

of admissible evidence.”¹ Sierra Club, the party seeking discovery, bears the burden of establishing relevance.² If the Commission agrees with Sierra Club on the threshold relevance question, it must then address Ameren’s privilege assertion, to the extent the Commission believes Ameren has asserted a plausible privilege theory. Ameren, the party claiming that a privilege precludes discovery, bears the burden to show that the privilege applies.³

7. On relevance, the Commission should require Ameren to produce “unredacted copies of all documents produced to date as part” of the Company’s 2020 IRP, for at least two reasons.

8. First, the requested material is directly relevant to, and reasonably likely to lead to the discovery of admissible information regarding the prudence of Ameren’s request to invest approximately \$219.4 million in 2018 test year capital expenses, and another \$153.7 million in test year O&M spending at the Labadie, Rush Island, and Sioux coal-burning plants.⁴ A significant portion of those test year capital and O&M expenses are for ongoing environmental compliance retrofits at each of the three coal plants—specifically, compliance with EPA’s Effluent Limitations Guidelines (“ELG”) and Coal Combustion Residuals (“CCR”) Rule.⁵ Ameren’s rebuttal testimony makes clear that those environmental retrofits are ongoing, that the Company incurred significant, related capital costs in 2019, and that Ameren expects to incur additional costs on these same projects in 2020, and beyond. Thus, Ameren’s 2018 decision to retrofit its coal plants has effectively committed the Company—and by extension, its

¹ *In the Matter of the Application of Kansas City Power & Light Co. for Approval to Make Certain Changes in Its Charges for Elec. Serv. to Continue the Implementation of Its Regulatory Plan*, No. ER-2009-0089, 2009 WL 5069707, at *6 (Dec. 9, 2009).

² *Id.*

³ *Id.*, at *8.

⁴ See generally Revenue Requirement Direct Testimony of Avi Allison on Behalf of Sierra Club at 8, dated December 4, 2019.

⁵ Rebuttal Testimony of Jim Williams at 4-7, Schedule JLW-R1.

customers—to a multi-year environmental retrofit project that will cost hundreds of millions. Although Ameren submitted a formal IRP in September 2017, any analysis that the Company has conducted since then, or as part of its upcoming IRP, could be relevant to the prudence of both the Company’s initial 2018 retrofit decision and its continued investment in those projects.

9. Ameren suggests that the Ameren’s 2017 IRP provides a “reasonable basis” for the Company’s continued spending at Labadie, Rush Island, and Sioux,⁶ and that “information developed *after* those capital decisions were made” is irrelevant.⁷ But it is well-settled that a utility’s obligation to analyze the prudence of an investment or construction decision is not a static, once-and-done responsibility. Instead, the utility has an ongoing obligation to its ratepayers and to the Commission to evaluate the *continuation* of an investment, as well as its decision to enter into and *remain* in that particular investment.⁸ This requires the utility to respond prudently to changing circumstances or new economic or regulatory challenges that arise as a project progresses. The Company’s duty to prudently plan and operate its environmental compliance projects did not end in September 2017, but continues today, and the Commission is entitled to review current information about those compliance projects and the economics of the coal-burning units.

10. In this case, Sierra Club witness Avi Allison presented substantial evidence demonstrating that Ameren’s 2018 test year expenses were imprudent, and that those investment

⁶ Rebuttal Testimony of Matt Michels at 8.

⁷ Ameren Response to Sierra Club Discovery Concern at 6 (emphasis in original).

⁸ *Application of El Paso Electric Company for Authority to Change Rates*, Docket No. 5700, 10 P.U.C. BULL 1071, 1984 WL 274081 at *27 (Oct. 26, 1984, on modification Dec. 7, 1984). The utility has a continuing responsibility to respond to “changing circumstances or new challenges that arise as a project progresses.” *Gulf States Utilities Co.*, 578 So. 2d at 85 (citing *Long Island Lighting Co.*, Case No. 27563, 71 P.U.R.4th 262 (N.Y. Pub. Serv. Comm’n Nov. 16, 1985), and *Central Vermont Public Service Corp.*, Docket No. 5132, 83 P.U.R.4th 532 (Vt. Pub. Serv. Bd. May 15, 1987)), and *Central Vermont Public Service Corp.*, Docket No. 5132, 83 P.U.R.4th 532 (Vt. Pub. Serv. Bd. May 15, 1987).

decisions relied on a series of unreasonable 2017 IRP assumptions that were out-of-date by the time the Company began to incur the 2018 retrofit costs. With that in mind, Sierra Club sought discovery of any analyses or documentation developed after 2017, and in anticipation of 2020 IRP, that might be relevant to the prudence of the Company's CCR and ELG retrofits.

11. Ameren cannot artificially confine the Commission's evaluation of the prudence of the Company's 2018 expenses by asserting that only the assumptions included in a 2017 IRP are relevant. Instead, the Commission has the authority and obligation to ensure that those 2018 expenses were prudently incurred (and continue to be prudent) based on known and knowable risks at the time they were incurred and will be incurred. And in evaluating the prudence of Ameren's continued 2018 capital investments, any updated analyses, assumptions, or documentation developed as part of the Company's 2020 IRP could lead to relevant information about the reasonableness of Ameren's continued investment in the CCR and ELG projects.

12. Second, documents created in the 2020 IRP are relevant to Sierra Club's challenge to the general O&M expense for the coal-burning plants, which will continue beyond the 2018 test year if approved without limitation in this docket. The amount of customer money at issue is indisputably significant. This future O&M beyond the test year makes current information about the Ameren coal plants relevant to the Commission's resolution of this case. On this issue as well, the Company has argued in its discovery objections and at the February 10, 2020 discovery conference that the 2017 IRP is the primary factual basis that it intends to rely on in order to justify its ongoing coal plant spending. But Ameren is not entitled to determine which facts are relevant to the prudence of its spending—that responsibility is vested with the Commission. The Commission has an obligation to rely on the most-persuasive relevant evidence in determining the prudence of spending charged to regulated electric customers.

Because the coal plant O&M costs will continue into future years beyond the test year if Ameren's request in this case is granted, current information about the economics of coal plants is potentially relevant to the Commission's decision in this case. For these reason, information from the development of the 2020 IRP is relevant to the Commission's decision in this case.

13. As to the privilege assertion, the Company's work product arguments are without merit and it cannot meet its burden to block relevant discovery on this ground. As preliminary point, in its February 7, 2020 Response to Sierra Club's Statement, the Company cited no authority in support of its work product claim. In any event, the Commission, in its December 3, 2019 Establishing Special Contemporary Issues, stated that with respect to the 2020 IRP that "[t]his is not a contested case."⁹ Ameren should not be permitted to hide relevant data from the Commission in a rate case where customers' bills are at stake based on its inchoate concern about preparing for a non-contested filing, especially where much of the work of the IRP has nothing to do with legal analysis.¹⁰ Further, the work product doctrine is a "qualified" privilege¹¹ against production of responsive documents that can generally be outweighed by need. Here, the Commission's statutory obligation to set just and reasonable rates and therefore its need for the best information to assess prudence of ongoing O&M and the ongoing spending on the environmental projects at Ameren's coal plants outweighs any potential concern about the future non-contested filing.

⁹ File No. EO-2020-0047, Revised Order Establishing Special Contemporary Resource Planning Issues, Dec. 3, 2019.

¹⁰ For example, the IRP will include an assessment of the cost of building hypothetical new power plants of various types. These assessments have very little to do with any lawyer's opinion, but are matters of economics and engineering.

¹¹ *State ex rel. Safeco Nat. Ins. Co. of Am. v. Rauch*, 849 S.W.2d 632, 635 (Mo. Ct. App. 1993).

14. Sierra Club respectfully asks for a decision by February 27, 2020, which is the penultimate business day before the evidentiary hearing is set to begin in this proceeding. This Motion has been filed as soon as possible after the February 10, 2020 discovery conference. If Commission is unable to decide this Motion by February 27, 2020, the Commission may be deprived of relevant evidence that would aid in its decision of Ameren's request to include coal plant spending in customers' rates and impair its ability to set just and reasonable rates.

15. For these reasons, Sierra Club respectfully requests expedited treatment of this Motion and further asks that Ameren be compelled to produce a response to Sierra Club Data Request 6.3.

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Dated: February 11, 2020

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was filed in EFIS on this 11th day of February, 2020, with notice of the same being sent to all counsel of record.

/s/ Tony Mendoza _____
Tony Mendoza