with those communications
24 for the same reason would be discoverable. And then,
25 finally, on number four, we ask for all documents that

1 were shared by Invenergy and -- and other persons
2 employed or associated with Renew Missouri including
3 consultants for Renew Missouri might have had that
4 were shared with Renew Missouri.

5 Now, if there was information shared and
6 Ms. Piontek -- it wasn't shared with her or she didn't
7 review it, then I think that probably remains work
8 product, and I -- I'm not -- I wouldn't take issue
9 with that not being produced, but again, if it was
10 provided or reviewed by her, then I believe that, that
11 information for the reasons gave is -- is properly
12 subject to discovery.

13 So those -- those are the four, I think,
14 that deal with the work product, quite principally,
15 work product objections that have been made, and
16 again, I would point out just because an attorney gave
17 information to Ms. Piontek doesn't mean it shielded --
18 the advice is shielded, but not facts and data
19 information itself. That's what the Dandurand case
20 says.

21 Judge, I don't know if you have any
22 questions on those four. There's one other one, but
23 it's sort of unrelated to these issues I've been
24 talking about, so I thought I would stop there to ask
25 if you have any questions for me about those four.

1 LAW JUDGE DIPPELL: Okay. So, and I might
2 need to restate. What I have seen, what you
3 submitted, the -- the exhibits to your filings, but I
4 haven't actually seen, and I -- I mean, unless it was
5 filed in the docket, I haven't -- Judge Fewell hasn't
6 actually seen those data requests.

7 MR. LOWERY: Those data requests were
8 submitted Monday with our statement of discovery.

9 LAW JUDGE DIPPELL: Okay.

10 MR. LOWERY: They are exhibits, and the way
11 they were submitted, Judge, is the objections that
12 were lodged stated the data request and repeated the
13 data request, and then stated the objection --

14 LAW JUDGE DIPPELL: Okay.

15 MR. LOWERY: -- under it, so they are --
16 they are in the case file and were submitted on time.

17 LAW JUDGE DIPPELL: Okay. Okay. I -- I
18 just wasn't sure when -- when you started talking, if
19 I had actually seen the data request, so. Oh. I --
20 and I was looking at the wrong document. Yes. Never
21 mind. Okay. I thought I had seen them, but.

22 MR. LOWERY: That's -- there are
23 exhibits -- there are exhibits to our statement of
24 concern and disagreement, Judge.

25 LAW JUDGE DIPPELL: Okay. Got it.

1 MR. LOWERY: That's where they are.

2 LAW JUDGE DIPPELL: I do have them. Thank
3 you. Well, then, would Grain Belt like to respond?

4 MS. CALLENBACH: Yes. Thank you, Judge.

5 MR. LOWERY: These are actually Renew
6 Missouri.

7 LAW JUDGE DIPPELL: I'm sorry?

8 MR. LOWERY: These are actually Renew
9 Missouri DRs.

10 LAW JUDGE DIPPELL: Oh, I'm sorry. I'm
11 sorry.

12 MR. LOWERY: Renew --

13 LAW JUDGE DIPPELL: We did talk about Grain
14 Belt earlier, so. If -- if you don't have any reply
15 to what Mr. Lowery said about your request, then I'll
16 go ahead and go to Mr. -- Mr. Owen. Sorry.

17 MR. OWEN: Are you asking Grain Belt if
18 they have a response or -- I'm sorry, I'm a little
19 confused about is, if Grain Belt is -- does have
20 anything to add or if you want to take me first, I can
21 go first. That's fine.

22 LAW JUDGE DIPPELL: I'll go ahead and take
23 you, Mr. Owen.

24 MR. OWEN: Okay. Thank you, Judge. Okay.
25 So I want to be -- I want to be crystal clear here

1 that when these DRs were sent, we made an effort to
2 talk to Ameren about whether or not we could provide a
3 privilege log. We simply asked for a week to do that.
4 The response -- what we wanted to be able to discuss
5 it -- the response we got, was, well, we can discuss
6 this with the judge and that discuss was in quotations
7 as though we had done something offensive. We have
8 provided this privilege log now. We did it within the
9 time that we asked as part of an informal way to
10 resolve this before this tribunal had to get involved
11 with it. And we believe that, you know, this -- this
12 tribunal and the judge overseeing this case should
13 have a right to be able to look at that and determine
14 what is privileged, what is confidential, what is
15 protected by a common interest, and what is not. We
16 absolutely believe that this dispute -- bringing this
17 dispute to this -- to you or anyone here is premature.
18 This is well within the time we had to try to respond
19 to these things, to these issues. And we just think
20 that's important, because I want to make it clear that
21 we did try to work this out. And it was -- and quite
22 frankly, I believe it was met with disdain and
23 hostility. So to the extent that this common interest
24 doctrine is not some sufficient legal interest that's
25 being protected here, I want to make sure that we get

1 into that a little bit. I mean, this clearly extends
2 any attorney/client or work product privilege to two
3 separate clients who are represented by separate
4 attorneys who share an identical legal interest and
5 who agree to exchange information regarding the
6 matter. It can be legal. It can be factual. It can
7 be strategic. These are all things that have been
8 decided on in previous rulings by the Public Service
9 Commission over a number of years. And that they have
10 found that because both parties -- that the commission
11 has found that because both parties claiming a common
12 interest privilege where parties in the same
13 proceeding, they share a common legal interest.

14 Now, this whole idea that somehow
15 Ms. Piontek is concealing something or not revealing
16 something with her testimony, I just simply do not
17 understand that. Everything you can point to in her
18 testimony has a citation. Most of it is citations to
19 other public records or other things that the
20 commission have ruled on. They -- these are not some
21 sort of secret. You know, they're not some sort of
22 secret things that we are trying to conceal here.
23 They're not things that would be only known to certain
24 parties. We absolutely believe that everything that
25 she has in there is -- is -- is -- is relevant to our

1 concerns about the fact of whether or not Ameren
2 Missouri should be allowed or should not be allowed to
3 build this gas plant, which by the way, I -- for the
4 life of me, I cannot figure out why the relationship
5 between Grain Belt Express and Renew Missouri is
6 relevant to that, why it is probative to that or why
7 it should not be -- or why any communication shouldn't
8 be protected. You know, we have -- for years, Renew
9 Missouri for years has advocated for the Grain Belt
10 Express transmission line. We have been involved with
11 cases before the Public Service Commission. We have
12 testified in regards to this before the legislature.
13 We have been involved with cases before appellate
14 courts. It's very clear that we believe that any
15 project that delivers more renewable energy to the
16 State of Missouri is a good thing. There's some
17 belief, and there's some suggestion in -- in Ameren's
18 filing that there's some nefarious for profit
19 rationale for our support for this. I would point out
20 we are nonprofit. We're not profiting off of anything
21 with this. We are in favor of renewable energy
22 projects. Grain Belt Express is a renewable energy
23 project. This gas plant that they propose to build is
24 not. I mean, you know, to the fact that there would
25 be something that, you know, that we don't have a

1 common interest here, I just -- they don't assert any
2 reason why that wouldn't apply to this or why
3 privilege or confidentiality would not apply to this.
4 I mean, I would be -- I mean, that would just, in a
5 nutshell, be what we would argue here. I know you
6 can't make any ruling on this, but I mean, I
7 absolutely believe that privilege and confidentiality
8 apply to common interest parties in the same case and
9 that there should be no reason -- there should be no
10 reason why if this -- if this tribunal wants to review
11 our privilege log, which we have always been willing
12 to give them, but I would also note it is their
13 impetus that they have to ask for it, which they never
14 did. That's under State Ex Rel. versus Ford Motor
15 Company versus Westbrooke, I would note. It's a
16 supreme court case. 151 S.W.3d 364. I believe Ameren
17 refers to that case in their -- in their dispute, but
18 do not put that part in it, and they're entitled to
19 it. And we provided it to them, and I believe that
20 you should absolutely be able to look at that and
21 determine what might be protected under this common
22 interest legal doctrine, what should be protected by
23 privilege, what should be protected by, you know, work
24 product and ultimately make that decision.

25 So we'd argue not only is there -- not only

1 is this bringing this dispute contrary to our efforts
2 to try to resolve this, but I'd also argue it's
3 premature, and we ask for the Court to rule against
4 those particular provisions that have already been
5 discussed.

6 MR. LOWERY: Judge, if you don't mind, if I
7 could respond to a few of those points.

8 LAW JUDGE DIPPELL: Go ahead, Mr. Lowery.

9 MR. LOWERY: The reason that we brought the
10 statement of discovery disagreement up is because the
11 commission set a discovery conference and required
12 that if you have a disagreement or concern that you
13 provide that three days before that conference. So it
14 was our belief that we were, in effect, compelled to
15 advise the commission that, in fact, we do have a
16 discovery dispute. And, so that's why we brought --
17 that's why we filed what we filed when we filed it.
18 If there's been no discovery conference, then we would
19 have gone through the normal process, if the
20 delegation had not been made for the ALJ to make any
21 ruling regarding discovery matters at discovery
22 conferences is what the delegation order says,
23 obviously, we wouldn't have filed that statement. So
24 it's a -- it's an artifice of the fact that the
25 commission scheduled that discovery conference and set

1 a deadline for when we must raise those issues that we
2 filed it. There's no -- there's no defarious {sic} --
3 no nefarious or destain or any other personal issue.
4 It's simply a matter of what the commission order --
5 what the schedule says.

6 There's a lot of things -- I'll try to
7 figure out where to start. First of all, Mr. Owen
8 completely ignored the fact that if the communications
9 and materials at issue are not shielded by a
10 privilege, and I explain why they were not, and I
11 think that the Dandurand case makes it clear they're
12 not. It doesn't matter whether there's a common
13 interest or not. You can't create -- you can't create
14 a shield with a privilege by virtue of the common
15 interest doctrine if the shield doesn't exist in the
16 first place. So it's a complete red -- this whole
17 common interest discussion to the extent Ms. Piontek
18 was given or reviewed or in any way relied on this
19 information is a complete red herring. It has nothing
20 to do with the issue at hand.

21 Furthermore, it actually was Renew
22 Missouri's burden to provide the privilege log from
23 the beginning, and we cite this rule in our statement
24 of Discovery Rule 57.01(c)(3). If a privilege or work
25 product doctrine is asserted as a reason for

1 withholding information, then without revealing the
2 protected information, the objecting party shall state
3 the information that could permit others to assess the
4 applicability of the privilege or work product
5 doctrine. It was their burden to do that, and they
6 didn't do it from the get-go.

7 Now I don't have an issue with the fact
8 that they promptly, when we demanded the privilege
9 log, provided it, but the timing of the -- the dispute
10 coming before the commission, again, was driven by the
11 discovery conference, and the fact that -- the fact
12 that they said, well, we'll give you a privilege log,
13 which they were supposed to do all along, doesn't mean
14 that we weren't in a position that we had to bring
15 the -- the matter to the commission's attention. So
16 that, too, is sort of a -- a procedural diversion from
17 the substance of what the actual issue is, and the
18 actual issue is, what are we entitled to discover that
19 Ms. Piontek relied upon or reviewed? That's the
20 question. Not procedure about how we may or may not
21 have gotten that.

22 Mr. Owen also said that the PSC for years,
23 making it sound like that the PSC has ruled on the
24 common interest doctrine question multiple times. To
25 my knowledge, they've ruled on it once. And that was

1 in a Grain Belt case several years ago. And -- and
2 first of all, the commission's not bound by stare
3 decisis and exactly what the facts were there are not
4 exactly the facts here. One distinguishing fact is
5 that both parties objected to the subject data request
6 here only Renew Missouri has, and the other thing that
7 Mr. Owen glosses over -- and I don't know. Maybe our
8 writing isn't very clear. The profit motive. The
9 commercial interest that we pointed to when we talk
10 about the -- whether the common interest doctrine
11 applies, we don't claim that Renew Missouri has a
12 commercial interest. We don't claim that Renew
13 Missouri has a profit motive. They don't. We fully
14 understand that they're not for profit. We completely
15 understand the motivation and the interest that they
16 have. That is basically to promote renewables and to
17 prevent, if they can, more fossil fuel generation from
18 being built. But as it applies to Grain Belt and
19 Invenergy, they do have a commercial interest. They
20 would like to sell Ameren Missouri transmission. And
21 I'm sure that if Invenergy renewables who Ms. Luckey
22 is employed by and who have been communicated to Renew
23 Missouri on this matter would like to sell Ameren
24 Missouri renewables that are attached to Grain Belt
25 line in Kansas, that's a commercial interest. And the

1 case law tells us that a commercial interest is not
2 sufficient to establish the common interest doctrine.
3 So -- so I don't think anything Mr. Owen said actually
4 rebuts the limits on the work product shield that they
5 would like to array.

6 MS. CALLENBACH: Judge, may I respond to
7 that, please?

8 LAW JUDGE DIPPELL: Go ahead,
9 Ms. Callenbach.

10 MS. CALLENBACH: Thank you. It's our
11 position that common interest that is shared between
12 Grain Belt and Renew Missouri is, we are both parties
13 to this proceeding, interested in seeing Ameren
14 evaluate reasonable alternatives to the Castle Bluff
15 project. That is the legal interest at play here.
16 This has nothing whatsoever to do with any potential
17 commercial interest that Mr. Lowery cites to.

18 LAW JUDGE DIPPELL: And Mr. Owen, did you
19 want to respond again?

20 MR. OWEN: I mean, again, I -- I would just
21 point to the fact that there is -- there is -- there
22 is case law that talks about whether or not, you know,
23 that -- who has the burden to produce this? I mean,
24 like I said, the privilege log, it is our assertion
25 they have the right to ask for it. We -- we offer to

1 provide it almost immediately upon when they -- when
2 they filed these objections. We have given it to them
3 now.

4 So I mean -- I mean, ultimately, you know,
5 again, we believe that the commission can review that
6 and determine what or what isn't privileged or subject
7 to work doctrine by looking at that because, I mean,
8 ultimately, you know, this focus on the common
9 interest, I mean, yes, we do believe we have a common
10 interest. We do have a common interest in this case,
11 and I believe that just by saying, well, that's just
12 not enough, well, no, it's not enough. It's got to
13 talk about privileged information, and it's got to
14 talk about work product. And it is -- it is our
15 belief that everything that -- you know, Ms. Piontek,
16 that's how you pronounce her name -- when she did
17 this, I mean, everything there is -- you know, is --
18 is going to be protected.

19 MR. LOWERY: Judge, if I might, one
20 comment, and then I'll stop. The privilege log in
21 itself is not going to allow the commission to make
22 that determination. The commission needs to, at a
23 bare minimum, if it is not going to overrule the
24 objections, at a bare minimum needs to require that
25 Renew Missouri produce all of the communications and

1 documents that are subject to that privilege log to
2 the commission so that Judge Fewell can examine them
3 for them. Because you can't tell from the privilege
4 log what they are, and you also can't tell which of
5 those have been reviewed or provided necessarily to
6 Ms. Piontek which is also information that Renew
7 Missouri needs to provide. And, so the idea that you
8 take a privilege log and look at it cold and you can
9 determine the privilege question is just not correct.
10 It's not -- it's -- there's no way you or Judge Fewell
11 or any other judge could do so.

12 I also want to say one other thing. They
13 didn't provide the privilege -- we demanded the
14 privilege log the morning after we got the objection,
15 and then they said they would provide it then, and I
16 believe the Ford case that he cites to was decided
17 before the change to the civil rules that required
18 parties actually provide the information necessary to
19 assess the privilege, if I'm remembering the chain of
20 events of that case and when the civil rules were
21 amended on that.

22 MR. OWEN: And my response to that would be
23 that if there is some sort of legal precedent for us
24 turning over all of our confidential and privileged
25 information so the Court can review it and see our

1 mental impressions in trying to prepare for this case,
2 Ameren should be required to show that legal
3 authority, so we can respond to it.

4 LAW JUDGE DIPPELL: I'm sorry, which --
5 which legal authority?

6 MR. OWEN: The legal authority as to why we
7 would need to turn over all of our communication to
8 the commission to review it. That will show the
9 mental impression that us, as lawyers, looked at in
10 order to do this, why that would be something that
11 would be allowed?

12 MR. LOWERY: I don't think it would be too
13 difficult, Judge, to find a number of instances where
14 the commission itself has done a -- an in camera
15 review under just these kind of circumstances, and
16 certainly courts do it all the time. So the idea --
17 the idea that the judge who isn't the decisionmaker
18 here, by the way, the commission is, should be
19 deprived of the information he or she needs to
20 actually assess a privileged claim, I find to be
21 surprising.

22 MR. OWEN: Should be easy to cite that
23 then.

24 LAW JUDGE DIPPELL: We -- the commission
25 has the ability and has in the past with confidential

1 matters appointed a special master, one of the other
2 judges or someone to review confidential information.
3 I'm -- I'm hoping that we don't -- maybe we won't get
4 to that point, but certainly, the commission would
5 have to -- or the judge would have to review -- I
6 mean, we could -- can't just say -- well, I -- I
7 haven't -- I haven't had a chance to review your
8 privilege log that was just filed, and I -- I haven't
9 looked at it, so I don't know how detailed it is, but.
10 In any event, if necessary, the commission could
11 appoint someone to review that confidential
12 information because of the timeline that's set in this
13 case. I am assuming that everyone is in favor of not
14 delaying things as much as possible, so. The whole
15 point in setting the discovery conference in the first
16 place was to try to get in front of these disputes so
17 that they wouldn't drag on right up until the hearing
18 date. But that being said, if they're complex and
19 involve privileged information, then -- then that may
20 be necessary. We have to take the time we have to
21 take, so.

22 MR. OWEN: If they feel like they need a
23 delay, we're certainly not going to object to that.

24 MR. LOWERY: We won't be asking for a delay
25 in the procedural schedule, Judge.

1 LAW JUDGE DIPPELL: All right. I realize
2 that. Mr. Owen, let me ask you just -- isn't it
3 the -- this is an expert witness, I'm assuming.
4 That's the position that this witness is your expert.
5 I mean, isn't it typical that whatever a witness
6 relied on is open for discovery in --

7 MR. OWEN: Not if it's privileged or not if
8 it's confidential.

9 LAW JUDGE DIPPELL: And it's your opinion
10 that --

11 MR. OWEN: We have -- we have asserted
12 that. We have -- we have stated that, yes, we have.

13 LAW JUDGE DIPPELL: And that includes
14 Mr. Lowery -- or Ameren has asked for drafts and edits
15 and that kind of information.

16 MR. OWEN: Yeah.

17 MR. LOWERY: To be clear, Judge, we haven't
18 asked for -- Mr. Owen for edits or drafts. We
19 consider that is, to be attorney/client privilege, but
20 we certainly asked for it from Grain Belt. They're
21 not -- they're not Ms. Piontek's lawyer, and I --
22 the -- the -- the assertion that the law is that if
23 it's -- that if the information started out as
24 privileged or started out as confidential, that --
25 that is a permanent shield against what an expert

1 reviewed and relied upon. That is not consistent with
2 Missouri law and -- and I pointed to the Dandurand
3 case, and I think -- I think it's almost black-letter
4 law that, that is not the law in Missouri.

5 MS. CALLENBACH: Judge, may I ask a favor?
6 Mr. Lowery, could you provide -- could you e-mail the
7 parties with the citation to the Dandurand case?
8 We're not finding it just not on our initial review.

9 MR. LOWERY: Sure.

10 MS. CALLENBACH: But also, Judge, I did
11 want to point out that the underlying basis for
12 Ameren's issues here appears to be that there must be
13 some facts or data Ms. Piontek relied upon that aren't
14 cited to in her testimony, and that's why they need
15 these communications, but I think Ameren needs to
16 demonstrate that there are specific facts or data that
17 are cited to before we even go down that route.

18 MR. LOWERY: Judge, how could -- how could
19 we know if there is information, facts, data,
20 communications that she reviewed and relied upon that
21 didn't make it into her testimony. How could we know
22 that if we don't know what they are? That --
23 that's -- that's asking to prove a negative which is
24 impossible to do.

25 MS. CALLENBACH: Everything she relies upon

1 is cited to in her testimony. Is there some fact or
2 data that's in there that's -- that does not have a
3 cite that you want more information about?

4 MR. LOWERY: Everything she claims she
5 relied on is cited. She doesn't get to draw a box
6 around what she did or did not review. We're entitled
7 to discovery to test whether or not that is actually,
8 in fact, the case. And what you guys are trying to do
9 is draw a box around it, a box of your own choosing
10 without actually letting us look behind what she
11 actually reviewed and -- and relied upon to see.

12 MR. OWEN: If she actually reviewed it,
13 Jim, it would be in the citation.

14 MR. LOWERY: How do we know that? She
15 could review a lot of stuff she didn't cite.

16 MR. OWEN: She verified it.

17 MS. CALLENBACH: She signed a verification.

18 LAW JUDGE DIPPELL: Okay. Let's -- let's
19 not go back and forth.

20 MR. OWEN: I mean, Your Honor, he's calling
21 my client -- my employee a liar essentially.

22 MR. LOWERY: That --

23 MR. OWEN: You are, Jim.

24 LAW JUDGE DIPPELL: I didn't get that,
25 Mr. Owen.

1 MR. LOWERY: Judge, that is absolutely not
2 true. The verification she signed said what is in
3 here is true and correct to the best of my knowledge
4 and belief. She didn't say anything about what's not
5 there. And I didn't accuse her of lying at all.
6 We're entitled to discovery about what she actually
7 looked at. It may not have ended up in there. There
8 may be a reason that it didn't. I would like to ask
9 her in deposition why that is, if that's the case, but
10 if I can't see the information, I can't ask the
11 question. Judge, Your Honor --

12 MS. CALLENBACH: Judge, I believe you might
13 be on mute.

14 LAW JUDGE DIPPELL: I apologize. Is --
15 Grain Belt and Renew, are you all saying that there is
16 nothing else that she relied on, that absolutely
17 everything is in the testimony? If that's the case,
18 then what is privileged?

19 MS. CALLENBACH: The -- James, you want to
20 go?

21 MR. OWEN: No, no, no. Go ahead.

22 MS. CALLENBACH: Well, the communications
23 are -- the communications are what is privileged at --
24 not the facts and data that she relied upon. But, no,
25 we're not claiming that -- that's all she reviewed,

1 but we're claiming that Ameren is only entitled to the
2 facts or data that she relied upon to form the basis
3 of the opinions in her testimony.

4 LAW JUDGE DIPPELL: Okay. I think I need
5 to review the actual data request a little -- a little
6 clearer to -- to get a better understanding of that.

7 MR. GRAHAM: Your Honor, this is Paul
8 Graham.

9 LAW JUDGE DIPPELL: Yes. Mr. Graham, go
10 ahead.

11 MR. GRAHAM: It may help, if I got the
12 right case, I did some research for you while you're
13 asking. I think the Dandurand case is at 30 S.W.3d
14 831. Jim, you can verify that, but I thought -- I
15 thought staff should help.

16 MR. LOWERY: That's correct. That's
17 correct, Paul. Thanks.

18 LAW JUDGE DIPPELL: Thank you, Mr. Graham.

19 MS. CALLENBACH: Thank you.

20 LAW JUDGE DIPPELL: I'm just looking over
21 some questions I wanted to make sure got answered and
22 make sure they are, in fact -- so for -- for Renew and
23 Grain Belt, and I don't want to -- I don't want to
24 make light of a privilege, but what -- what harm is
25 out there in releasing these -- these requested

1 information?

2 MS. CALLENBACH: Judge, it's Grain Belt
3 Express's position that anything pertaining to
4 strategy on pending litigation is subject to
5 privilege. And that would include drafts and other
6 communications.

7 MR. OWEN: Yeah. I certainly think it
8 reveals the impression of the -- the mental
9 impressions of the attorneys here. I mean, I guess
10 the ultimate answer is, where does that end, if that's
11 allowed?

12 LAW JUDGE DIPPELL: Okay.

13 MR. LOWERY: Judge, we're asking tangible
14 work product, not -- not -- and there could be a line
15 depending on what, but again, until you see -- until
16 the commission looks at the materials, there is no way
17 for the commission to know where that line is. There
18 is attorney work product. That's correct. Opinion
19 work product. That's one thing, but there's also
20 tangible work product. And tangible things that this
21 witness reviewed are fair game. And -- and they want
22 to -- they want to cast a blanket over everything or
23 Mr. Owen's advice to her, that would also not be
24 subject to discovery. I agree with that. But I
25 suspect that there are things that are subject to

1 discovery that fall on the other side of the line, and
2 they just are lumping it all together in an attempt
3 not to produce anything at all even to the commission.

4 MR. OWEN: And I would also say, we're
5 supposed to turn over work papers? I don't believe
6 that there were any work papers here. I mean, I think
7 isn't that what we're talking about here as well?
8 Maybe -- maybe that's not what Ameren is asking about,
9 but it's so broad. It's hard to say.

10 LAW JUDGE DIPPELL: Okay. Well, I think I
11 have gotten my questions answered on -- these are so
12 detailed and -- and the law and everything needs to be
13 reviewed closely because privilege is -- is a -- a
14 topic that, obviously -- I mean, the commission deals
15 with all kinds of confidential information, but
16 certainly, we all respect any argument containing
17 privileged information. So we're going to -- that's
18 one of the reasons that I said I -- in the beginning,
19 I wasn't going to make any rulings specific today,
20 because I want to make sure that we do have an
21 opportunity to review everything closely and -- and
22 make sure we get it right. So I don't want to delay
23 the -- the proceeding or anything, but that's the
24 reason that the commission delegated the authority to
25 the judge to make discovery or make procedural and --

1 and discovery rulings, so. Hopefully, the -- the --
2 Judge Fewell will be able to get to this -- to your
3 arguments quickly, so.

4 MR. LOWERY: Judge, could I just do a
5 couple minor cleanup things --

6 LAW JUDGE DIPPELL: Yes.

7 MR. LOWERY: -- hopefully are not
8 controversial. I also failed to mention DR number one
9 from the second set, and for all the reasons I have
10 given, I believe we are also entitled to, certainly,
11 after a commission review of the documents to see what
12 is not shielded by privilege or what the commission
13 might find is not shielded by privilege, that falls in
14 the same category as one to four in the first set. So
15 you do have those with the -- as I said, with the
16 filing we made Monday, and then there's DR number six
17 from the first set which has -- which has really
18 nothing to do with anything we've been talking about.
19 They did respond to it, but the question specifically
20 asks for whether or not Ms. Piontek is aware of a --
21 and we describe a particular analysis, an economic
22 analysis. The answer that she gave says that she has
23 not conducted any such analysis. That doesn't answer
24 the question. The question was, is she aware of any
25 such analysis, and she may not be, but her answer just

1 says she didn't conduct it. We didn't ask her if she
2 did it. We asked her if she was aware of any and to
3 identify and provide it if she is aware of any and the
4 same -- that's to part A of the question, and the same
5 deficiency in her answer says with respect to part B,
6 we would simply be asking -- we simply ask the
7 commission to compel Renew Missouri if they are
8 willing to voluntarily do it to actually ask the
9 question that was asked in full.

10 LAW JUDGE DIPPELL: And there was some
11 dispute in the filings about whether or not this was a
12 motion to compel and whether it was proper to bring a
13 motion to compel at this stage. Mr. Owen, you look
14 like you were about to --

15 MR. OWEN: No.

16 LAW JUDGE DIPPELL: -- respond to that.

17 MR. OWEN: No.

18 LAW JUDGE DIPPELL: Well, let me just ask.
19 Has -- if -- if the commission is considering this a
20 motion to compel and we've had an opportunity to argue
21 about it here today, has -- has Grain Belt and Renew
22 have an opportunity to respond? Do you feel you've
23 had an opportunity to respond sufficiently to --

24 MR. OWEN: Your Honor, my understanding we
25 have -- we have relied on our oral argument here. I

1 mean, in regards to the fact that respectfully, and I
2 know this is being recorded, and respectfully, you've
3 taken notes, but if there is -- you know, this is not
4 the judge that's overseeing this. We might ask if
5 there's a possibility that we can have opportunity to
6 have a written response to this, it might be helpful.

7 MR. LOWERY: Judge, a couple -- pardon me.
8 The company would not have an objection to a
9 reasonable time for them to respond in writing.

10 LAW JUDGE DIPPELL: I think also.

11 MS. CALLENBACH: That would suffice.

12 LAW JUDGE DIPPELL: I'm sorry, go ahead.

13 MS. CALLENBACH: I'm sorry, with respect to
14 Grain Belt Express, our arguments that we filed in our
15 response to Ameren's statement or rather, motion to
16 compel yesterday were purely procedurally. Our
17 responses to those data requests are due today, and I
18 believe Mr. Lowery did indicate that we are providing
19 responses to one to 13, and then 19, 20, I think --
20 half of 21, and I think we stand on our objection to
21 one and a half of the 22. If there is to be a motion
22 to compel, certainly, it should -- that should follow
23 after Ameren has the opportunity to review our
24 substantive responses that we'll be providing today.

25 MR. LOWERY: Judge, just to be clear, I

1 don't believe that the import of the commission's
2 order delegated authority to Judge Fewell contemplates
3 or requires that a further motion to compel be filed.
4 In fact, the commission's practice the last several
5 years has clearly been with these discovery
6 conferences that you don't need to file a motion to
7 compel, you don't need to confer with counsel, and the
8 judge before you file a discovery statement and that
9 the discovery conference is substantive to that entire
10 process.

11 Now Grain Belt's taking issue with that,
12 but I don't believe that's the commission's practice
13 over the last few years since the commission adopted
14 this practice and having discovery conferences. They
15 know what our arguments are, and I just said I don't
16 object to a reasonable time for them to respond and --
17 and, so I think if they want to respond, they should
18 do so before this provisional discovery conference
19 that we requested take place. Maybe by -- I don't
20 know -- Monday or Tuesday, and then we have the
21 discovery conference later in the week, if necessary,
22 and we can take up the oral argument, and then the
23 commission can decide after that based on those
24 papers, what I -- I think is fair to all parties and
25 suggest to the commission.

1 LAW JUDGE DIPPELL: Well, and -- and I
2 agree with most of what you said, Mr. Lowery, but
3 sometimes -- sometimes the -- the orders have not
4 always contemplated that -- that the discovery
5 conference will be a complete substitute for -- for
6 the rest of the process. It's often times a -- a
7 substitute for -- to shorten the process so that you
8 don't have to do as many steps, but the -- the goal of
9 the discovery conferences all along has been, like I
10 say, to try to shorten the amount of time it takes for
11 the commission to rule on -- on these kinds of
12 disputes, so. With that being said, I think it would
13 be helpful given the complexity and the importance of
14 the objections to receive a written response, and if
15 Mr. Owen is -- is it possible for you to get a written
16 response, say, by Tuesday?

17 MR. OWEN: I'd have to talk to my
18 co-counsel about that, but we'll do our best.

19 LAW JUDGE DIPPELL: Okay. And I will
20 discuss the possibility of a -- another discovery
21 conference with Judge Fewell next week, and I think
22 that's -- I think that's answering all of the
23 questions I had.

24 MS. CALLENBACH: Judge, may I just confirm?
25 Is Grain Belt permitted to file a written response as

1 well since some of the privilege issues do implicate
2 our information as well?

3 LAW JUDGE DIPPELL: Yes. Certainly, you
4 may also file a response.

5 MS. CALLENBACH: Thank you.

6 LAW JUDGE DIPPELL: And -- and any of the
7 other parties for that matter.

8 MR. OWEN: Yeah. I confirm we can get that
9 done by Tuesday.

10 LAW JUDGE DIPPELL: All right. Great.
11 Okay. Is there anything else that anybody wants to
12 bring up?

13 MR. LOWERY: Not from the company, Your
14 Honor. Thank you.

15 LAW JUDGE DIPPELL: Okay.

16 MR. OWEN: No, Your Honor.

17 LAW JUDGE DIPPELL: Thank you --

18 MS. CALLENBACH: No. Thank you, Judge.

19 LAW JUDGE DIPPELL: -- all. Thank you very
20 much.

21 MR. GRAHAM: Thank you, Judge.

22 MR. OWEN: Thank you, Judge.

23 LAW JUDGE DIPPELL: All right. We can then
24 go off the record. We're adjourned. Thank you.

25 MR. LOWERY: Thank you.

1 MS. CALLENBACH: Thank you.

2 (Audio ended.)

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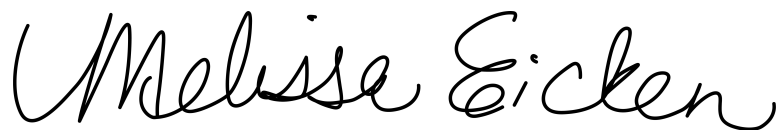
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