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January 2, 2001

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
200 Madison Street, Suite 100  
P.O. Box 360  
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**FILED<sup>3</sup>**

JAN 02 2001

Missouri Public  
Service Commission

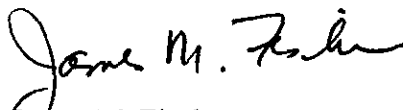
RE: *Kansas City Power & Light Company*  
Case No. EM-2000-753

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter are the original and eight (8) copies of Kansas City Power & Light Company's Response to the Office of Public Counsel's Motion to Compel. A copy of the foregoing Response has been hand-delivered or mailed this date to each party of record.

Thank you for your attention to this matter.

Sincerely,

  
James M. Fischer

/jr  
Enclosures

cc: All parties of Record

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

**FILED<sup>3</sup>**  
JAN 02 2001

Missouri Public  
Service Commission

In the Matter of the Application of Kansas City     )  
Power & Light Company for an Order Authorizing     )  
the Transfer of Certain Electric Generation Assets     )  
Used to Provide Electric Service to Customers     )  
in Missouri and Other Relief Associated with     )  
Kansas City Power & Light Company's Plan to     )  
Restructure Itself into a Holding Company,     )  
Competitive Generation Company, Regulated     )  
Utility Company, and Unregulated Subsidiary.     )

Case No. EM-2000-753

**KANSAS CITY POWER & LIGHT COMPANY'S  
RESPONSE TO THE OFFICE OF PUBLIC COUNSEL'S  
MOTION TO COMPEL**

COMES NOW Kansas City Power & Light Company ("KCPL") and makes the following response to the Motion to Compel ("Motion") filed by the Office of the Public Counsel ("Public Counsel") on December 22, 2000. For the reasons stated below, the Missouri Public Service Commission ("Commission") should deny the Motion in its entirety.

**I.     Introduction**

In its Motion, Public Counsel requests that "the Commission compel Company to produce all documents within the scope of Data Request Nos. 516, 520, 526, and 533 because no timely written objections have been made to these data requests." In its pleading, Public Counsel:

- Fails to inform the Commission that KCPL provided responses or responsive documents to the data requests long before the Motion was filed.<sup>1</sup>
- Incorrectly states that "(t)he relevant written correspondence (regarding the discovery dispute) is attached to this motion as Attachment B." Public Counsel did not include in its Attachment B a letter dated December 1, 2000 that is material.
- Incorrectly states that KCPL objected to Data Requests Nos. 526 and 533.
- Fails to inform the Commission that Public Counsel agreed KCPL would provide a privilege log for any privileged document located after October 16, 2000.

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<sup>1</sup> Regarding Data Request No. 516, 14 documents were provided on November 3<sup>rd</sup> and 13<sup>th</sup>. Regarding Data Request No. 520, 20 documents were provided on December 1<sup>st</sup>. Regarding Data Request Nos. 526 and 533, KCPL responded fully on December 1<sup>st</sup>.

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At the outset, it is important to note that Public Counsel's Motion does not allege that the documents listed on KCPL's privilege logs fail to meet the threshold requirements of privileged communications or the work product doctrine. Consequently, the only issue for the Commission to decide is whether the Commission will adopt Public Counsel's strained interpretation of a Commission rule that will, if adopted, abrogate rights granted to KCPL by Missouri law. Public Counsel's interpretation is not supported by relevant case law from Missouri—or any other jurisdiction—or other relevant Commission decisions. KCPL apologizes to the Commission in advance for its long recitation of facts, but it is necessary to fully respond to the position taken by Public Counsel in this matter.

## **II. Factual Timeline**

### **i. October 5, 2000**

Public Counsel served 33 data requests upon KCPL. Some of Public Counsel's data requests failed to comply with Missouri Rules of Civil Procedure. For example, Data Request No. 526 asks for “all documents created by or for KCPL or its affiliates related to organizing and implementing the reorganization.” Data Request 533 asks for “all documents created by or on behalf of the project coordinator that are related to the restructuring initiative.” KCPL would have been justified in objecting to these data requests because of their overly broad and burdensome scope. Moreover, they lack the requisite particularity required under Missouri law.<sup>2</sup> Despite Public Counsel's misrepresentation to the contrary, however, KCPL did not object to the requests.<sup>3</sup> Instead, KCPL attempted to cooperate with and accommodate Public Counsel.<sup>4</sup>

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<sup>2</sup> Missouri's discovery rules “calls for specification of the documents ... with reasonable particularity. Requests for production which commence ‘any and all documents, reports, statements ...’ can scarcely be regarded as reasonably particular....” *State ex rel. Wilson v. Copeland*, 685 S.W.2d 252, 253 (Mo.App. 1985); Mo. R. Civ. P., 58.01.

<sup>3</sup> In its Motion, at page 2, Public Counsel states that “On October 20, 2000, Company sent Public Counsel a letter stating objections to data requests 526 and 533.” A review of that letter, which is included in Attachment B to the Motion, demonstrates that, at best, Public Counsel's statement is extremely misleading. KCPL did not object to the

ii. October 13, 2000

One of KCPL's attorneys left a voice mail message for Public Counsel's attorney in which he stated that some of the data requests were overly broad and stated that KCPL would be forced to file objections to these data requests unless KCPL and Public Counsel could reach a compromise. This message was delivered three days before the deadline for filing written objections.<sup>5</sup>

iii. October 16, 2000

During a teleconference, KCPL discussed its concerns with Public Counsel that some of its data requests were overly broad and burdensome. More importantly, KCPL informed Public Counsel that it "would be unable to review all responsive documents prior to October 16, 2000 and that KCPL reserves the right to make a claim of privilege or assert another legal protection." This portion of the teleconference is memorialized in a letter dated October 20, 2000, which is attached to the Motion as Attachment B. At this point, KCPL assumed that it had reached an agreement with Public Counsel that:

1. Obviated the need to file an objection regarding data requests that KCPL believed to be overly broad and burdensome, and
2. KCPL would provide Public Counsel a privilege log for all documents protected from disclosure that were located after October 16, 2000.

iv. October 27, 2000

In a letter dated October 27, 2000, Public Counsel confirmed the essential elements of the agreement reached on October 16, 2000.

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data requests in that letter. Instead, the letter documents the agreement reached between the parties that made objections unnecessary.

<sup>4</sup> Public Counsel's actions lend credence to the old saw coined by Clare Boothe Luce that "no good deed goes unpunished."

<sup>5</sup> Since the 10th day, October 15<sup>th</sup>, 2000 fell on a Sunday, KCPL's deadline for filing an objection was October 16, 2000. See 4 CSR 240-2.050(1).

v. October 30, 2000

In accordance with the agreement reached with Public Counsel, KCPL provided Public Counsel a privilege log that listed three documents responsive to Data Request No. 516 ("October 30<sup>th</sup> Log"). A copy of the privilege log is attached hereto as Exhibit "A."

vi. November 6, 2000

In a letter dated November 6, 2000, Public Counsel acknowledged receipt of the October 30<sup>th</sup> Log and stated ("November 6<sup>th</sup> Letter"):

[i]f you intended for this privilege log to serve as an objection pursuant to 4 CSR 24-2.090(2) (sic), I am afraid that it is too late under the rule. The Public Service Commission has made very clear that failure to object within the ten-day requirement is a waiver of any objection to providing responses to data requests.<sup>6</sup>

To support its position, Public Counsel attached a Commission Order issued in Case No. EM-96-149. In Section III of this Response, KCPL will demonstrate that this order in no way relates to the waiver of the attorney client privilege or work product doctrine.

vii. December 1, 2000

In response to Data Requests Nos. 520, 526 and 533, KCPL provided Public Counsel a privilege log than listed 22 documents ("December 1<sup>st</sup> Log"). These documents were located after KCPL provided Public Counsel the October 30<sup>th</sup> Log. A copy of the December 1<sup>st</sup> Log is attached hereto as Exhibit "B." The cover letter accompanying the privilege log stated the following in connection with the four outstanding data requests ("December 1<sup>st</sup> Letter")<sup>7</sup>:

Data Request 516

Despite our good faith efforts, we have been unable to resolve this dispute.

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<sup>6</sup> A copy of this letter is attached to Motion as Attachment B.

<sup>7</sup> A copy of the December 1<sup>st</sup> Letter is attached hereto as Exhibit C.

#### Data Request 520

With the exception of documents protected by the attorney client privilege and/or work product doctrine, and those documents that have already been delivered in response to other data requests, Kansas City Power & Light Company will hand deliver responsive documents on the morning of December 4, 2000. The enclosed privilege log lists those documents that are responsive to Data Request 520.

#### Data Request 526

All of the documents that KCPL has provided Public Counsel in response to all other data requests are responsive to this data request. Please review all of KCPL's responses. Please note that certain documents responsive to Data Request 526 are listed on the enclosed privilege log.

#### Data Request 533

All of the documents that KCPL has provided Public Counsel in response to all other data requests are responsive to this data request. Please review all of KCPL's responses. Please note that certain documents responsive to Data Request 533 are listed on the enclosed privilege log.

The information contained in the December 1<sup>st</sup> Letter is crucial for the Commission's understanding of this discovery dispute. With respect to the outstanding data requests, the letter demonstrates that KCPL had either provided all responsive documents, listed withheld documents on a privilege log or promised to hand deliver any remaining documents by December 4, 2000. In its Motion, Public Counsel failed to attach a copy of or refer to the December 1<sup>st</sup> Letter. In the December 1<sup>st</sup> Letter, KCPL also notes that several documents responsive to Data Requests Nos. 526 and 533 were from the files of KCPL's General Counsel and were included on the attached privilege log<sup>8</sup>. This was consistent with the agreement between the parties. (See the third paragraph of

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<sup>8</sup> The log referred to is the December 1<sup>st</sup> Log.

KCPL's October 20<sup>th</sup> letter to Public Counsel, and the third and fourth paragraphs of Public Counsel's October 27<sup>th</sup> letter to KCPL.)<sup>9</sup> Again, Public Counsel omitted this material fact from its Motion.

viii. December 4, 2000

As promised in the December 1<sup>st</sup> Letter, KCPL hand delivered the documents referenced in the December 1<sup>st</sup> Letter.

**III. The Commission Order On Which Public Counsel Relies Does Not Support Its Contention That KCPL Waived Its Right To Invoke The Attorney Client Privilege Or The Work Product Doctrine**

As previously stated, in its November 6<sup>th</sup> Letter, Public Counsel referred KCPL to an order issued in Case No. EM-96-149 (the "Order"). A copy of the Order is attached to Public Counsel Motion as Attachment B. Public Counsel's reliance on the Order is misplaced. The Order does not relate to the issue of waiver vis-à-vis the attorney client privilege or work product doctrine. In Case No. EM-96-149, Staff served numerous data requests upon Union Electric Company d/b/a AmerenUE ("Ameren") in furtherance of a revenue requirement cost of service audit. Ameren responded to some of Staff's data requests by filing written objections after the time-period set forth in 4 CSR 240-2.090(2) had elapsed. In its written objections, Ameren offered the following grounds for its objections<sup>10</sup>:

- A. The data requests were irrelevant;
- B. The data requests were not authorized under the experimental alternative regulation plan;
- C. The data requests were vague, overly broad and unduly burdensome; and
- D. The data requests failed to specify any given time frame for the information requested.

Unlike KCPL, as soon as it received the data requests Ameren had the ability to formulate specific objections grounded in fact to Staff's data requests. KCPL's attorneys did not receive the

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<sup>9</sup> Both of these letters are included in Attachment B to the Motion.

documents listed on the privilege logs provided to Public Counsel until after the 10 day period had elapsed. KCPL's attorneys cannot examine a data request, then determine whether a responsive document will be protected by the attorney client privilege or work product doctrine until the requested documents are located and examined. In fact, the attorneys often will not know if there are any responsive documents, let alone responsive documents protected by the attorney client privilege or work product doctrine. Due to Public Counsel's shotgun approach to discovery, KCPL's personnel must often examine thousands of documents to determine whether they are responsive to Public Counsel's data requests. When responsive documents are located, they are sent to KCPL's attorneys. At this point, the attorneys must examine a responsive document before determining whether it is protected from disclosure by the attorney client privilege and/or work product doctrine.

As a review of Ameren's written objections demonstrates, the discovery dispute resolved by the Order did not involve the attorney client privilege or work product doctrine. Accordingly, the Order cited by Public Counsel in no way supports its assertion that KCPL's attorneys' inability to object to the data requests on the grounds of attorney client privilege and/or work product to prior to the elapse of the 10 day period constitutes a waiver of those legal protections.

#### **IV. Missouri Law On The Attorney Client Privilege**

In the State of Missouri, the attorney client privilege is a fundamental policy. State v. Timons, 956 S.W.2d 277 (Mo.App. 1997). Missouri law provides an absolute shield against forced disclosure of confidential communications between attorney and client. Board of Registration for Healing Arts v. Spinden, 798 S.W.2d 472, 475 (Mo.App. 1990); May Dep't Stores Co. v. Ryan, 699 S.W.2d 134, 136 (Mo.App. 1985); Section 491.060(3), RSMo; Mo. Civ. R. Pro., 56.01(b)(1). The

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<sup>10</sup> Copies of Ameren's written objections are attached hereto as Exhibit "D".

Missouri Supreme Court has adopted a broad concept of the attorney client privilege. See State ex rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 383 (Mo. Banc 1978). Absent a waiver, privileged communications are not discoverable. State ex rel. Chase Resorts, Inc. v. Campbell, 913 S.W.2d 832, 838 (Mo.App. 1995). "Application of the attorney-client privilege is a matter of law, not judicial discretion ...." Id., citing, State ex rel. McBride v. Dalton, 834 S.W.2d 890, 891 (Mo.App. 1992). Public Counsel has failed to cite any case law or Commission decision that supports its assertion that KCPL's inability to assert the attorney client privilege or work product doctrine within 10 days of receiving data requests, due to the fact that protected, responsive documents had not been located, constitutes a waiver of these protections.

In a letter dated November 16, 2000, KCPL explained its concerns regarding Public Counsel's novel application of 4 CSR 240-2.090(2). A copy of the letter is attached to the Motion as Attachment B. In the letter, KCPL stated the following:

On October 5, 2000, KCPL received 33 data requests from the Office of Public Counsel including Data Request 516. The Law Department immediately reviewed the data requests to determine if there were any grounds for filing an objection. During this initial review period, the Law Department has the ability to determine whether a data request is burdensome, overbroad or irrelevant. None of the data requests fell into any of these three categories.

The Law Department, however, cannot determine whether any document is protected by the attorney-client privilege or work product doctrine until the actual documents are collected and reviewed. Due to the wide-ranging nature of the data requests, it was not possible to complete the document search within ten days of receiving the data requests. Consequently, the Law Department could not file an objection on the basis of the attorney-client privilege or work product doctrine until responsive, yet legally protected, documents were identified.

The basic elements of an attorney client privilege claim are 1) the exchange of confidential

information, between a 2) client and 3) attorney. State ex rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 384 (Mo. 1978). KCPL's attorney cannot claim attorney client privilege unless the attorney has received and examined the document to determine if the basic elements of a privilege claim exist.<sup>11</sup>

**V. A Line Of Commission Decisions Prohibits  
The Use Of Abstract Or General Objections**

Public Counsel argues that KCPL's attorney should have filed objections to protect documents whose existence he was not aware. Public Counsel is asking KCPL's attorney to file an objection without knowing if there are any grounds for an objection. Public Counsel has never alleged that KCPL knew of the existence of privileged documents prior to October 16, 2000 and failed to file an objection by that date. Public Counsel is arguing that KCPL waived its legal protections if any protected documents are located and turned over to KCPL's Law Department after October 16, 2000.

As stated earlier, the Order issued by the Commission in Case No. EM-96-149 does not support Public Counsel's contention. However, the Commission in that case issued an order that fully supports KCPL argument that general or abstract objections are prohibited. In the case, the Commission stated that:

[i]n previous decisions, the Commission has not found general objections to data requests acceptable. *In the Matter of Sho-Me Power Corporation*, 29 Mo. P.S.C. 409, Case Nos. EA-87-49, EA-87-101 and EA-87-105, June 2, 1987. Objections to discovery requests should specifically set forth the grounds for each objection as found in the Missouri Rules of Civil Procedure.

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<sup>11</sup> Although the elements for a claim of work product protection differ from the elements of a claim of attorney client privilege, the procedure for determining whether a document, assuming there is a responsive document, is protected from disclosure is exactly the same. The attorney must examine any responsive document prior to concluding that a document is protected from disclosure.

Order Granting in Part Staff's Motion to Compel, Order Denying in Part Staff's Motion to Compel and order Denying AmerenUE's Motion for Reconsideration, p.5, Case No. EM-96-149, (November 9, 2000.) A copy of this order is attached hereto as Exhibit "E."

In an attempt to avoid this type of discovery dispute, in the past KCPL filed a generic objection, within the ten-day period, in which KCPL stated that it objects to each of the data requests "to the extent the party seeks information protected by the attorney client privilege and/or work product doctrine." The purpose of this generic objection was to protect any document that may be located after the ten-day period has elapsed. The Commission, however, rejected this approach. The Commission stated that "[c]ourts generally will not consider abstract objections such as ... privileged, or work product with no further specificity as to why a particular interrogatory is objectionable." Order Regarding GST Steel Company's First Motion to Compel Discovery and Amending the Procedural Schedule, p.5, Case No. EC-99-553 (July 29, 1999), quoting, S. Katz, 16 Missouri Practice -- Civil Rules Practice 43 (2d ed. 1998). KCPL provided that order to Public Counsel long before Public Counsel filed its Motion. The order is included in Attachment B of Public Counsel's Motion.

Had the dispute taken place in a court of law, it is likely that a Court would impose the doctrine of estoppel to prevent Public Counsel from arguing the KCPL waived its rights by failing to file a general objection prior to October 16, 2000.

**VI. A Court would Impose the Doctrine of Equitable Estoppel To Prevent Public Counsel From Arguing That KCPL Waived Any Of Its Legal Protections**

Missouri law holds that the elements of estoppel are as follows:

- An admission, statement or act inconsistent with the claim afterwards asserted and sued upon;

- Reliance by the other party on such admission, statement or act; and
- Injury to the other party resulting from permitting the first party to contradict or repudiate the admission, statement or act.

The last day for KCPL to object to Public Counsel's data requests was October 16, 2000. On the same date, in an attempt to resolve the discovery dispute without having to file an objection, KCPL informed Public Counsel that it would be unable to collect and review all responsive documents to determine if any were protected from disclosure prior to the deadline imposed by 4 CSR 240-2.090(2) and that KCPL reserved the right to make a claim of privilege or assert the work product doctrine for those protected document located after October 16, 2000. If it was Public Counsel's position that KCPL's proposal constituted a waiver of its legal protections, it was incumbent upon Public Counsel to state its position during the teleconference that took place on October 16, 2000. Public Counsel led KCPL to believe that its proposal was acceptable. In reliance on the agreement reached with Public Counsel, KCPL refrained from filing an objection. But for the agreement, KCPL would have filed a general objection. The overwhelming majority of the documents listed on the privilege logs are the personal notes of KCPL's general counsel. These notes reveal his mental impressions, conclusions, opinions, and legal theories<sup>12</sup>. See State ex rel. Atchison, Topeka and Santa Re Ry. Co. v. O'Malley, 898 S.W.2d 550, 552-53 (Mo. 1995). The remaining documents listed on the privilege logs are confidential communications between KCPL's general counsel and KCPL's officers and managers. It is clear that KCPL will suffer harm should the Commission permit Public Counsel to change its position. Were this dispute resolved in a court of law, it is likely that the court would prevent Public Counsel from changing its position.

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<sup>12</sup> "[A]n attorney may not sit in a rocking chair and then blithely appropriate opposing counsel's efforts through discovery procedures." May Dep't Stores Co. v. Ryan, 699 S.W.2d at 136.

## VII. Conclusion

Thus far, Public Counsel has submitted nearly 50 expansive data requests to KCPL in this case. KCPL has provided a large number of documents in response to those requests. Unless it waives its right, KCPL has an absolute right to shield its confidential communications from Public Counsel. Public Counsel has failed to demonstrate that KCPL waived its attorney client privilege. As for KCPL's work product, in its Motion, Public Counsel failed to demonstrate that KCPL waived this legal protection and did not even attempt to meet the standards needed to obtain attorney tangible work product. Accordingly, the Commission should deny public Counsel's Motion.

Respectfully submitted,

  
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ATTORNEYS FOR  
KANSAS CITY POWER & LIGHT COMPANY

## CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Application has been hand-delivered or mailed, First Class, U.S. Mail, postage prepaid this 2<sup>nd</sup> day of January, 2001, to:

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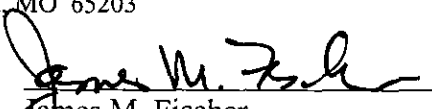
John McKinney  
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James M. Fischer

**PRIVILEGE LOG**  
(October 30, 2000)

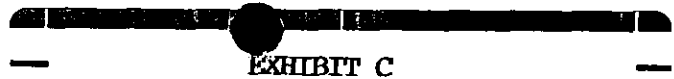
	Date	Author(s)	Recipient(s)	cc:	Re:	# Pages	Privilege Claim	Request Number
1.	3/31/00	William Hieronymus	William Riggins Matthew Estes		Memorandum re Market Power	35	AC/WP	516
2.	5/22/00	William Hieronymus Julie Solomon	William Riggins		Memorandum re Market Power	9	AC/WP	
3.	7/26/00	William Hieronymus Julie Solomon	William Riggins		Memorandum re Market Power	21	AC/WP	516

# PRIVILEGE LOG

(December 1, 2000)

	Date	Author(s)	Recipient(s)	cc:	Re:	# Pages	Privilege Claim	Public Counsel Request
1.	04/05/00	Bill Riggins	Bill Riggins		Notes regarding financial forecasts	1	WP	520, 526, 533
2.	04/28/00	Bill Riggins	Bill Riggins		Notes on modeling of production costs and PPA	1	WP	520, 526, 533
3.	05/10/00	Bill Riggins	Bill Riggins		Notes on allocation of liability	1	WP	520, 533
4.	05/17/00	Bill Riggins	Bill Riggins		Notes on allocation of revenue	1	WP	520, 526, 533
5.	05/31/00	Bill Riggins	Bill Riggins		Notes on allocation of income statement and balance sheet	1	WP	520, 526 533
6.	06/14/00	Bill Riggins	Bill Riggins		Notes on cost of service	1	WP	520, 526 533
7.	06/11/00	Joseph Jacobs	Bill Riggins	Rebecca Bradley	E-mail regarding financial models	1	WP	520, 526 533
8.	06/07/00	Bill Riggins	Bill Riggins		Notes on financial analysis	1	AC/WP	520, 526 533
9.	07/06/00	Bill Riggins	Bill Riggins		Notes on market power	1	WP	520, 526 533
10.	07/19/00	Bill Riggins	Bill Riggins		Notes on competitive bids	1	WP	520, 533
11.	09/27/00	Bill Riggins	Bill Riggins		Notes on PPA	1	WP	520, 526 533
12.	09/18/00	Andrea Bielsker	Bill Riggins		E-mail on issues surrounding financial statements	1	AC/WP	520, 526 533
13.	08/23/00	Bill Riggins	Bill Riggins		Notes on financial issues	1	WP	520, 526 533
14.	08/02/00	Bill Riggins	Bill Riggins		Analysis of financial issues associated with PPA	1	WP	520, 526 533
15.	09/20/00	Bill Riggins	Bill Riggins		Notes on financial issues	1	WP	520, 526 533

	Date	Author(s)	Recipient(s)	cc:	Re:	# Pages	Privilege Claim	Public Counsel Request
16.	08/09/00	Bill Riggins	Bill Riggins		Notes on financial modeling and risk factors	1	WP	520, 526 533
17.	04/12/00	Bill Riggins	Bill Riggins		Notes on accounting issues and assumptions used in financial modeling	1	WP	520, 526 533
18.	04/28/00	Bill Riggins	Bill Riggins		Notes on assumptions used in financial modeling.	1	WP	520, 526 533
19.	04/12/00	Bill Riggins	Bill Riggins		Notes on financial modeling	1	WP	520, 526 533
20.	04/05/00	Bill Riggins	Bill Riggins		Notes on allocation of expenses and financial forecasts	1	WP	520, 526 533
21.	05/17/00	Bill Riggins	Bill Riggins		Notes on allocation and financial modeling.	1	WP	520, 526 533
22.	05/10/00	Bill Riggins	Bill Riggins		Notes on allocation of expenses and financial modeling	1	WP	520, 526 533



Gerald A. Reynolds

(816) 556-2138  
(816) 556-2787 (Facsimile)

December 1, 2000

**VIA U.S. MAIL & FACSIMILE (573) 751-5562**

Mr. John B. Coffman  
Deputy Public Counsel  
Office of the Public Counsel  
200 Madison Street, Suite 650  
P.O. Box 7800  
Jefferson City, MO 65102

RE: Case No. EM-2000-753

Dear Mr. Coffman:

In your letter dated November 27, 2000, you discuss four overdue data requests. The purpose of this letter is to provide Public Counsel with an update on these data requests.

**Data Request 516**

Despite our good faith efforts, we have been unable to resolve this dispute.

**Data Request 520**

With the exception of documents protected by the attorney client privilege and/or work product doctrine, and those documents that have already been delivered in response to other data requests, Kansas City Power & Light Company will hand deliver responsive documents on the morning of December 4, 2000. The enclosed privilege log lists those documents that are responsive to Data Request 520.

**Data Request 526**

All of the documents that KCPL has provided Public Counsel in response to all other data requests are responsive to this data request. Please review all of KCPL's responses. Please note that certain documents responsive to Data Request 526 are listed on the enclosed privilege log.



**Kansas City Power & Light Company**  
**Page Two**

Data Request 533

All of the documents that KCPL has provided Public Counsel in response to all other data requests are responsive to this data request. Please review all of KCPL's responses. Please note that certain documents responsive to Data Request 533 are listed on the enclosed privilege log.

Please do not hesitate to contact me if you have any questions or concerns.

Sincerely yours,

Gerald A. Reynolds

Enclosure

# PRIVILEGE LOG

(December 1, 2000)

	Date	Author(s)	Recipient(s)	cc:	Re:	# Pages	Privilege Claim	Public Counsel Request
1.	04/05/00	Bill Riggins	Bill Riggins		Notes regarding financial forecasts	1	WP	520, 526, 533
2.	04/28/00	Bill Riggins	Bill Riggins		Notes on modeling of production costs and PPA	1	WP	520, 526, 533
3.	05/10/00	Bill Riggins	Bill Riggins		Notes on allocation of liability	1	WP	520, 526, 533
4.	05/17/00	Bill Riggins	Bill Riggins		Notes on allocation of revenue	1	WP	520, 526, 533
5.	05/31/00	Bill Riggins	Bill Riggins		Notes on allocation of income statement and balance sheet	1	WP	520, 526, 533
6.	06/14/00	Bill Riggins	Bill Riggins		Notes on cost of service	1	WP	520, 526, 533
7.	06/11/00	Joseph Jacobs	Bill Riggins	Rebecca Bradley	E-mail regarding financial models	1	WP	520, 526, 533
8.	06/07/00	Bill Riggins	Bill Riggins		Notes on financial analysis	1	AC/WP	520, 526, 533
9.	07/06/00	Bill Riggins	Bill Riggins		Notes on market power	1	WP	520, 526, 533
10.	07/19/00	Bill Riggins	Bill Riggins		Notes on competitive bids	1	WP	520, 526, 533
11.	09/27/00	Bill Riggins	Bill Riggins		Notes on PPA	1	WP	520, 526, 533
12.	09/18/00	Andrea Bielsker	Bill Riggins		E-mail on issues surrounding financial statements	1	AC/WP	520, 526, 533
13.	08/23/00	Bill Riggins	Bill Riggins		Notes on financial issues	1	WP	520, 526, 533
14.	08/02/00	Bill Riggins	Bill Riggins		Analysis of financial issues associated with PPA	1	WP	520, 526, 533
15.	09/20/00	Bill Riggins	Bill Riggins		Notes on financial issues	1	WP	520, 526, 533

	Date	Author(s)	Recipient(s)	cc:	Re:	# Pages	Privilege Claim	Public Counsel Request
16.	08/09/00	Bill Riggins	Bill Riggins		Notes on financial modeling and risk factors	1	WP	520, 526 533
17.	04/12/00	Bill Riggins	Bill Riggins		Notes on accounting issues and assumptions used in financial modeling	1	WP	520, 526 533
18.	04/28/00	Bill Riggins	Bill Riggins		Notes on assumptions used in financial modeling	1	WP	520, 526 533
19.	04/12/00	Bill Riggins	Bill Riggins		Notes on financial modeling	1	WP	520, 526 533
20.	04/05/00	Bill Riggins	Bill Riggins		Notes on allocation of expenses and financial forecasts	1	WP	520, 526 533
21.	05/17/00	Bill Riggins	Bill Riggins		Notes on allocation and financial modeling.	1	WP	520, 526 533
22.	05/10/00	Bill Riggins	Bill Riggins		Notes on allocation of expenses and financial modeling	1	WP	520, 526 533

KANSAS CITY POWER & LIGHT COMPANY

LAW DEPARTMENT

TELEPHONE NUMBER (816) 556-2138

FACSIMILE NUMBER (816) 556-2787

FACSIMILE TRANSMITTAL SHEET

Please deliver the following pages to:

Name: John B. Coffman Date: December 1, 2000

The Office of Public Counsel

4:17 PM CST

Firm: Jefferson City Time:

City: (573) 751-5562 (573) 751-5565

Facsimile Number: Telephone Number:

From:

Gerald A. Reynolds

Floor/Room 20

Direct Dial Number: (816) 556-2138

Total number of pages including this cover letter: 4

**CONFIDENTIALITY NOTICE:** The documents accompanying this facsimile transmission contain confidential information belonging to the sender that is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this faxed information is strictly prohibited. If you have received this facsimile in error, please immediately notify us by telephone to arrange for return of the original document to us.

**MESSAGE**

**Note: IF YOU EXPERIENCE ANY PROBLEMS IN RECEIVING ANY OF THESE PAGES, PLEASE CALL AS SOON AS POSSIBLE (816) 556-2138.**

KANSAS CITY POWER & LIGHT COMPANY

1201 WALNUT

KANSAS CITY, MISSOURI 64106-2124

# MESSAGE CONFIRMATION

12/01/2000 16:29

DATE	S,R-TIME	DISTANT STATION ID	MODE	PAGES	RESULT
12/01	00'45"	573 751 5562	CALLING	05	OK 0000

12/01/2000 16:28

NO.657 001

**KANSAS CITY POWER & LIGHT COMPANY  
LAW DEPARTMENT  
TELEPHONE NUMBER (816) 556-2785  
FACSIMILE NUMBER (816) 556-2787**

## FACSIMILE TRANSMITTAL SHEET

**Please deliver the following pages to:**

Name: <u>John B. Coffman</u>	Date: <u>December 1, 2000</u>
<u>The Office of Public Counsel</u>	Time: <u>4:17 PM CST</u>
Firm: <u>Jefferson City</u>	
City: <u>(573) 751-5562</u>	<u>(573) 751-5565</u>
Facsimile Number:	Telephone Number:
From: <u>Gerald A. Reynolds</u>	Floor/Room <u>20</u>
Direct Dial Number: <u>(816) 556-2138</u>	
Total number of pages including this cover letter: <u>4</u>	

**CONFIDENTIALITY NOTICE: The documents accompanying this facsimile transmission**

October 3, 2000

EXHIBIT D

Mr. Steven R. Dottheim  
Chief Deputy General Counsel  
Missouri Public Service Commission  
Governor Office Building  
200 Madison Street, Suite 100  
Jefferson City, MO 65101

Dear Steve:

In recent weeks, we have received data requests from the Staff, which are unrelated to (and certainly unauthorized by) any proceeding under the EARP.<sup>1</sup> Indeed, these data requests are of a kind that would be appropriate only in a rate reduction proceeding, but appear quite foreign in the EARP context. Moreover, we have been advised that representatives of the Staff plan to remain on site for several months, for what appears to be the kind of audit-like work that might be appropriate in a rate reduction proceeding, but certainly has no place in the EARP.

As you know, the EARP expressly provides that "Staff, OPC and other signatories may not file, encourage or assist others to file a rate reduction case through June 30, 2001," unless certain special conditions occur, which they have not. *See* EARP, § 7 (c). Thus, the signatories were very clear that rate reduction proceedings, including the various forms of discovery that make up much of those proceedings, were not to begin before the conclusion of the EARP.

The procedure for filing "recommendations" with the Commission concerning whether the EARP should be continued and under what terms, § 7 (g), equally clearly does not contradict the limitations of § 7(c) by somehow creating a rate reduction proceeding by another name. It is true that § 7 (g) invites the parties to suggest changes they believe to be appropriate, "including new rates, if recommended." This simple parenthetical reference to "new rates" allows the signatories flexibility: we can propose anything ranging from a specific new rate (based on any reasoning the individual

<sup>1</sup> As of this writing, these data requests are No. 13, Nos. 16-21, No. 23, No. 25-26, No. 29, No. 35, No. 40, No. 59, Nos. 61-72, Nos. 74-76 and No. 4114.  
13147



Mr. Steven R. D. [redacted]eim

Page 2

October 3, 2000

signatory believes is persuasive) down to a simple conclusion that the rate needs to be changed without specifying what that rate should be. It does not, however, supersede the moratorium contained in § 7(c).

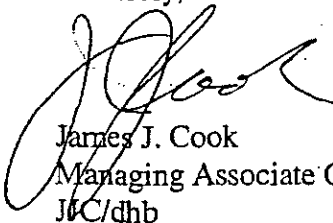
The fact that the reference to "new rates" does not import a traditional ratemaking procedure into the EARP is further confirmed by the fact that these recommendations are part of the process by which the Commission can evaluate what, after all, has been an experiment. The Commission cannot independently take any affirmative action based on these recommendations. It is well-established in Missouri law that the Commission cannot mandate an earnings sharing mechanism like that embodied in the EARP. Thus, the Commission could not order a new EARP based on these recommendations. Such recommendations can become provisions in a new EARP only by agreement of the signatories, followed by approval of the Commission.

Section 7(g) does not specifically provide for any mechanism of information disclosure to inform a signatory's analysis of the EARP. However, the EARP itself generally provides for the disclosure of a wealth of information that includes all that the signatories believed was needed to fulfill all responsibilities under the EARP, including the duty to make the recommendation required in § 7(g). *See* EARP, § 7(e). Again, nothing in these provisions of the EARP remotely suggests that any party is entitled to use the broader, far more burdensome, discovery techniques so common in a full-fledged ratemaking. What is particularly striking is that some of the Data Requests that are of concern have little to do with rates in any event.

In sum, because we believe the discovery strategy being pursued by the Staff is unauthorized by § 7(g), or anything else in the EARP – indeed, is wholly at odds with its premises -- we cannot acquiesce in this strategy. We remain open to discussing this problem with you, particularly if you can show some basis under the EARP for these data requests or the on-site work you contemplate.

I look forward to hearing your thoughts on this matter.

Sincerely,



James J. Cook  
Managing Associate General Counsel  
JJC/dhb

October 5, 2000

**VIA FEDERAL EXPRESS MAIL**

Mr. Steve Dottheim  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

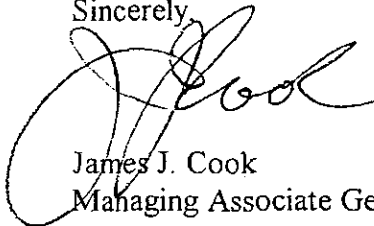
Re: Case No. EM-96-149  
Review of EARP II

Dear Mr. Dottheim:

AmerenUE hereby objects to Data Request Nos. 13, 16-21, 23, 25-26, 29, 35, 40, 59, 61-72, 74-77 and 4114 in the above matter on the grounds that they are part of a discovery process that is not mandated or contemplated by the EARP. Specifically, such data requests are not expressly authorized by any provision of the EARP and are outside the scope of any provision of the EARP that arguably authorizes data requests. For example, the provision of the EARP for filing recommendations with the Commission concerning the continuation of the EARP, that is, Section 7(g), does not provide for any mechanism of information disclosure beyond the monitoring disclosures mandated in Section 7(e). Furthermore, these data requests ask for information outside of those monitoring provisions.

If you have any questions, please call.

Sincerely,



James J. Cook  
Managing Associate General Counsel

Enclosure



October 9, 2000

**VIA FEDERAL EXPRESS MAIL**

Mr. Steve Dottheim  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

Re: Case No. EM-96-149  
Review of EARP II

Dear Mr. Dottheim:

AmerenUE hereby objects to Data Request No. 78R in the above matter on the grounds that it is part of a discovery process that is not mandated or contemplated by the EARP. Specifically, such a data request is not expressly authorized by any provision of the EARP and is outside the scope of any provision of the EARP that arguably authorizes data requests. For example, the provision of the EARP for filing recommendations with the Commission concerning the continuation of the EARP, that is, Section 7(g), does not provide for any mechanism of information disclosure beyond the monitoring disclosures mandated in Section 7(e). Furthermore, this data request asks for information outside of those monitoring provisions.

If you have any questions, please call.

Sincerely,

  
James J. Cook  
Managing Associate General Counsel

Enclosure

RECEIVED  
OCT 10 2000

COMMISSION ON  
PUBLIC SERVICE COMMISSION

October 12, 2000

**VIA FACSIMILE & FEDERAL EXPRESS MAIL**

Mr. Steve Dottheim  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

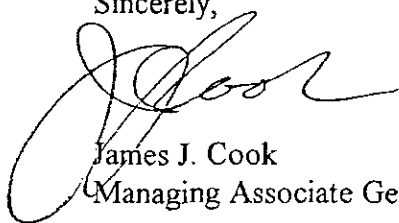
Re: Case No. EM-96-149  
Review of EARP II  
Additional Objection to Data Request No. 74R

Dear Mr. Dottheim:

AmerenUE hereby submits an additional objection to Data Request No. 74R in the above matter. Without waiving its previously submitted overall general objection to this data request, AmerenUE further objects to Data Request No. 74R on the grounds that this request is vague, overly broad and unduly burdensome. It fails to specify any given time frame for the information requested. Moreover, the request to describe "all actions ... undertaken to improve plant efficiency ..." is also too vague and overly broad, thereby asking the Company to expend many manhours to produce a response containing volumes and volumes of information which would not lead to the discovery of relevant, admissible evidence.

If you have any questions, please call.

Sincerely,



James J. Cook  
Managing Associate General Counsel

Enclosure

RECEIVED  
OCT 13 2000

COMMISSION  
PUBLIC SERVICE

October 12, 2000

**VIA FEDERAL EXPRESS MAIL**

Mr. Steve Dottheim  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

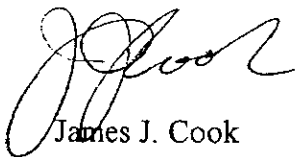
Re: Case No. EM-96-149  
Review of EARP II

Dear Mr. Dottheim:

AmerenUE hereby objects to Data Request No. 80R in the above matter on the grounds that it is part of a discovery process that is not mandated or contemplated by the EARP. Specifically, such a data request is not expressly authorized by any provision of the EARP and is outside the scope of any provision of the EARP that arguably authorizes data requests. For example, the provision of the EARP for filing recommendations with the Commission concerning the continuation of the EARP, that is, Section 7(g), does not provide for any mechanism of information disclosure beyond the monitoring disclosures mandated in Section 7(e).

If you have any questions, please call.

Sincerely,



James J. Cook  
Managing Associate General Counsel

Enclosure

RECEIVED  
OCT 13 2000

COMMISSION COUNSEL  
PUBLIC SERVICE COMMISSION

October 19, 2000

**VIA FEDERAL EXPRESS MAIL**

Mr. Steve Dottheim  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

Re: Case No. EM-96-149  
Review of EARP II

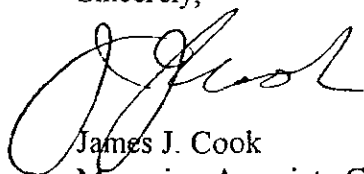
Dear Mr. Dottheim:

AmerenUE hereby objects to Data Request Nos. 50R, 55R, 82R, 83R, 84R, 85R, 86R and 87R in the above matter on the grounds that they are part of a discovery process that is not mandated or contemplated by the EARP. Specifically, such data requests are not expressly authorized by any provision of the EARP and are outside the scope of any provision of the EARP that arguably authorizes data requests. For example, the provision of the EARP for filing recommendations with the Commission concerning the continuation of the EARP, that is, Section 7(g), does not provide for any mechanism of information disclosure beyond the monitoring disclosures mandated in Section 7(e). Furthermore, these data requests ask for information outside of those monitoring provisions.

In addition, as to Data Request No. 87R, AmerenUE further objects on the grounds that this request is vague, overly broad and unduly burdensome.

If you have any questions, please call.

Sincerely,



James J. Cook  
Managing Associate General Counsel

Enclosure

RECEIVED

OCT 23 2000

COMMISSION COUNSEL  
PUBLIC SERVICE COMMISSION

October 26, 2000

**VIA FEDERAL EXPRESS MAIL**

Mr. Steve Dottheim  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

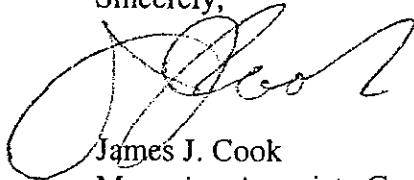
Re: Case No. EM-96-149  
Review of EARP II

Dear Mr. Dottheim:

AmerenUE hereby objects to Data Request Nos. 88R, 89R, 90R, 91R, 92R, 93R, 94R, 95R, 96R, 97R, 98R, 99R, 100R, 101R, 102R, 103R, 104R, 105R, 106R and 107R in the above matter on the grounds that they are part of a discovery process that is not mandated or contemplated by the EARP. Specifically, such data requests are not expressly authorized by any provision of the EARP and are outside the scope of any provision of the EARP that arguably authorizes data requests. For example, the provision of the EARP for filing recommendations with the Commission concerning the continuation of the EARP, that is, Section 7(g), does not provide for any mechanism of information disclosure beyond the monitoring disclosures mandated in Section 7(e). Furthermore, these data requests ask for information outside of those monitoring provisions.

If you have any questions, please call.

Sincerely,



James J. Cook  
Managing Associate General Counsel

Enclosure

RECEIVED  
OCT 27 2000  
COMMISSION COUNSEL  
PUBLIC SERVICE COMMISSION



STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 9th  
day of November, 2000.

In the Matter of the Application of Union )  
Electric Company for an Order Authorizing: )  
(1) Certain Merger Transactions Involving )  
Union Electric Company; (2) The Transfer )  
of Certain Assets, Real Estate, Leased ) Case No. EM-96-149  
Property, Easements and Contractual )  
Agreements to Central Illinois Public )  
Service Company; and (3) In Connection )  
Therewith, Certain Other Related )  
Transactions )

**ORDER GRANTING IN PART STAFF'S MOTION TO COMPEL, ORDER  
DENYING IN PART STAFF'S MOTION TO COMPEL AND ORDER  
DENYING AMERENUE'S MOTION FOR RECONSIDERATION**

**Procedural Facts**

On October 25, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a motion to compel discovery and a Motion for Expedited Treatment of Staff's Motion to Compel. On October 27, 2000, the Commission directed Staff to file a copy of the documents containing Union Electric Company d/b/a AmerenUE (AmerenUE)'s written objections no later than 12 p.m. on October 30, 2000. Staff filed its response on October 30, 2000, complying with the Commission's request and adding DRs 88R-107R to its motion to compel. Staff stated that it received AmerenUE's objection to DRs 88R-107R on October 27, 2000, in a letter dated October 26, 2000.

On October 31, 2000, the Commission issued its order directing AmerenUE to answer Data Requests (DRs) 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 no later than November 10, 2000. The Commission also granted AmerenUE until November 3, 2000, to file a response to the remaining portion of Staff's motion to compel filed October 25, 2000, as amended October 30, 2000.

On November 2, 2000, AmerenUE filed its Motion for Reconsideration of the Commission's Order Granting in Part the Motion to Compel. AmerenUE stated that it should have been given an opportunity to respond to Staff's Motion before the Commission ruled on DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 because its argument was that the discovery procedures applied by the Commission do not apply to the Second EARP.

On November 3, 2000, AmerenUE filed its opposition to Staff's motion to compel.

On November 8, 2000, Staff filed a reply to AmerenUE's suggestions in opposition to Staff's motion to compel and a reply to AmerenUE's motion for reconsideration.

**Motion For Reconsideration of the Commission's Motion  
Granting in Part the Motion to Compel**

AmerenUE alleged in its motion for reconsideration that the Commission, by acting before receiving AmerenUE's response to Staff's Motion to Compel, was unaware of a "procedural ambiguity" regarding the application of the normal discovery procedure to the operation of the Experimental Alternative Regulation Plan (Second EARP). In fact, AmerenUE raised that issue in its general objections filed October 3,

2000. AmerenUE also raised the procedural issue in its objection letters dated October 5, October 9, October 11, October 19, and October 26, 2000. In each of those letters, AmerenUE stated that it did not believe that the normal discovery procedures applied.

If AmerenUE believed that the normal discovery procedures did not apply, when Staff began submitting its DRs pursuant to Commission rule 4 CSR 240-2.090, AmerenUE was nonetheless bound by the rule invoked to respond within 10 days with its objection that the process did not apply. AmerenUE could have requested an extension of time from Staff and set a time by agreement with the parties or AmerenUE could have asked the Commission to extend the time for objections. AmerenUE failed to take any action before the 10 days expired, and therefore, AmerenUE waived its objections for any DR where the objections were not timely filed.

In its motion for reconsideration, AmerenUE stated that the Commission's order issued October 31, 2000, is "particularly unfair" because AmerenUE was required to comply with the time frames established in a rule that AmerenUE claims does not apply "in this context." AmerenUE further stated that the Second EARP contains specific disclosure provision defining the information needed and governing information disclosure in lieu of the usual discovery process. *Motion for Reconsideration, p. 3.* AmerenUE identifies those provisions as Section 7.e. and Section 7.f.iv. of the Second EARP. Section 7.e. sets out the nine categories of reports and data to be provided. AmerenUE specifically notes that the Second EARP states "UE will not be required to develop any new reports." AmerenUE also

points out that Section 7.f.vi. requires AmerenUE to prepare a "preliminary earnings report," followed by a "final earnings report," for each Sharing Period. Therefore, AmerenUE argues that nothing is included in the Second EARP that either adopts or incorporates the familiar data request process.

AmerenUE does not provide any new information that was not already available to the Commission when it rendered its decision on October 31, 2000, when it found that AmerenUE objections to DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 were untimely, and ordered AmerenUE to answer those DRs no later than November 10, 2000. Therefore, the Commission, having considered AmerenUE's additional arguments, finds no reason to change its order issued October 31, 2000.

**General Objection: Applicability of Discovery to Second EARP**

The remaining DRs included in Staff's motion to compel are DRs 59, 61-72, 74-78, 80, 82-107.<sup>1</sup> AmerenUE filed timely objections to DRs 59, 61-72, 74-78, 80, and 82-107. In its letter dated October 3, 2000, AmerenUE stated its general objection that it believed that "the

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<sup>1</sup> DRs 50, 55, 74, 78, 80, 82-87, and 88-107 are marked as such on the data requests as issued but are referred to in Staff's response to Commission Order Directing Filing filed October 30, 2000, and in AmerenUE objection letters as DRs 50R, 55R, 74R, 78R, 80R, 82-87R, and 88R-107R. There is no explanation for addition of the "R" to the original DR number, but it does appear that the DR numbers referred to on the request and the DR number followed by the letter R on the Staff's response and AmerenUE's objection refer to the same DR. This order will refer to the DR by its original number only.

discovery strategy being pursued by Staff is unauthorized by § 7(g), or anything else in the EARP."<sup>2</sup>

AmerenUE pointed out that the Second EARP expressly provided that Staff, Public Counsel and other signatories may not file, encourage or assist others to file a rate reduction case through June 30, 2001, except in certain circumstances. *Second EARP, Section 7(c)*. AmerenUE stated that rate reduction proceedings, including the various forms of discovery that make up much of those proceedings, were not to begin before the conclusion of the Second EARP.

On October 5, 2000, AmerenUE filed a second letter objecting to DRs 59, 61-72, and 74-77, alleging that these DRs "are part of a discovery process that is not mandated or contemplated by the EARP," are not expressly authorized by the Second EARP and are outside the scope of any provision of the EARP. AmerenUE made the same objection to DRs 78, 80, 82-87 and 88-107 in its objection letters dated October 9, October 11, October 19, and October 26, 2000, respectively. In addition, AmerenUE raised two specific objections in regard to DRs 74 and 87 submitted by Staff in its letters dated October 12 and October 19, 2000, respectively, along with its general objection. These specific objections will be addressed in the next section.

In previous decisions, the Commission has not found general objections to data requests acceptable. *In the Matter of Sho-Me Power*

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<sup>2</sup> Section 7(g) refers to the Stipulation and Agreement approved by the Commission in its Report and Order issued in this case on February 21, 1997. (Section 7 of this Stipulation and Agreement was entitled "New Experimental Alternative Regulation Plan (New Plan)." This entire Stipulation and Agreement is referred to as the "Second EARP" for the purposes of this order.)

Corporation, 29 Mo. P.S.C. 409, Case Nos. EA-87-49, EA-87-101 and EA-87-105, June 2, 1987. Objections to discovery requests should specifically set forth the grounds for each objection as found in the Missouri Rules of Civil Procedure (Mo.R.Civ.P.). Commission Rule 4 CSR 240-2.090(1) states that "[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." The standard for discovery is set out in Rule 56.01(b)(1), Mo.R.Civ.P.<sup>3</sup> AmerenUE failed to set forth specific objections to DRS 59, 61-72, 73, 75-78, 80, 82-86 and 88-107 in its letters dated October 3, October 5, October 9, and October 26, 2000.

The Commission has also reviewed AmerenUE's general objection. AmerenUE alleged that "the discovery strategy being pursued by Staff is unauthorized by § 7(g), or anything else in the EARP," which requires the Commission to look at the Second EARP. There are various sections in the Second EARP that lead the Commission to the conclusion that normal discovery procedures do apply in Case No. EM-96-149 like any other case. Section 7(e) of the Second EARP sets out the "monitoring" provisions, including "reports and data identified below." Specifically, Section 7(e) states that

Monitoring of the New Plan will be based on UE supplying to Staff and OPC, on a timely basis, the reports and data identified below. These reports and

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<sup>3</sup> See Rule 56.01(b)(1): Parties may obtain discovery regarding any matter, not privileged, which 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 and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

data must be provided as part of the New Plan . . . Staff, OPC and the other signatories participating in the monitoring of the New Plan may follow up with data requests, meetings and interviews, as required, to which UE will respond on a timely basis. UE will not be required to develop any new reports, but information presently being recorded and maintained by UE may be requested. (emphasis added.)

Section 7(e) sets out the reports and data that must be provided on an ongoing basis throughout the three-year period and specifically authorizes data requests.

Section 7(g) states that AmerenUE, Staff, Public Counsel and other signatories must meet to review "the monitoring reports and additional information required to be provided." Section 7(g) does not contain restrictive language that would limit the additional information available to that identified under Section 7(e).

Section 8 of the Second EARP is entitled State Jurisdictional Issues. Under Section 8(a), AmerenUE agrees to make available "all books and records and employees and officers of Ameren, UE and any affiliate or subsidiary of Ameren as provided under applicable law and Commission rules," subject to Ameren's right to object. The applicable law and Commission rules that would apply would be Commission Rule 4 CSR 240-2.090(1) and Rule 56.01(b)(1), Mo.R.Civ.P.

Section 8(b) specifically states "UE, Ameren and any affiliate or subsidiary thereof agree to continue voluntary and cooperative discovery practices." Section 11 of the Second EARP states "Nothing in this Stipulation and Agreement is intended to impinge or restrict in any manner the exercise by the Commission of any statutory right, including the right of access to information, and any statutory

obligation." Reading all of these sections together, the Second EARP does not change the existence or applicability of Commission Rule 4 CSR 240-2.090 regarding discovery. In fact, Section 8(b) of the Second EARP is clearly on point where "UE, Ameren and any affiliate or subsidiary" agree to continue voluntary and cooperative discovery practices.

In its written opposition filed on November 3, 2000, AmerenUE argues that Section 7(e) relating to monitoring reports and Section 7.f.iv. relating to preliminary and final earnings reports provide the Staff with "more than enough information to fulfill every task under the EARP."

In light of Section 8(b), AmerenUE cannot reasonably argue that it did not expect the use of discovery in these Second EARP proceedings. Therefore, the Commission finds that normal discovery procedures as set forth in Commission Rule 4 CSR 240-2.090 do apply to the Second EARP and its implementation specifically as it relates to the evaluation of the EARP process pursuant to Section 7(g) of the Second EARP.

AmerenUE failed to file a specific objection to DRs 59, 61-72, 73, 75-78, 80, 82-86, and 88-107, and therefore, the Commission will direct AmerenUE to file its answers to DRs numbers 59, 61-72, 73-78, 80, 82-86, and 88-107 within the time period required by Commission Rule 4 CSR 240-2.090(2), and if the time for answering a DR has passed, the Commission will allow AmerenUE additional time for filing its answer. The Commission finds that, after considering AmerenUE's

general objection, even if the objection had been specific enough, AmerenUE's substantive argument was incorrect.

### Specific Objections to DRs

In a letter dated October 12, 2000, AmerenUE raised an additional objection to DR 74 on the grounds that the request made in DR 74 is vague, overly broad, and unduly burdensome. AmerenUE alleges that this request fails to specify any given time frame for the information requested. DR 74 states

DR 74: Please describe all actions the Company has undertaken to improve plant efficiency and to reduce fuel costs for each Ameren generating facility. Provide all cost savings or production savings achieved.

DR 74 does lack a time frame for the information requested by Staff. AmerenUE states that it is being asked to "expend many manhours to produce a response containing volumes and volumes of information which would not lead to the discovery of relevant, admissible evidence." Because of the lack of adequate time parameters in DR 74, the Commission will deny Staff's Motion to Compel as the data request is overbroad as written. Staff may issue a DR relating to the same subject matter as long as the request includes a reasonable time frame.

In AmerenUE's objection letter dated October 19, 2000, AmerenUE also objected to DR 87 on the grounds that this request is vague, overly broad and unduly burdensome. DR 87 states

DR 87: Provide a copy of all interviews (internal and external) and all internal correspondence from all Ameren employees in relation to the Venice power plant outage. Provide for the period covering the time of the accident through the present.

Unlike its specific objection to DR 74, AmerenUE does not specify why it believes that DR 87 is "vague, overly broad and unduly burdensome." Therefore, the Commission will direct AmerenUE to respond to DR 87.

**IT IS THEREFORE ORDERED:**

1. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is granted in part in that Union Electric Company d/b/a AmerenUE shall answer Data Request numbers 59, 61-72, 73, 75-78, 80 and 82-87 as soon as possible, but in no event later than November 19, 2000.

2. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is granted in part in that Union Electric Company d/b/a AmerenUE shall answer Data Request numbers 88-107 within the time period required by Commission Rule 4 CSR 240-2.090(2).

3. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, as amended on October 30, 2000, is denied in part in that Data Request 74 is found to be overly broad because it failed to provide time frames for which the data was requested.

4. That the motion for reconsideration filed by Union Electric Company d/b/a AmerenUE on November 2, 2000, is denied.

5. That this order shall become effective on November 19, 2000.

**BY THE COMMISSION**

A handwritten signature in black ink, reading "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

(S E A L)

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur  
Murray, C., dissents with dissenting opinion

Register, Regulatory Law Judge

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the Matter of the Application of Union       )  
Electric Company for an Order Authorizing:       )  
(1) Certain Merger Transactions Involving       )  
Union Electric Company; (2) The Transfer       )  
of Certain Assets, Real Estate, Leased       ) Case No. EM-96-149  
Property, Easements and Contractual       )  
Agreements to Central Illinois Public       )  
Service Company; and (3) In Connection       )  
Therewith, Certain Other Related Transactions)

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

The Commission acted prematurely when we granted in part Staff's Motion to Compel, ordering UE to answer 16 Data Requests prior to receiving UE's response to that motion. Therefore, we should grant UE's motion for reconsideration. UE's motion adequately explains its failure to timely object to data requests under a discovery procedure that arguably does not apply to the instant proceeding.

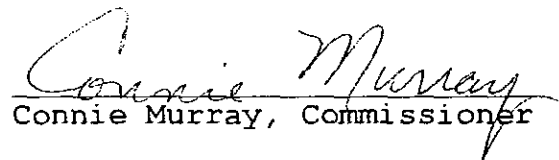
The information required of UE under the terms of the EARP does not include, as Staff claims it does, the degree of information required in a "revenue cost of service audit". As UE points out, we have not directed Staff to perform such an audit. Staff's task under the EARP is merely to file a recommendation as to the future of the second EARP. The EARP explicitly states the type of information to be provided. Staff

does not have a right to demand, in this proceeding, information beyond that relevant to the recommendation that it must file by February 1, 2001.

The proper direction for this Commission to give the parties at this juncture would be to order them to meet for the purpose of reaching an agreement about the information to be provided. If no such agreement could be reached within a reasonable time, we could order an on-the-record presentation of the legal arguments concerning the motions.

For these reasons, I respectfully dissent.

Respectfully submitted,

  
Connie Murray, Commissioner

Dated at Jefferson City, Missouri,  
on this 9th day of November 2000.

**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 9<sup>th</sup> day of Nov. 2000.



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**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY  
November 9, 2000**

**CASE NO: EM-96-149**

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Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge