

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 24th  
day of January, 2002.

Staff of the Missouri Public Service  
Commission,

Complainant,

v.

Union Electric Company,  
d/b/a AmerenUE,

Respondent.

**Case No. EC-2002-1**

**ORDER DENYING MOTION TO COMPEL  
DATA REQUESTS 554 AND 555**

This is an order denying the Office of Public Counsel's Motion to Compel Respondent UE to produce documents corresponding to Public Counsel's Data Request Nos. 554 and 555. The controlling rule is found at 4 CSR 240-2.090(2) and states, in pertinent part, that if a recipient objects to data requests, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within 10 days after receipt of the data request.

This discovery dispute began with Public Counsel's filing of its motion to compel on November 30, 2001. UE timely filed its response to that motion on December 7.

Attorney-Client Privilege Objection to Data Requests Nos. 554 and 555

Public Counsel is requesting correspondence and other legal documents relating to the Joint Dispatch Agreement which allocates off-system sales revenues to company ratepayers. UE provided a partial response to data requests No. 554 and 555 and, along with its response, UE raised the objection that the other data sought was protected by the attorney-client privilege. UE noted that it could not ascertain the fact that this data would be protected by the attorney-client privilege until it actually researched and recovered the data. This process took more than the 10 days which is provided for objection in the Commission's rule. UE objected as soon as it became aware of the exact nature of the data.

Public Counsel argues that because UE did not plead its attorney-client privilege within the ten-day period established by rule, the privilege is waived. Public Counsel cites Gipson v. Target Stores<sup>1</sup> in support of this argument. The Gipson decision states, "The proper time for objection is when the question calling for disclosure of privileged matters is asked and before it is answered."(*Emphasis added*)<sup>2</sup> Under the present circumstances, Public Counsel applies this principle incorrectly. In fact, the case cited by Public Counsel actually supports UE's contention that there has been no waiver inasmuch as UE objected when the question calling for disclosure of privileged matters was asked, and before it was answered.

In its motion to compel, Public Counsel has also argued that, by virtue of missing the 10-day objection period, UE's waiver of its objection is virtually automatic. Following Public Counsel's argument, information which is protected by the attorney-client

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<sup>1</sup> Gipson v. Target Stores 630 S.W.2d 107 (Mo.App. 1981) (Quoting Rock v. Keller 278 S.W. 759, 766 (1926)).

<sup>2</sup> Gipson at 109.

privilege on the 10<sup>th</sup> day will not be protected by the attorney-client privilege on the 11<sup>th</sup> day, simply due to the stroke of midnight on day ten.

In further support of its argument, the Public Counsel cites a Commission order in which a party missed the 10-day deadline for objection and was subsequently compelled to provide the requested information.<sup>3</sup> The order referred to by Public Counsel did indeed order a respondent to provide data after it had missed the 10-day objection deadline. However, Public Counsel did not make any showing that the order cited is relevant in this case. There is no indication that the order cited dealt with any privilege and Public Counsel did not assert that there was any such relevance.

Conversely, in circumstances dealing with privilege, the Commission has issued orders in which it denied a motion to compel even though the respondent missed the 10-day deadline. In fact, Public Counsel was the party for whom the motion to compel was denied. The Commission would refer the parties to an order regarding motion to compel issued in Case No. EM-2000-753 in which the Commission held:

The requirement that such written objection be filed within 10 days does not, and cannot, apply to privilege claims relating to specific documents to be disclosed under otherwise objectionable data requests. The Commission holds that claims of privilege relating to the disclosure of specific documents need not be asserted within 10 days of service of a data request.

In spite of the duty of candor, which requires an attorney to inform the tribunal of contrary authority, Public Counsel did not mention the situation where the Commission had ruled against it on similar facts.

Admittedly, UE did not object within the 10 days established by the Commission's rule. If UE was aware that the information requested was privileged, it should have

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<sup>3</sup> See Order Denying Motion to Expedite and Order Granting In Part the Motion to Compel, Case No. EM-96-149, October 31, 2000.

objected within 10 days of receiving that request. Timely objection to data requests is always important, and particularly so in this case.

Nevertheless, it has been well-settled law in Missouri, since 1926, that an objection based upon privilege is not waived unless the answer has already been given.<sup>4</sup> According to the privilege log, the documents sought appear to be documents exchanged between UE attorneys and their subject matter experts. That log is attached. The documents requested by Public Counsel for Data Request Nos. 554 and 555 remain under UE's attorney-client privilege, and therefore need not be produced. The importance of maintaining the protected confidentiality in attorney-client relationships dictates this result. Therefore, in keeping with its previous rulings, the Commission will deny Public Counsel's motion to compel.

Lastly, as a possible alternative, Public Counsel requested that if the commission were to deny its motion to compel it should either require production of the attorney-client documents in a redacted form or appoint a special master. After initially considering this matter the Commission offered the parties an opportunity to provide additional support for their respective positions. Public Counsel, AmerenUE, and Staff each filed a response. Public Counsel made a lengthy argument as to the relevancy of the data sought. Relevance of attorney-client communications does not make them discoverable. There has been no evidence, nor even suggestion, that UE is somehow using the privilege to shield information which does not fall within the privilege. Absent any such evidence, the Commission cannot justify any such invasive and time-consuming procedures. Based upon the responses of Public Counsel, Staff, UE, and the research the Commission has performed, the Commission finds that the attorney-

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<sup>4</sup> Rock v. Keller, 312 Mo. 458, 278 S.W. 759, 766(4) (1926).

client privilege properly applies and Public Counsel's request for production of redacted documents or for the appointment of a Special Master will also be denied.

**IT IS THEREFORE ORDERED:**

1. That the Motion to Compel filed by the Office of the Public Counsel is denied as to its Data Requests Nos. 554 and 555, and AmerenUE shall not be required to respond to those data requests.
2. That this order shall become effective on February 3, 2002.

**BY THE COMMISSION**



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

(S E A L)

Simmons, Ch., Murray, Lumpe, Gaw,  
Forbis, CC., Concur.

Dale Hardy Roberts, Chief Judge

**AMERENUE PRIVILEGE LOG IN CASE NO. EC-2002-1  
OPC DATA REQUEST NOS. 554 AND 555**

Number	Date	Author	Recipient(s)	Description	Privilege
1	1-31-00	M. Seidler (Ameren Energy, In-house Counsel)	J. Whitesides (Ameren Energy, President)	Legal Memorandum regarding Expansion of Ameren Energy's Business and Assets	Attorney-Client Privilege
2	6-7-00	M. Seidler	A. Serri (Ameren Energy Marketing, Vice President)	E-mail regarding the Joint Dispatch Agreement and Accounting issues	Attorney-Client Privilege
3	6-20-00	K. Wabel (Ameren Energy Resources)	J. Whitesides, A. Serri, M. Seidler, and R. Porter (Ameren Energy Resources)	E-mail regarding the JDA and development projects for Ameren Energy Resources	Attorney-Client Privilege
4	8-8-00	B. Rettenmaier (Ameren Energy, Comptroller)	M. Seidler	E-mail regarding the JDA and Joppa plant	Attorney-Client Privilege
5	8-10-00	M. Seidler	J. Hopf (Ameren Energy, Senior Vice President)	E-mail regarding the JDA and new generation assets	Attorney-Client Privilege
6	8-28-00	M. Seidler	J. Whitesides, J. Hopf, A. Serri and S. Sullivan (Ameren Corporation, Vice President and General Counsel)	E-mail regarding the JDA and potential transactions for Ameren Energy and Ameren Energy Marketing	Attorney-Client Privilege
7	9-5-00	M. Seidler	J. Whitesides, J. Hopf, and B. Rettenmaier	Legal Memorandum concerning the JDA and proposed Ameren Energy Marketing capacity sale	Attorney-Client Privilege
8	9-8-00	M. Seidler	C. Nelson (Ameren Services, Vice President) and U. Heinze (Ameren Energy Resources, Manager)	Legal Memorandum concerning the JDA and proposed Ameren Energy Marketing capacity sale	Attorney-Client Privilege
9	10-20-00	M. Seidler	A. Serri, J. Hopf, J. Johnson (Ameren Energy, Vice President), B. Rettenmaier and D. Pisaní (Ameren Energy, Director)	Legal Memorandum regarding the JDA and proposed Ameren Energy Marketing transaction	Attorney-Client Privilege
10	3-5-01	A. Serri	M. Seidler	E-mail regarding the JDA and proposed Ameren Energy Marketing transaction	Attorney-Client Privilege
11	3-6-01	J. Raybuck (Ameren Services, In-house Attorney)	S. Sullivan and J. Cook (Ameren Services, Managing Associate General Counsel)	E-mail regarding the JDA and proposed Ameren Energy Marketing transaction	Attorney-Client Privilege
12	3-7-01	M. Seidler	J. Whitesides	E-mail regarding the JDA and proposed Ameren Energy Marketing transaction	Attorney-Client Privilege

**AMERENUE PRIVILEGE LOG IN CASE NO. EC-2002-1  
OPC DATA REQUEST NOS. 554 AND 555**

Number	Date	Author	Recipient(s)	Description	Privilege
13	3-20-01	A. Statman (Wright & Talisman, Outside Attorney)	S. Sullivan	Legal Memorandum regarding the JDA and FERC issues for proposed Ameren Energy Marketing transaction	Attorney-Client Privilege
14	7-13-01	A. MacDonald (Thelen Reid, Outside Attorney)	J. Raybuck and W. Baker (Thelen Reid, Outside Attorney)	E-mail regarding the JDA and SEC issues	Attorney-Client Privilege
15	7-13-01	J. Raybuck	S. Sullivan and J. Cook	E-mail regarding the JDA and various regulatory issues	Attorney-Client Privilege
16	7-27-01	M. Seidler	S. Sullivan, J. Cook, R. Evans (Ameren Services, Managing Associate General Counsel), J. Raybuck and D. Hennen (Ameren Services, Associate General Counsel)	E-mail forwarding Legal Memorandum of January 31, 2000	Attorney-Client Privilege
17	8-10-01	M. Seidler	J. Hopf	E-mail forwarding Legal Memorandum of January 31, 2000	Attorney-Client Privilege
18	9-26-01	M. Seidler	J. Whitesides	Legal Memorandum regarding the JDA and Cross Commodity Trading	Attorney-Client Privilege