

December 7, 2001

VIA HAND DELIVERY



Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
Jefferson City, MO 65101

FILED³

DEC 7 2001

Missouri Public
Service Commission

Re: MPSC Case No. EC-2002-1

Dear Mr. Roberts:

Enclosed for filing on behalf of Union Electric Company, d/b/a AmerenUE, in the above matter, please find an original and eight (8) copies of **Union Electric Company's Response To The Office Of Public Counsel's Motion To Compel.**

Kindly acknowledge receipt of this filing by stamping a copy of the enclosed letter and returning it to me in the enclosed self-addressed envelope.

Very truly yours,

James J. Cook / sh

James J. Cook
Managing Associate General Counsel

JJC/cjs
Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³
DEC 7 2001

Missouri Public
Service Commission

The Staff of the Missouri Public
Service Commission,

Complainant,

v.

Union Electric Company, d/b/a
AmerenUE,

Respondent.

Case No. EC-2002-1

**UNION ELECTRIC COMPANY'S RESPONSE TO
THE OFFICE OF PUBLIC COUNSEL'S
MOTION TO COMPEL**

COMES NOW Union Electric Company d/b/a AmerenUE ("the Company" or "UE") in response to the Office of Public Counsel's ("OPC") Motion to Compel the Company to produce all documents within the scope of Data Request Nos. 554, 555, and 726 through 741 in the above matter.

In Response, the Company will address each paragraph in the Motion *seriatim*.

Data Requests 554 and 555

1. The Company does not dispute the claims made in paragraph 1.
2. The Company agrees that its response to DR 554 and 555 included certain data, as requested, and a statement that other documents were being withheld because they "fall within the attorney client privilege." The Company did not file an objection claiming attorney/client privilege within ten days, because the Company did not know that the documents which were otherwise responsive to the DR included attorney/client

documents until after they were accumulated, which was not completed until after the ten day period. The Company also agrees that it did not produce redacted documents or a privilege log at that time.

3. The Company agrees that it has communicated with the OPC, and participated in a conference with the Regulatory Law Judge. The Company also agrees that the privilege log attached to the Motion is the log that the Company produced.

4. OPC asserts that it cannot understand why the Company, "with ample legal resources would not be able to ascertain within ten (10) days of receipt whether it believed that a privilege applied to requested documents." In addition, OPC expresses concern about the Company's inability to "make timely objections when the objections involve legal matters (i.e. "attorney/client privilege"). In addition, Staff quotes a court decision, stating that "the proper time for objection is when the question calling for disclosure of privileged matters is asked and before it is answered."

The Company agrees that an objection must be made before the question is answered. The Company did just that. The Company did not answer (or in this case, produce the requested materials) because the Company determined – only after finding and examining the documents – that they were covered by the attorney/client privilege.

OPC's interpretation of the law seems to be that the Company is to know, even before it finds the requested documents, that the request calls for documents that are covered by the privilege. Obviously, if the request had been specific in asking for "all documents prepared by attorneys in response to requests for legal advice," the Company could have raised the objection immediately.

However, absent a request that is obvious on its face, the Company could not know whether a document that otherwise was responsive to the data request was also a document covered by the privilege, until the document was found. The Company had more than ten days to find the documents. Therefore, the Company must have more than ten days to raise an objection that cannot be known until the documents themselves are recovered and examined.

Concerning the fact that the response itself was delayed, the Company can only apologize and inform the Commission that it is doing the best it can, responding to a great many data requests, and responding to the vast majority of those requests in a timely manner. Whether the Company's legal resources are "ample" enough to produce all requested documents within the time provided, the Company's legal department must rely upon the other officers, managers and employees of the Company to search their files for responses to most DRs. Given the very large number of such DRs that the Company has received from the OPC, Staff and other parties, the Company believes that its record in responding is really quite good – not perfect – but respectable.

5. The Company denies that it has waived its attorney/client privilege on the documents in dispute here. Under OPC's theory, the Company will need to assert that privilege – as well as all other types of objections that cannot be known until specific documents are found and reviewed – for every DR received, within ten days. Then after the documents are retrieved, we can, one supposes, retract the privilege claims where they turn out not to apply. This does not seem to be a very logical or efficient process.

Obviously, objections that are obvious from the question (or document request) itself, should be made as soon as possible, and within the ten day period.

Certainly the Company should (and does) endeavor to make objections such as “irrelevance” as soon as possible after reading the request. However, the ten day period does not restrict the ability of a party to raise those objections that cannot be known until the documents themselves are found and reviewed.

Data Requests 726 – 741

6. The Company agrees with the statements in paragraph 6.

7. OPC argues that these DRs, which request a significant amount of data concerning “time of use” or “time of day” rates, might help prepare their case.

This is a rate complaint case – a case that has been initiated by the Staff, claiming that the Company’s rates are too high. The Staff’s direct testimony contains very limited “rate design” testimony. In fact, the Staff’s rate design recommendations are limited to two very distinct points, as set out on page three of the testimony of Mr. James Watkins. There is no suggestion in Staff’s testimony about any other rate design changes, additions, revisions, or any other modification that would warrant a detailed examination of the type of material that OPC now requests.

OPC has not filed a complaint. Therefore, as of now, any discussion of the type of rate design modifications that OPC might be considering, is irrelevant. OPC’s argument that the information “could be helpful,” or is “reasonably calculated to lead to the discovery of evidence relevant to the issues...” would mean that virtually everything under the sun is relevant. The “reasonably calculated” rule is certainly a rule that can be used to decide whether a discovery request is appropriate or not. But it should not be read so broadly as to be meaningless.

8. The Company agrees that this matter has been discussed with the Regulatory Law Judge and that the parties have not reached an agreement.

9. Paragraph nine includes OPC's argument that it has an ongoing statutory right to conduct discovery of regulated utilities. The statutory reference included by OPC also includes a "good cause shown" standard. In other words, just because the OPC asks for something, does not mean that the Company is obliged to provide it. There still must be some limits. The Company suggests that in this case, the limit is the issue of relevance in the context of the case in which the request is made. In this case, this request is irrelevant and the Company's objection should be upheld.

WHEREFORE, the Company respectfully requests that the Motion to Compel be denied.

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a AmerenUE

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class U.S. mail, postage prepaid, on this 7th day of December, 2001, on the following parties of record:

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