BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's 2020 Utility Resource Filing Pursuant to 20 CSR 4240 – Chapter 22.	)))	File No. EO-2021-0021

SIERRA CLUB'S RESPONSE TO MOTION FOR PROTECTIVE ORDER

1. In an attempt to circumscribe Sierra Club's access to indisputably relevant evidence in this proceeding, Union Electric Company d/b/a Ameren Missouri ("Ameren" or the "Company") advances several irrelevant arguments that fail, on their face, to meet the Commission's legal standard for granting a heightened protective order. Under 20 CSR 4240-2.135(4), Ameren must identify a concrete and specific harm that creating extra protections would remedy. Ameren fails to meet that standard and, instead, speculates that allowing Sierra Club equal access to relevant evidence *might* prejudice the Company's future negotiating posture *if* the Eighth Circuit remands a U.S. District Court order finding Ameren liable for Clean Air Act violations. Ameren also posits that Sierra Club *might* inadvertently disclose information that might harm the Company in some unidentified way, or that Sierra Club will take supposedly inconsistent positions regarding the prudence of spending a billion dollars to continue operating Rush Island and Labadie in a manner that complies with the Clean Air Act. These arguments are without merit, and Ameren fails to identify any precedent supporting the Company's request for a protective order under these circumstances. In fact, Ameren raised many of these very same arguments in its effort to prevent Sierra Club's in-house counsel from effectively participating in *United States v. Ameren Missouri*, Case No. 11-cv-00077 (E.D. Mo.). The Chief Judge of the U.S. District Court for the Eastern District of Missouri rejected those arguments, and the Commission should do the same. Because Ameren has not met its burden, the Commission should deny Ameren's motion for protective order.

I. Background: Ameren's Protective Order Motion

2. In 2011, the United States Environmental Protection Agency ("EPA") filed suit against Ameren for illegally modifying the Rush Island Energy Center and significantly increasing harmful pollution without a permit and without installing best available control technology, in violation of the Clean Air Act. To protect its members and the public from excess harmful pollution, Sierra Club intervened to support EPA's claims and to advocate for the reduction or elimination of harmful air pollution from the Rush Island plant.

3. In January 2017, the U.S. District Court for the Eastern District of Missouri issued a comprehensive, 195-page order detailing Ameren's multiple violations of the Clean Air Act at the Rush Island power plant.[1] In September 2019, the court issued a detailed, 165-page order requiring the installation of pollution controls at both the Rush Island and Labadie plants to reduce emissions of sulfur dioxide ("SO_2") as a remedy for the Company's multiple violations of the law.[2] Dr. Joel Schwartz, a prominent scientist at Harvard's School of Public Health and a key expert witness in the case, estimated that between 2007 and 2016, the violating emissions from Rush Island contributed to as many as 800 premature deaths.[3]

4. Under the ruling, Rush Island Units 1 and 2 are required to reduce SO_2 emissions at a level commensurate with, or lower than, the installation of wet flue gas desulfurization, and Labadie must reduce emissions to meet SO_2 limits equivalent or lower than the installation of Dry Sorbent Injection. The exact magnitude of the costs remains to be determined, but it will likely exceed $1 billion. EPA and Sierra Club are vigorously defending the district court's order on appeal,

[1] *United States v. Ameren Missouri*, 229 F.Supp.3d 906 (E.D. Mo. 2017).

[2] *United States v. Ameren Missouri*, 421 F.Supp.3d 729 (E.D. Mo. 2019), *appeal docketed*, No. 19-3220 (8th Cir. Oct. 11, 2019).

[3] *Id.* at 786.

and Ameren's speculation that it is "unlikely" the Eighth Circuit will affirm the district court's detailed factual and legal findings is wishful thinking.

5. The Commission subsequently issued an order directing Ameren in its 2020 Integrated Resource plan to "[m]odel scenarios related to environmental upgrades to the Rush Island and Labadie coal-fired plants as mandated by the federal courts," as Sierra Club has advocated for years.[4] Revised Order Adopting Special Contemporary Issues, File No. EO-2020-0047 (Dec. 3, 2019), referred to hereafter as "SCI 1.D."

6. On September 27, 2020, Ameren filed a Motion for Protective Order seeking to prohibit Sierra Club attorneys with access to the SCI 1.D IRP materials from sharing it with "any Sierra Club employee, consultant, attorney, witness, agent, or representative of any kind that is involved" in *United States v. Ameren Missouri*, Case No. 11-cv-00077 (E.D. Mo).[5]

7. As the primary basis for its motion, Ameren alleges that certain Sierra Club representatives' access to information regarding SCI 1.D "*could* compromise Ameren Missouri's future negotiating posture should modification of the district court's judgment become appropriate and necessary in order to achieve an outcome that is in the best interests of Ameren Missouri customers, in the unlikely event that the district court's judgment was upheld."[6]

[4] *See, e.g.*, *In the Matter of Ameren Missouri's 2017 Utility Resource Filing*, File No. EO-2018-0038, Item No. 44 (Sierra Club Comments at 2, 8 (Feb. 28, 2018)), Item No. 54 (Joint Filing ¶ 60 (Apr. 30, 2018)), and Item No. 58 (Sierra Club's Reply to Ameren Missouri's Response to Alleged Deficiencies (May 30, 2018)).

[5] Mot. for Protective Order ¶ 10.

[6] Mot. ¶ 7 (emphasis added).

II. Ameren Has Not Shown a Likelihood of "Harm" from Granting Access to SCI 1.D Materials to Sierra Club Representatives.

8. Pursuant to 20 CSR 4240-2.135(4), Ameren must identify a concrete and specific harm that creating extra protections under the protective order would remedy. For the reasons that follow, Ameren has not met its burden that it would be harmed by allowing Sierra Club's representatives access to SCI 1.D materials.

9. First, Ameren's allegations of harm are rife with cascading, pure speculation. Ameren argues that, *if* the litigation presently before the 8th Circuit is remanded to the district court, *if* the parties engage in settlement, *if* Sierra Club representatives involved with that case have reviewed the *hypothetical* scenarios contained within SCI 1.D, and *if* those economic scenarios are still accurate, *then* it "*could* compromise" Ameren's negotiating posture.[7] Even if Ameren could demonstrate that each of those contingencies is likely to occur (which it cannot), the Company offers no specifics on how this information might actually harm them in negotiation. Those kinds of "conjectural" and "hypothetical" allegations are not sufficient to establish any judicially cognizable harm.[8]

10. Second, if the 8th Circuit remands the case back to the district court, it is likely that Plaintiffs will obtain this very data in discovery because Ameren's own estimates of the costs and benefits of retiring these coal plants will be indisputably relevant and proportional to the needs of

[7] *Id.*

[8] *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674, 676 (D.C. Cir. 1985) ("Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time'; the party seeking injunctive relief must show that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.") (quoting *Connecticut v. Massachusetts,* 282 U.S. 660, 674 (1931)); *see also U.S. v. Metropolitan St. Louis Sewer Dist.*, 569 F.3d 829, 839 (8th Cir. 2009) (ratepayers' alleged interest in avoiding higher rates that might be caused by a Clean Water Act enforcement was contingent on a number of future events and too speculative to demonstrate harm to a legally protected interest).

the case.[9] Indeed, as discussed below, Ameren already tried—and failed—to shield Sierra Club's in-house counsel from certain materials in the federal court litigation. Creating special protections in this proceeding will not remedy the harm that Ameren purports to be worried about.

11. Third, Ameren's proposed protective order is unnecessary because this Commission's confidentiality rules already preclude Sierra Club counsel from using information gleaned from this case in any other matter.[10]

12. Fourth, even if the allegations against Sierra Club had merit, Ameren is not making a logically consistent argument. Each Sierra Club attorney, as an officer of the court, is expected to adhere to the American Bar Association's Code of Professional Responsibility and/or the ethical rules relevant to the State Bar through which they are licensed. This sense of professional decorum holds true regardless of the case to which a Sierra Club attorney is assigned. Thus, it would be superfluous for the Commission to place any additional safeguards on this docket.

13. The Commission took a similar position in *Veolia Energy Kansas City, Inc. for Authority to File Tariffs to Increase Rates*, HR-2011-0241, 2011 WL 3223527, at *1, *5 (July 18, 2011) by denying Veolia Energy Kansas City's ("Veolia") protective order request that would have barred Kansas City Power & Light Company's ("KCP&L") internal counsel and expert witness from accessing Veolia's trade secrets. The Commission reasoned that the protective order was unnecessary because KCP&L's outside counsel could violate a protective order just as easily as its inside counsel could violate a confidentiality regulation. *Id.* As compliance ultimately hinged on ethical obligations, "[a]nother invisible line, just outside the one already existing, does not logically add more protection." *Id.* The same is true here, as an attorney barred from this docket could violate a

[9] Fed. R. Civ. Pro. 26(b)(1).

[10] *See* 20 CSR 4240-2.135(13) ("All persons who have access to information under this rule shall keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided").

protective order just as easily as an attorney working on this docket could violate a confidentiality regulation. Accordingly, Ameren's protective order request serves no purpose because Sierra Club attorneys, as officers of the court, are already bound by established standards of professionalism.

III. Ameren's Request, If Granted, Would Harm the Public Interest.

14. As explained above, Ameren's motion should be denied because the Company failed to state a non-speculative basis in favor of its request. But the public interest also favors rejecting Ameren's request. Indeed, Ameren's proposed protective order would establish a precedent that undermines transparency and encourages utilities to arbitrarily deny parties access to information. It would also hamper Sierra Club's ability to scrutinize Ameren's 2020 IRP for the benefit of captive customers.

15. Missouri's regulated utilities should not be permitted to limit scrutiny of their resource plans on a whim. Granting Ameren's motion would give regulated utilities the power to dictate which entities may scrutinize their resource planning on the basis of mere speculation and would therefore set a damaging precedent for Missouri's captive electric customers.

16. Ameren's proposed protective order would also impede Sierra Club's participation in the 2020 IRP docket, which has the potential to harm the public interest by short-circuiting inquiry of the 2020 IRP. Sierra Club, as it has historically, is prepared to aid in providing analysis of Ameren's resource plans, which can only benefit Ameren's customers. Indeed, Sierra Club was a party to Ameren's very first IRP, the entirety of which Ameren attempted to designate as highly confidential.[11] More recently, in Ameren's last rate case, Sierra Club's advocacy increased scrutiny of the utility's coal plant spending by, for example, defeating Ameren's refusal to produce coal plant

[11] *See Union Electric Company's d/b/a AmerenUE 2005 Utility Resource Filing*, File No. EO-2006-0240.

resource planning documents[12] and by unearthing the fact that Ameren was not previously maintaining records of the documents it uses to determine its MISO energy-market bids.[13] As in the recent rate case, and many other Commission proceedings, Sierra Club intends to devote its resources to evaluating Ameren's resource planning in this 2020 IRP, which involves consequential choices that will impact captive customers for years to come. From the perspective of Ameren's customers, more review of Ameren's 2020 IRP is indisputably better than less.

17. Finally, if Ameren's motion were granted as requested, Sierra Club would be required to incur additional consulting and expert expenses in this proceeding. Earlier this year, Sierra Club retained Tyler Comings to evaluate Ameren's 2020 IRP during the stakeholder process, and Mr. Comings aided Sierra Club in drafting the comments provided to Ameren on May 29, 2020. But because Mr. Comings assisted in the federal court litigation as a consultant (and not a witness) for the United States in the 2012-13 timeframe—approximately eight years ago—Ameren's proposed protective order would preclude his involvement in this proceeding.[14] As a result, Sierra Club would be required to seek a different expert. But Sierra Club's next-obvious choice, Dr. Ezra Hausman, whom Sierra Club retained to work on Ameren's 2014 and 2017 IRPs, would also be precluded for the same reason, as Dr. Hausman served as a witness in the NSR litigation years ago.

[12] Tr. Vol. IV at 106-207, 121-124, File No. ER-2019-0335 (Nov. 13, 2019) (Judge Dippell ordering Ameren, over its objection, to produce information about the reasonableness of continuing to operate Rush Island and Labadie in light of pending environmental compliance obligations).

[13] Revenue Requirement Direct Testimony of Avi Allison at 36:14-18, 37:1-7, File No. ER-2019-0335 (Dec. 4, 2019) (explaining that Ameren should adopt a policy of maintaining its energy market decision documents); Corrected Non-Unanimous Stipulation and Agreement ¶ 11, File No. ER-2019-0335 (Feb. 28, 2020) (adopting Sierra Club's recommendation regarding energy market decision documents).

[14] Mot. ¶ 19 (proposing to prohibit anyone with "involvement of any kind" in the NSR case from accessing the SCI materials).

18. Ameren fails to identify any need for precluding a consultant who worked on the Clean Air Act case nearly a decade ago (and has not participated since) from accessing 2020 IRP modeling scenarios, or harm that would follow as a result of such access. Ameren's proposed protective order would further hinder Sierra Club's engagement in Ameren's 2020 IRP docket because it would require Sierra Club to incur additional expense and delay while a new consultant familiarized themselves with the IRP. Moreover, the number of consultants available to work for public interest organizations pales in comparison to those willing to work for the private sector. There is good reason why public interest groups utilize the same stable of counsel and experts.

IV. Ameren's Arguments about Sierra Club's Handling of Information Are Irrelevant and Meritless.

19. Ameren makes two categories of allegations that, while irrelevant to its claim of harm associated with the hypothetical NSR litigation renegotiation, warrant a response because the Company has wrongly cast aspersions at Sierra Club's participation in cases before this Commission that we cannot leave unanswered.

20. First, despite Ameren's innuendo, Sierra Club has never publicly disclosed any of Ameren's confidential data—not in the recent rate case, not in its current IRP stakeholder process, not ever. In fact, in each of the instances of inadvertent disclosure cited by Ameren, Sierra Club immediately took steps to correct the disclosure. In the first incident, when Sierra Club responded to Ameren's discovery requests in another case in 2015, Sierra Club inadvertently produced *to Ameren* one of Ameren's own confidential documents that Sierra Club had obtained in a Commission matter involving Ameren. Sierra Club promptly rectified the situation, prompting Ameren's Director and Assistant General Counsel, Wendy Tatro, to compliment Sierra Club's counsel for his "very thoughtful response" to the situation.[15] Next, Sierra Club's counsel obtained expert deposition

[15] Ex. 1 (email exchange between S. Bector and W. Tatro).

transcripts of an Ameren expert witness who was also testifying in a Montana matter. Once Sierra Club counsel learned that the transcripts had been designated as Protected Material, he promptly returned the transcripts. Finally, lacking any basis for its request in Missouri, Ameren points to an Oregon order discussing Sierra Club's handling of PacifiCorp's confidential information where Sierra Club improperly disclosed PacifiCorp's information from one proceeding to PacifiCorp in another proceeding. Again, there was never public disclosure of any confidential information. None of these incidents involved bad faith, caused any harm to Ameren, involved public disclosure, or warrant the imposition of special remedial provisions against Sierra Club.

21. While Ameren goes to great lengths to describe the stakes of *United States v. Ameren Missouri*, the utility fails to mention that it unsuccessfully requested to shield access to certain information from Sierra Club's in-house counsel with the same set of misleading evidence, baseless conjecture, and absence of appropriate legal standards as it is attempting to do in this docket. In that case, Sierra Club observed when responding to Ameren's allegations that Ameren's outside counsel had accidentally disclosed 221 documents.[16] Rather than question Ameren's own ability to handle confidential materials or speculate "how many other times" similar mistakes may have occurred, Sierra Club remarked that "inadvertent mistakes can occur even when diligent counsel are involved."[17] The Chief Judge of the U.S. District Court for the Eastern District of Missouri heard these very same arguments from Ameren and was unpersuaded, as this Commission should be.[18]

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[16] *See* Sierra Club's Reply in Support of its Motion to Amend Stipulated Protective Order to Include Sierra Club, and Allow Sierra Club Equal Access to Discovery (Highly Confidential Materials Issue) at 10-11, Case No. 11-cv-00077 (E.D. Mo. May, 31, 2017). Ex. 2.

[17] *Id.* at 10.

[18] *See* Mot. and Status Hearing Tr. at 70-71, Case No. 11-cv-00077 (E.D. Mo. June 28, 2017). Ex. 3.

22. In Ameren's 2020 IRP proceeding, Sierra Club has already demonstrated its commitment to compliance with this Commission's confidentiality provisions. Indeed, on April 29, 2020, Ameren's counsel inadvertently emailed a confidential version of the Company's preliminary IRP assumptions to a non-lawyer, Sierra Club staff member. Upon realizing that the email contained confidential information, the Sierra Club staff member immediately informed Ameren of the mistake and deleted the file.[19] Additionally, when Sierra Club counsel received the same confidential file and replied to confirm that he deleted it, Ms. Tatro replied "we aren't asking attorneys to sign. Trusting in that whole ethical obligation thing!"[20]

23. Second, Ameren's concern that Sierra Club might take "contradictory positions" boils down to its attorneys not understanding that federal environmental laws and Missouri public utilities law have distinct purposes and require nuanced understanding. Consider the ramifications for Rush Island—one of the worst SO_2 polluters in the United States. Because the Clean Air Act exists, Sierra Club opposes Rush Island's ongoing and unabated SO_2 emissions, which endanger the public health and welfare well beyond Missouri's borders. If the 8th Circuit upholds the district court's liability and remedy decisions, the question for Ameren, its customers, Commission Staff, the Office of the Public Counsel, and intervenors will be what is the lowest-cost means of complying with the pollution requirements at Rush Island and Labadie. If retiring one or more units is the lower-cost option than retrofitting them, then any reasonable party would oppose an Ameren request to spend $1 billion to retrofit power plants that cannot compete in today's energy market. Doing so is not a "contradictory position" and, in any event, is irrelevant to Ameren's theory that Sierra Club's negotiating skills require unusual protections.

[19] Ex. 4.

[20] Ex. 5.

24. Ameren posits in ¶ 15 that a protective order is warranted because Sierra Club will use information from the SCI 1.D IRP materials to take a contradictory position in a future docket that will oppose the same controls that Sierra Club seeks to impose through federal litigation. This is a bizarre and improper argument to make as Ameren is essentially asking the Commission to shield it from future litigation based on speculation. Ameren does not even attempt to convey how access to SCI 1.D IRP materials is connected to Sierra Club's ability to argue a contradictory position in future cases. Ameren's argument thus fails from both a logical and evidentiary perspective.

V. Conclusion.

25. The Commission should not entertain Ameren's attempts to stonewall Sierra Club in this docket as it would set a dangerous precedent and further encourage the utility to muddle the legal process with unsubstantiated accusations, speculation, and innuendo. In sum, Sierra Club respectfully requests that the Commission deny Ameren's Motion for Protective Order.

/s/ Henry B. Robertson
Henry B. Robertson (Mo. Bar No. 29502)
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hrobertson@greatriverslaw.org

Attorney for Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was filed on EFIS and sent by email on this 7th day of October, 2020, to all counsel of record.

/s/ Henry B. Robertson
Henry B. Robertson

Exhibit 1

SIERRA CLUB

Sunil Bector <sunil.bector@sierraclub.org>

Highly Confidential/Proprietary documents

wtatro@ameren.com <wtatro@ameren.com> Fri, Dec 4, 2015 at 7:09 AM
To: Sunil Bector <sunil.bector@sierraclub.org>
Cc: Henry Robertson <hrobertson@greatriverslaw.org>, Thomas Cmar <tcmar@earthjustice.org>, Jill Tauber <jtauber@earthjustice.org>

Thank you for the very thoughtful response, Sunil. I appreciate the steps being taken in order to rectify this issue and prevent a reoccurrence.

Thanks

Wendy Tatro : : Director and Assistant General Counsel : : T 314.554.3484 : : F 314.554.4014

Ameren Missouri : : 1901 Chouteau Ave : : St Louis, MO 63166

From: Sunil Bector [mailto:sunil.bector@sierraclub.org]
Sent: Thursday, December 03, 2015 1:01 PM
To: Tatro, Wendy K
Cc: Henry Robertson; Thomas Cmar; Jill Tauber
Subject: Re: Highly Confidential/Proprietary documents

Dear Wendy,

Thank you for bringing this matter to our attention. We sincerely regret this inadvertent disclosure, and my email discusses how it happened along with corrective measures we will take to ensure that this mistake does not reoccur.

Context

We are currently involved in litigation against Ameren Missouri in federal court. Pursuant to this litigation, Sierra Club instituted a litigation hold in order to preserve (i.e., not destroy) documents that may be relevant to the litigation. Several Sierra Club staff, including me, are subject to this litigation hold. Ameren has sent Sierra Club over fifty requests for production of documents in the federal court litigation, and Sierra Club has made significant efforts (reviewing tens of thousands of documents) to provide Ameren with appropriate responsive documents, which to date total 2,726 documents.

The document in question, MPSC_1_MPSC_0081_Kevin_Thompson_Att_MPSC 0081 – MeramecAssessment-HC.pdf, was pulled from my email repository for production in the federal court case because it was responsive to one or more of Ameren's discovery requests.

EXHIBIT
J
Blumberg No. 5008

Destruction of highly confidential documents from ER-2014-0258

Sierra Club takes its responsibilities pursuant to 4 CSR 240-2.135 very seriously. The document in question had not been destroyed because the PSC case is not yet over. Indeed, on Tuesday I received a Highly Confidential filing in the rate case docket. Moreover, pursuant to 4 CSR 240-2.135(19), "[w]ithin ninety (90) days after the completion of the proceeding, including judicial review, all copies of all ... highly confidential information ... [must be returned or destroyed]" (emphasis added). Judicial review of the final order in the PSC case is ongoing, as the PSC's decision in ER-2014-0258 was appealed and is currently being litigated in state court. Thus, the requirement under 4 CSR 240-2.135(19) for Sierra Club to return or destroy the highly confidential (and proprietary) information it obtained during the course of Case No. ER-2014-0258 has not yet been triggered.

Sierra Club's inadvertent production

Sierra Club should not have disclosed Ameren's confidential document from the PSC venue to Ameren in another venue. We acknowledge this mistake, and we will take actions to ensure that it does not happen again. No other party has received this document, and we trust that Ameren has not suffered any harm as a result of receiving a copy of its own confidential information. We assure you that this document has not been—and is not intended to be—used as a basis for any cause of action that Sierra Club has asserted in the federal court litigation.

Corrective measures

(1) Our document review process has included a search for the phrase "highly confidential" in any potentially responsive document, in order to allow us to flag and cull out documents marked "highly confidential" from our searches for documents responsive to Ameren's discovery requests in the federal court litigation. The document at issue was not flagged because that phrase appeared nowhere in it. To make our review process more robust, we will search for the text "HC" in addition to "highly confidential" in both the text of the file and in the file name. Please note that other PSC documents from ER-2014-0258 did appear as a result of our searches for the phrase "highly confidential," and we both redacted them and marked them appropriately on our privilege log that we produced to Ameren in the federal court litigation.

(2) After receiving your email, we promptly searched our entire production for the word "confidential" to double check what we have produced to Ameren in the federal court litigation. This search turned up one more inadvertent disclosure with the file name "2014-12-05 - Hausman Direct Testimony FINAL.docx" and Bates No. PL_PROD004:PL-0065483.

(3) Ameren and Sierra Club have stipulated to a protective order in the federal court litigation. Pursuant to Paragraph 18 of this protective order and Fed. R. Civ. P. 26(b)(5)(B) (clawback provisions), Sierra Club has notified Ameren's counsel of the inadvertent disclosures and requested in writing that the two documents be returned or destroyed.

(4) As a gesture of good faith, Earthjustice, Great Rivers Environmental Law Center, and Sierra Club will destroy all documents labeled "Highly Confidential" or "Proprietary" (and any notes from those documents) from the following dockets by December 18, 2015: ER-2014-0258, EO-2015-0084, and EO-2015-0055. We have already instructed our experts to do the same.

(5) We will continue to monitor the status of our PSC cases, and we will destroy any proprietary or highly confidential information within the period specified by 4 CSR 240-2.135(19). We will also continue to notify our experts of their obligation to return or destroy this information.

Again, we apologize for this inadvertent disclosure. We believe that our corrective measures will prevent any similar problem from occurring in the future.

Best,

Sunil

Sunil Bector
Associate Attorney
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105-3441

415.977.5759 phone

On Mon, Nov 30, 2015 at 12:49 PM, Tatro, Wendy K <WTatro@ameren.com> wrote:

Gentlemen:

We have a problem. I am e-mailing the three of you because each of you represented the Sierra Club in Ameren Missouri's last rate case. It has come to my attention that in some non-PSC litigation currently pending, in which Ameren Missouri and Sierra Club are adverse, the Sierra Club has produced at least one Highly Confidential document that was provided to it in a Missouri Public Service Commission proceeding (the rate case). I do not know if any of you are directly involved in the non-PSC litigation, but, regardless, you are each responsible for complying with Commission regulations.

Access to the original document was provided to the Sierra Club via rate case discovery (the document in question was labeled MPSC_1_MPSC_0081_Kevin_Thompson_Att_MPSC 0081 – MeramecAssessment-HC.pdf) in File No. ER-2014-0258. The document was marked as Highly Confidential. The Sierra Club's attempt to use it in litigation outside of the case in which it was produced is a violation of Commission regulations, in several ways. I can think of at least three violations:

1. Only Ezra Hausman signed a non-disclosure agreement, which means only Mr. Hausman (along with you three attorneys) is allowed to view the document per 4 CSR 240-2.135(7). To the extent that ANYONE from the Sierra Club viewed this document other than Mr. Hausmann (or you three), it was done in violation of this regulation.

2. After a case is over at the Commission, the regulations impose a duty to return or destroy all Highly Confidential/Proprietary information within 90 days per 4 CSR 240-2.135(19). Since this case was over in June of 2015, all documents (and notes about the document) should have been destroyed by the Sierra Club no later than September of 2015. Clearly, this did not happen as the document in question was produced after that date.

3. Finally, the Commission's rules are very clear – Highly Confidential/Proprietary material is to ONLY BE USED in the Commission proceeding in which it was produced per 4 CSR 240-2.135(17). The regulation states, "All persons who have access to information under this rule must keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided." The Sierra Club's production of this document in another forum is a clear violation of this regulation.

As an attorney, I find these violations disturbing. I realize we have different viewpoints on various issues, but we should not have different viewpoints on whether to comply with Commission regulations.

My client finds these violations problematic and, given the nature of the violations, we will likely (at a minimum) seek special limitations upon what documents the Sierra Club is given access to in future cases before the MPSC. I cannot speak to what actions might be taken outside of the Commission proceedings.

At this time, I am requesting that each of you take on the duties imposed by Commission regulations - that you ensure all documents labeled as Highly Confidential or Proprietary Information (and any notes from those documents) are shredded and that you provide me an email confirmation of the same. This should be done for File Nos. ER-2014-0258 (rate case), EO-2015-0084 (IRP) and EO-2015-0055 (MEEIA 2). I will also send Jill Tauber a separate e-mail regarding the MEEIA 2 case. I expect to receive e-mail confirmation that this has been completed no later than the end of this week.

Wendy Tatro : : Director and Assistant General Counsel : : T 314.554.3484 : : F 314.554.4014

Ameren Missouri : : 1901 Chouteau Ave : : St Louis, MO 63166

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Exhibit 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
and	)	**Case No. 4:11 CV 77 RWS**
SIERRA CLUB,	)	
Plaintiff-Intervenor,	)	
v.	)	
AMEREN MISSOURI,	)	
Defendant.	)	

SIERRA CLUB'S REPLY IN SUPPORT OF ITS MOTION TO AMEND STIPULATED PROTECTIVE ORDER TO INCLUDE SIERRA CLUB, AND ALLOW SIERRA CLUB EQUAL ACCESS TO DISCOVERY (HIGHLY CONFIDENTIAL MATERIALS ISSUE)

I. Introduction

Sierra Club submits the following Reply Memorandum in support of its Motion to Amend Stipulated Protective Order (Doc. No. 90) to Include Sierra Club, and Allow Sierra Club Equal Access to Discovery. The present brief responds to Ameren's Opposition (Doc. No. 883) ("Opp.") regarding access by Sierra Club's in-house counsel of record, Sunil Bector, to Highly Confidential information ("HCI") and documents.[1] Sierra Club respectfully requests an expedited ruling so that Sierra Club and the United States can have access to the same materials and effectively coordinate discovery for the remedy phase.

[1] Sierra Club is simultaneously filing an Opposition brief to Ameren's Motion for a Protective Order on Sierra Club's Access to Liability Phase Discovery and supporting memorandum (Doc. Nos. 881, 882).

In its motion, Sierra Club seeks Mr. Bector's access to HCI on the same terms as other "Plaintiff's Counsel" as that term is defined by the Stipulated Protective Order ("SPO") (Doc. No. 90) so that he can play a key role in litigating this case -- participating at depositions and trial, working with experts, writing briefs, and formulating litigation strategy. Mr. Bector would be unable to perform this role if he lacked access to HCI and literally had to leave the room every time Highly Confidential information was mentioned or documents were shown. (SPO, ¶¶9, 11.)

Sierra Club's motion focuses on the 2,000 Highly Confidential documents that Ameren produced during the liability phase, and the "similar number of relevant Highly Confidential documents" that Ameren says that it expects to produce during the remedy phase. (Ex. D to Sierra Club's supporting memorandum, 5/10/17 letter from M. Ali.)

Ameren makes four meritless arguments in its Opposition to justify restricting this information from Mr. Bector.

1. Ameren first argues that Mr. Bector should not have access to HCI because "Ameren's in house attorneys may not access such materials." (Opp. At 2.) While it is true that Ameren's in-house attorneys have restricted access to HCI from *third parties* such as other competing utility companies, Ameren ignores the obvious fact that Ameren's in-house attorneys have access to *Ameren's own* HCI, which constitutes much of the key HCI in the case. Mr. Bector should not be the only attorney in the entire case without access to this crucial material.

2. Regarding prejudice to Sierra Club, Ameren continues this fallacious reasoning by arguing that, since in-house counsel for both Sierra Club and Ameren are denied access to HCI, there can be no prejudice to Sierra Club. (Opp. at 7.) The premise of this argument is simply untrue, since Ameren's in-house counsel *does* have unfettered access to the critical HCI in this

case: Ameren's own HCI. Without access to these key materials, Mr. Bector cannot realistically participate as a litigating attorney in this case.

3. Ameren attempts to justify denying Mr. Bector access to HCI by speculating that non-parties such as other utility companies that produced or might produce some Highly Confidential materials might object to Mr. Bector reviewing such materials. However, unlike Ameren, Sierra Club is not a business competitor of these companies such that disclosure to Sierra Club's in-house counsel would raise concerns about misuse of the information for competitive decision-making. Moreover, Mr. Bector is an officer of the court who would be bound by the Stipulated Protective Order's prohibitions against misuse of the material, as well as walled off from the rest of Sierra Club by a firewall.

4. Finally, Ameren attempts to justify denying Mr. Bector's access to HCI by alleging that Sierra Club has frequently "mishandled" HCI in the past. This is factually untrue, and not a legitimate basis for denying Mr. Bector access to HCI in this case. Ameren's argument is based solely upon mudslinging and pure conjecture that "there is no telling how many other times Sierra Club has mishandled" protected materials. (Opp. at 4.) There is absolutely no basis for a finding that Sierra Club or Mr. Bector lack competence to handle confidential materials.

II. Legal Standard Governing Ameren's Request to Deny Mr. Bector Access to Highly Confidential Materials.

Ameren's brief does not acknowledge the governing legal standard, nor does it cite any legal authority from the Eighth Circuit or any other court, or the Federal Rules of Civil Procedure.

Because Ameren seeks to deny opposing in-house counsel's access to its Highly Confidential materials, the Court should apply a Rule 26(c) analysis and Ameren should bear the burden of demonstrating good cause for the restriction. *Process Controls Intern., Inc. v.*

Emerson Process Management, 2011 WL 1791714, *7 (E.D.Mo. May 10, 2011); Fed.R.Civ.P. 26(c)(1) (for good cause, a court may issue a protective order specifying the terms for disclosure of discovery, or requiring that a trade secret or other confidential information not be revealed or be revealed only in a specific way).

Under Rule 26(c), Ameren must make "a showing of specific harm or prejudice that will result" unless Mr. Bector is denied access to the HCI, and cannot rely on "'stereotype and conclusory statements.'" *Process Controls*, 2011 WL 1791714, *7 (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (internal quote omitted)); *Meridian Enters. Corp. v. Bank of America Corp.*, 2008 WL 474326, *1 (E.D.Mo. Feb. 15, 2008) (party seeking to limit disclosure of confidential information to opposing in-house counsel bears burden of showing good cause); *Clayton Corporation v. Momentive Performance, Materials, Inc.*, 2013 WL 2099437, *1 (E.D.Mo. May 14, 2013) (party seeking to impose patent prosecution bar on opposing counsel bears burden of showing good cause for its inclusion in protective order); *Greenstreak Group, Inc. v. P.N.A. Const. Technologies, Inc.*, 251 F.R.D. 390, 391 (E.D.Mo. June 19, 2008) (movant failed to meet burden of demonstrating that opposing counsel should be denied access to materials). In making a Rule 26(c) determination, the court "must also include a consideration of the relative hardship to the non-moving party should the protective order be granted." *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973) (citation omitted).

Applying the Rule 26 analytical framework, the Court should not restrict Mr. Bector's access to Highly Confidential information and documents and should allow him the same access as other "Plaintiff's Counsel."

III. Discussion

A. Ameren's argument that Sierra Club and Ameren would be on equal terms if both parties' in-house counsel were denied access to Highly Confidential materials is false.

As noted above, Sierra Club's motion for access focuses on *Ameren's* Highly Confidential materials -- the 2,000 documents that Ameren designated as Highly Confidential in the liability phase, and the "similar number" of documents that Ameren contends it will designate as Highly Confidential in the remedy phase. (Ex. D to Sierra Club's supporting memorandum, 5/10/17 letter from M. Ali.)

Ameren first argues that, because Ameren's in-house attorneys do not have access to Highly Confidential Information, Sierra Club's in-house counsel, Mr. Bector, would be on equal terms if he were also denied access to HCI. (Opp. at 2.) Ameren's argument is facile and misleading, since the principal HCI at issue is *Ameren's own* HCI, to which Ameren's in-house counsel have full and unfettered access. Ameren's brief simply ignores the obvious fact that, under Ameren's proposal, every single attorney in the case -- DOJ's trial counsel, EPA's in-house counsel, Ameren's outside counsel, Ameren's in-house counsel, and Sierra Club's outside counsel -- *except for Mr. Bector* would have access to this key HCI that Ameren has already produced and will continue producing during the remedy phase. Nor does Ameren attempt to justify this inequality.

Paragraph 21 of the Stipulated Protective Order recognizes that Ameren's in-house attorneys have access to Ameren's own HCI: "Nothing in this Protective Order shall limit or affect the right of a Designating Party to disclose, to authorize disclosure of, *or to use in any way*, its own Confidential Information or Highly Confidential Information" (original emphasis). Moreover, Paragraphs 5 and 6 of the Stipulated Protective Order make clear that the prohibitions

against disclosure of Confidential and Highly Confidential Information apply only to the "Receiving Party," not the party that produces the protected material. Thus, Ameren -- as the party producing its own Highly Confidential materials -- is not governed by these restrictions.

Put simply, Ameren's in-house attorneys would have access to this crucial material, and Sierra Club's in-house counsel, who has an active litigation role in the case, would not. There is no basis for placing Sierra Club on such unequal footing.

B. Sierra Club would suffer significant prejudice if Mr. Bector were denied access to Ameren's Highly Confidential materials.

If Mr. Bector were denied access to Highly Confidential materials, the prejudice to Sierra Club would be extreme.

Under the Protective Order, whenever Protected Material is to be disclosed or referred to, any person who does not have authorized access must be "exclude[d] from the room" (SPO, ¶¶9, 11) -- a scenario that would reoccur for Mr. Bector on a daily basis throughout this litigation. For example, whenever Mr. Bector took or defended a deposition, or participated in a hearing, he would have to leave the room whenever Ameren's Highly Confidential documents or subject matters were introduced, and Sierra Club's outside counsel would have to take over. Whenever Mr. Bector met or spoke on the phone with an expert or consulting witness in this case, he would have to leave the room whenever the discussion turned to Ameren's Highly Confidential documents or information. And whenever Mr. Bector even discussed litigation strategy with Sierra Club's outside counsel -- an event that occurs on a nearly daily basis -- he would have to excuse himself whenever the discussion turned to Ameren's Highly Confidential documents or information.

Given that Ameren's Highly Confidential materials are woven throughout this case (and Ameren controls what material is designated as Highly Confidential), Mr. Bector would be

effectively removed as a litigating attorney. Mr. Bector's expertise in environmental litigation could not be fully shared with undersigned outside counsel. And undersigned outside counsel would not even be allowed to discuss with his client any issues that involved Highly Confidential information. Moreover, the likely consequence of Ameren's approach would be continual collateral motions practice over whether Ameren appropriately designated certain material as Highly Confidential.

Ameren's sole, one-sentence response is that such a scenario "cannot possibly prejudice Sierra Club" since Ameren's in-house attorneys are similarly limited. (Opp. at 7.) This premise is fundamentally untrue, as shown above.

C. Ameren fails to show any specific harm that would result to Ameren or nonparties from disclosure of HCI to Mr. Bector.

Ameren has not demonstrated that restricting Mr. Bector's access to Highly Confidential material is necessary to avoid a "specific harm or prejudice" to Ameren or any nonparty. *Process Controls*, 2011 WL 1791714, *7 (citation omitted). Ameren's arguments are based on speculation, conclusory statements, and innuendo rather than a showing of specific harm or prejudice.

With respect to nonparties, Ameren speculates that some nonparties might object to Sierra Club's access to sensitive information that was either produced during the liability phase or might be produced during the remedy phase. (Opp. at 3.) However, Ameren fails to identify any specific objecting nonparties, or any specific sensitive material. Nor does Ameren provide any details on what the hypothetical objections might be, other than possible alleged "mishandling" of confidential materials (addressed below). These nebulous assertions fail to establish good cause for restricting Mr. Bector's access.

In contrast to Ameren's speculative assertions, it may be appropriate in certain circumstances to restrict in-house counsel's access to the sensitive information of his or her client's *business competitor*, such as trade secrets, business strategy, or pricing or marketing information. *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (denial of access to competitor's sensitive information may be necessary where in-house counsel is engaged in competitive decisionmaking for its client); *Process Controls*, 2011 WL 1791714, *7 (in-house counsel should be denied access to competitor's confidential materials if she "participat[es] in decisions about pricing, marketing, etc.").

It is likely that such concerns are the original basis for the SPO imposing restricted access by Ameren's in-house attorneys to Highly Confidential materials produced in this case from other nonparty utility companies who are Ameren's competitors. However, there are no such concerns about unfair business competition relating to Mr. Bector or Sierra Club, since Sierra Club is not a business competitor of Ameren or any utility company. Moreover, Ameren points to no trade secrets or business strategy information from other utility companies or other nonparties that needs protection from Sierra Club.

Further, Ameren does not assert that Mr. Bector will intentionally misuse sensitive information from Ameren or nonparties, nor is there any basis for such an allegation. Mr. Bector is an officer of the court, is bound by the same Code of Professional Responsibility as the other plaintiff's and defendant's lawyers in the case, and is subject to the same sanctions. *U.S. Steel Corp.*, 730 F.2d at 1468. Moreover, Mr. Bector would be bound by the same provisions of the Stipulated Protective Order which prohibit use of protected material "for any business, commercial, competitive, personal, or other purposes unrelated to the conduct of this Action."

(SPO, ¶¶5, 6.) If Mr. Bector violated this prohibition, he would be subject to the same sanctions as the other attorneys in the case.

Additionally, as discussed in Sierra Club's motion, Sierra Club is willing to go one step further and create a firewall between Mr. Bector (and any subsequent in-house counsel of record for Sierra Club) and the rest of Sierra Club's staff, including legal staff. Thus, Mr. Bector (and any necessary paralegals or legal assistants) would be the only Sierra Club personnel with access to Highly Confidential material.

All of these protections are more than sufficient to warrant Mr. Bector's access to Highly Confidential information and documents. This is especially true given that Ameren fails to make any specific showing that restricting Mr. Bector's access is necessary in the first place.

D. There is no basis for a judicial finding that Mr. Bector cannot be trusted with sensitive materials.

Ameren next asks this Court to make an extraordinary finding and ruling: that Sierra Club's in-house counsel cannot be trusted with sensitive materials and therefore should be denied access to Highly Confidential information and documents in this case. Citing no legal authority and mischaracterizing the factual record, Ameren provides no legal or factual basis for its request. If -- as Ameren suggests -- prior incidents of inadvertent disclosure were a basis to restrict future access to sensitive material, then Ameren's own outside counsel should not be permitted to handle confidential materials in this case.

Ameren's argument is based on speculation and innuendo. Ameren cites three incidents (discussed below) and then speculates that: "there is no telling how many other times Sierra Club has mishandled Ameren's protected materials…or other companies' protected materials" (Opp. at 4); "there is no telling who else has inadvertently received Ameren materials from Sierra Club

through similar mishaps" (Opp. at 5); and that Sierra Club has mishandled Ameren's materials "[m]ultiple [t]imes [b]efore" (Opp. at 6).

The facts of the three incidents at issue tell a different story, and show that Sierra Club takes its responsibilities seriously and is committed to enforcing protective order obligations.

a. The Court has first-hand knowledge of the first incident, in which Sierra Club's outside counsel in a Montana matter (not Mr. Bector or any other Sierra Club in-house counsel) requested that the Department of Justice provide expert deposition transcripts from the present case, unaware that they had been designated confidential. The Court was notified of the mistake, and the transcripts were returned. This resolution was satisfactory to Ameren at the time.

b. The Court also was apprised in Sierra Club's motion regarding the second incident, in which Sierra Club inadvertently produced to Ameren in another case in 2015 one of Ameren's own confidential documents that Sierra Club had obtained in a Public Service Commission matter involving Ameren. Again, at the time, Ameren's Director and Assistant General Counsel was satisfied with Ameren's immediate actions to rectify the error, which included corrective measures relating to Sierra Club's procedures for handling confidential materials. (Ex. J to Sierra Club's supporting memorandum, email exchange between W. Tatro and S. Bector) ("Thank you for the very thoughtful response, Sunil. I appreciate the steps being taken in order to rectify this issue and prevent a reoccurrence.")

c. In the final matter, Sierra Club referred to information from a confidential workshop in an Oregon Public Service Commission proceeding involving PacifiCorp to draft data requests submitted to PacifiCorp in a separate Wyoming proceeding. Sierra Club acknowledged that it should have first sought in the Wyoming proceeding a copy of the confidential document before serving data requests that referred in any fashion to the document. Following the occurrence, Sierra Club voluntarily undertook to (a) provide additional training to all of the lawyers and legal assistants involved in the matter; (b) reported the incident to all other Sierra Club lawyers and legal assistants so that they could take precautions in the future; and (c) designated a Sierra Club staff member to be responsible for overseeing protective order compliance matters.

As Ameren is aware, inadvertent mistakes can occur even when diligent counsel are involved. Last year, in unrelated litigation involving Ameren and Sierra Club, Ameren's outside counsel (Schiff Hardin) inadvertently disclosed 143 privileged documents to Sierra Club, and

then used a clawback procedure to retrieve them. In addition, Ameren's outside counsel inadvertently produced another 78 documents without a "Confidential" designation. Sierra Club raises this incident only to demonstrate that, under Ameren's logic, Schiff Hardin has demonstrated based on its "track record" that "it does not have or use proper procedures, protections, and controls to ensure that protected materials are carefully quarantined, provided to only the limited individuals authorized to see them, and *not* disclosed, inadvertently or otherwise, to those who may not access such protected materials." (Opp. at 7-8) (original emphasis). Moreover, using Ameren's logic, "there is no telling how many other times" (Opp. at 4) Schiff Hardin has inadvertently disclosed confidential materials in other matters and therefore the Court should not permit Schiff Hardin to handle sensitive materials in this case. Such an "analysis" obviously would be inappropriate, and yet Ameren asks the Court to make similar findings and conclusions against Sierra Club here.

There is no basis whatsoever for a finding that Mr. Bector cannot be trusted to handle confidential materials.

IV. Conclusion

For the foregoing reasons, the Court should enter the Proposed Order attached as Exhibit B to Sierra Club's supporting memorandum (Doc. No. 880), which incorporates the following requested relief:

(a) Including Sierra Club's outside and in-house counsel of record within the definition of "Plaintiff's Counsel" by modifying Paragraphs 2.1, 2.13, and 2.15 of the Stipulated Protective Order;

(b) Providing Sierra Club with full access to discovery from the liability phase on the same terms as Ameren and the United States;

(c) Providing Sierra Club's outside and in-house counsel of record with access to Protected Material, including Highly Confidential documents and information;

(d) Establishing a firewall between Sierra Club's in-house counsel of record and other Sierra Club staff (including legal staff) with respect to Highly Confidential documents and information.

Date: May 31, 2017

Respectfully submitted,

/s/ Benjamin Blustein
Benjamin Blustein (*pro hac vice*)
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Attorneys for Plaintiff Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2017, I caused a copy of the foregoing Reply Memorandum in Support of Sierra Club's Motion to Amend Stipulated Protective Order (Doc. No. 90) to Include Sierra Club, and Allow Sierra Club Equal Access to Discovery (Highly Confidential Materials Issue) to be filed and served upon all counsel of record via CM/ECF.

/s/ Benjamin Blustein
Counsel for Sierra Club

Exhibit 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	**No. 4:11-CV-77 RWS**
AMEREN MISSOURI,	)	
	)	
Defendant.	)	

MOTION AND STATUS HEARING
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
JUNE 28, 2017

APPEARANCES:

For Plaintiff: Jason A. Dunn, Esq.
U.S. DEPARTMENT OF JUSTICE.
ENVIRONMENT & NATURAL RESOURCES DIV.
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044

Andrew J. Lay, Esq.
OFFICE OF U.S. ATTORNEY
111 S. 10th Street, 20th Floor
St. Louis, MO 63102

(Appearances Continued on Page 2)

Reported by: SHANNON L. WHITE, RMR, CRR, CSR, CCR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7966

PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

APPEARANCES CONTINUED:

For Defendant:	Matthew B. Mock, Esq. David Clark Scott, Esq. SCHIFF HARDIN, LLP 233 S. Wacker Drive, 6600 Sears Tower Chicago, IL 60606
	Ronald S. Safer, Esq. RILEY AND SAFER, LLP 70 West Madison, Suite 2900 Chicago, IL 60602
	John F. Cowling, Esq. ARMSTRONG TEASDALE, LLP 7700 Forsyth Boulevard, Suite 1800 Clayton, MO 63105
For Intervenor Sierra Club:	Benjamin J. Blustein, Esq. MINER AND BARNHILL, P.C. 325 N. LaSalle Street, Suite 350 Chicago, IL 60654
	Sunil Bector, Esq. SIERRA CLUB 2101 Webster Street, Suite 1300 Oakland, CA 94612
For Movant OG&E:	Donald K. Shandy, Esq. CROWE & DUNLEVY 324 N. Robinson Avenue, Suite 100 Oklahoma City, OK 73102
For Movant B&W:	Angela M. Higgins, Esq. BAKER AND STERCHI, LLC 2400 Pershing Road, Suite 500 Kansas City, MO 64108

Mr. Mock is absolutely right that there are some documents in the liability discovery that we're not going to use; right? Why do we need a protective order and go through two months of motions practice to identify the documents?

THE COURT: Well, we're going to have to have a protective order because everybody has to play by the same set of rules in this case.

MR. DUNN: I'm sorry. Not a protective order. Why do we need a motion to exclude those documents from the liability phase?

THE COURT: So I'm going to amend what I said. Relevance is not an appropriate objection to producing them, but I'll entertain all other objections. Produce them. They'll make a decision whether they're relevant or irrelevant. You don't make that for them. Otherwise, you are invading the work product privilege. Third-party documents, totally separate.

MR. MOCK: Your Honor, on the relevance issue, the real issue is again this use by Sierra Club --

THE COURT: Okay. I'm unpersuaded. They also went to Schiff Hardin produced documents inadvertently. I can knock you both out of the case if you want me to, but they're officers of the court. And you know me well enough that, if they step out, it may be a verdict -- I may direct a verdict right then, take it all back. I've done that in cases where

liability -- you've messed up, liability is over, and we'll go only to how much your damage is against the Sierra Club.

I have the authority, the power, and the ability to make sure that every order I impose is followed to the "T." And if it's not, you do not want to find out what the hell's going to happen in this courtroom. You understand that.

MR. BLUSTEIN: Yes, Your Honor.

THE COURT: It's too big a deal. It's too important. And your honor is at stake. If that means going back to your office and sitting down with each and every person who works for you individually and making sure they understand how serious this Court is about enforcing its orders, then you need to do it. But, yes, stuff happens. That's why there's clawback provisions. And I understand there's risk, but I'll take care of it if there's a mistake. We're not afraid; we're willing to go forward. But I will enforce this Court's orders.

MR. MOCK: Understood. Thank you, Your Honor.

MR. DUNN: And, Your Honor, I think that actually -- I mean, that encapsulates, I think, why the proper -- or what that what we would submit is the right and most efficient approach here is to require Ameren to turn over all of the documents.

We've heard three reasons from Ameren. They filed -- there were, like, nine briefs; right? They've made their

CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 74 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 3rd day of July, 2017.

/s/Shannon L White
/s/Shannon L. White
Shannon L. White, CRR, RMR, CCR, CSR
Official Court Reporter

Exhibit 4

Sunil Bector <sunil.bector@sierraclub.org>

Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting

Johnson, Paula <PJohnson4@ameren.com> Wed, Apr 29, 2020 at 9:28 AM
To: Andy Knott <andy.knott@sierraclub.org>
Cc: "Berk, S Hande" <HBerk@ameren.com>, "Tatro, Wendy K" <WTatro@ameren.com>, Sunil Bector <sunil.bector@sierraclub.org>, Tony Mendoza <tony.mendoza@sierraclub.org>, Henry Robertson <hrobertson@greatriverslaw.org>

Thank you for the clarification and suggestion.

From: Andy Knott <andy.knott@sierraclub.org>
Sent: Wednesday, April 29, 2020 11:27 AM
To: Johnson, Paula <PJohnson4@ameren.com>
Cc: Berk, S Hande <HBerk@ameren.com>; Tatro, Wendy K <WTatro@ameren.com>; Sunil Bector <sunil.bector@sierraclub.org>; Tony Mendoza <tony.mendoza@sierraclub.org>; Henry Robertson <hrobertson@greatriverslaw.org>
Subject: Re: [EXTERNAL] Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting

Paula

I'm not participating in the call and I've deleted the slide deck without opening it. Sierra Club policy prevents me from signing the NDA due to the liability involved with the way Ameren drafted it. As with other dockets and meetings in the past, it would be helpful if in the future Ameren separated content of written materials and agendas into public and non-public sections in order to increase transparency of this process.

Thank you,

Andy

On Wed, Apr 29, 2020 at 11:00 AM Johnson, Paula <PJohnson4@ameren.com> wrote:

> Since I assume you are also participating in real time on the call, we would appreciate getting the signature as soon as you are able. I should mention, an electronic signature can be as simple as "/s/ Andy Knot" in the signature line.

Thank you.

Paula

From: Johnson, Paula
Sent: Wednesday, April 29, 2020 10:17 AM
To: Andy Knott <andy.knott@sierraclub.org>
Cc: Berk, S Hande <HBerk@ameren.com>; Tatro, Wendy K <WTatro@ameren.com>
Subject: RE: [EXTERNAL] Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting

Ah, our mistake. If you could execute the last page of the attached (electronic signature is fine under the circumstances), and send it back to me asap, you may open the slides.

From: Andy Knott <andy.knott@sierraclub.org>
Sent: Wednesday, April 29, 2020 10:15 AM
To: Johnson, Paula <PJohnson4@ameren.com>
Cc: Berk, S Hande <HBerk@ameren.com>; Tatro, Wendy K <WTatro@ameren.com>
Subject: Re: [EXTERNAL] Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting

I'm not an attorney.

On Wed, Apr 29, 2020 at 10:14 AM Johnson, Paula <PJohnson4@ameren.com> wrote:

> If you are an attorney for Sierra Club, you are already bound by the Commission rules so it will be okay.

From: Andy Knott <andy.knott@sierraclub.org>
Sent: Wednesday, April 29, 2020 10:13 AM
To: Berk, S Hande <HBerk@ameren.com>
Cc: Johnson, Paula <PJohnson4@ameren.com>; Tatro, Wendy K <WTatro@ameren.com>
Subject: [EXTERNAL] Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting

EXTERNAL SENDER **STOP.THINK.QUESTION.**
Verify unexpected requests before opening links or attachments.

Hande

I haven't signed the NDA. I haven't opened the slides. Am I allowed to look at it? If not, I'll delete it.

Thank you,

Andy

On Wed, Apr 29, 2020 at 9:24 AM Berk, S Hande <HBerk@ameren.com> wrote:

> Andy – so sorry I forgot to copy you; here is the slide deck.
>
> Thanks,
>
> Hande
>
> ---
>
> **From:** Berk, S Hande
> **Sent:** Wednesday, April 29, 2020 9:10 AM
> **To:** Tony Mendoza <tony.mendoza@sierraclub.org>; tyler.comings@aeclinic.org; Lauren Hogrewe <lauren.hogrewe@sierraclub.org>; Sunil Bector (sunil.bector@sierraclub.org) <sunil.bector@sierraclub.org>; james@renewmo.org
> **Cc:** Johnson, Paula <PJohnson4@ameren.com>; Tatro, Wendy K <WTatro@ameren.com>
> **Subject:** FW: Ameren Missouri 2020 IRP Stakeholder Meeting
>
> Please find attached the slide deck for today's meeting.
>
> Thanks,

Hande

From: Berk, S Hande
Sent: Tuesday, April 28, 2020 3:25 PM
To: Michels, Matt R <MMichels@ameren.com>; Tatro, Wendy K <WTatro@ameren.com>; Johnson, Paula <PJohnson4@ameren.com>; Andrew Lindhares <andrew@renewmo.org>; Ashok Gupta <agupta@nrdc.org>; Barb Meisenheimer <barb.meisenheimer@dnr.mo.gov>; Brad Fortson <brad.fortson@psc.mo.gov>; Bruce Morrison-NAACP <bamorrison@greatriverslaw.org>; David Roos <david.roos@psc.mo.gov>; David Woodsmall-MECG <david.woodsmall@woodsmalllaw.com>; Eric Wright <Eric.Wright@dnr.mo.gov>; geoff.marke@opc.mo.gov; Henry Robertson <hrobertson@greatriverslaw.org>; J Luebbert <j.luebbert@psc.mo.gov>; john.robinett@opc.mo.gov; Lisa Kremer <lisa.kremer@dnr.mo.gov>; Martin Hyman (martin.hyman@dnr.mo.gov) <martin.hyman@dnr.mo.gov>; Maurice Brubaker <mbrubaker@consultbai.com>; Suggett, Gaye L <GSuggett@ameren.com>; Terry Jarrett-MJMEUC <terry@healylawoffices.com>; Mers, Nicole <Nicole.Mers@psc.mo.gov>; Jeff.Keevil@psc.mo.gov; wdavis2@ameren.com; Aubuchon, Craig <CAubuchon@ameren.com>; Noonan, Matthew E <MNoonan2@ameren.com>; Shil, Prasenjit <PShil@ameren.com>; Deffenderfer, Scott D <SDeffenderfer@ameren.com>; Davies, Justin T <JDavies@ameren.com>; Renner, Stephanie <SRenner2@ameren.com>; Siracusa, John R <JSiracusa@ameren.com>; Thielemann, Kelley L <KThielemann@ameren.com>; Huss, James D <JHuss@ameren.com>; Schmidt, Jon M <JSCHMIDT3@ameren.com>; Jenkins, Rex W <RJenkins2@ameren.com>; Savage, Elizabeth A <ESavage@ameren.com>; Cherylyn.Kelley@dnr.mo.gov; Brown, Brad <BBrown8@ameren.com>; Giesmann, Craig J <CGiesmann@ameren.com>; Mizell, Gwen <GMizell@ameren.com>; Tiemann, Julie A <JTiemann@ameren.com>; Anders, Kevin D <KAnders@ameren.com>; Sean Brady (sbrady@cleangridalliance.org) <sbrady@cleangridalliance.org>; Poudel, Krishna <Krishna.Poudel@psc.mo.gov>; Hall, Caleb <Caleb.Hall@opc.mo.gov>; Krcmar, Aubrey M <AKrcmar@ameren.com>
Subject: Ameren Missouri 2020 IRP Stakeholder Meeting

Attached is the slide deck for our meeting tomorrow. We still need NDAs from some parties that are not copied in this email, so please DO NOT SHARE the document with your client unless client has signed the NDA.

Thanks,

Hande

S. Hande Berk, PMP : : Manager, Electric Resource Planning : : T 314.554.6166 : : E HBerk@ameren.com

Ameren Services : : 1901 Chouteau Ave, MC 1400 : : St. Louis, MO 63103

--

Andy Knott

Pronouns:he/him/his (learn why I'm listing my pronouns)

Senior Campaign Representative, Manager

Sierra Club

Beyond Coal Campaign - IL, KS, MO, NE

2818 Sutton Boulevard

St. Louis, MO 63143

E-Mail: andy.knott@sierraclub.org

Cell: 314.803.4695

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Exhibit 5

Sunil Bector <sunil.bector@sierraclub.org>

Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting

Tatro, Wendy K <WTatro@ameren.com> Wed, Apr 29, 2020 at 10:54 AM
To: Tony Mendoza <tony.mendoza@sierraclub.org>
Cc: Sunil Bector <sunil.bector@sierraclub.org>, "Johnson, Paula" <PJohnson4@ameren.com>, "Berk, S Hande" <HBerk@ameren.com>, "tyler.comings@aeclinic.org" <tyler.comings@aeclinic.org>, Lauren Hogrewe <lauren.hogrewe@sierraclub.org>

Probably better for Josh to talk with me about the IRP nondisclosure. Jim is working on the case, but secondarily at this point. We were all on a call yesterday about a motion that Jim is handling in the IRP and the nondisclosure did come up between Josh and I.

From: Tony Mendoza <tony.mendoza@sierraclub.org>
Sent: Wednesday, April 29, 2020 12:50 PM
To: Tatro, Wendy K <WTatro@ameren.com>
Cc: Sunil Bector <sunil.bector@sierraclub.org>; Johnson, Paula <PJohnson4@ameren.com>; Berk, S Hande <HBerk@ameren.com>; tyler.comings@aeclinic.org; Lauren Hogrewe <lauren.hogrewe@sierraclub.org>
Subject: Re: [EXTERNAL] Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting

Thank you, Wendy. For some context, Sunil is an attorney, but we have a rigorous internal standard for NDA compliance, hence all of our questions and emails back to you folks. I know Josh has been in touch with Jim about the IRP docket. We'll be in touch soon to think about how we can work together most effectively.

And, as I've told you before, if you need help persuading any intransigent clients that it's a good move for customers and shareholders to retire coal and replace it with 100% clean energy, I'm always happy to help.

On Wed, Apr 29, 2020 at 10:04 AM Tatro, Wendy K <WTatro@ameren.com> wrote:

> Sunil – we aren't asking attorneys to sign. Trusting in that whole ethical obligation thing! So you could have participated and you can see the deck. Sorry, there were so many emails flying that I didn't get back to you.

From: Sunil Bector <Sunil.Bector@sierraclub.org>
Sent: Wednesday, April 29, 2020 11:02 AM
To: Johnson, Paula <PJohnson4@ameren.com>
Cc: Berk, S Hande <HBerk@ameren.com>; Tony Mendoza <tony.mendoza@sierraclub.org>; tyler.comings@aeclinic.org; Lauren Hogrewe <lauren.hogrewe@sierraclub.org>; Tatro, Wendy K <WTatro@ameren.com>
Subject: Re: [EXTERNAL] Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting

Thanks. Paula. I'm not on the call and thus have not viewed or heard any of the information.

Sunil Bector
Staff Attorney
Sierra Club

2101 Webster, Suite 1300

Oakland, CA 94612

415.977.5759 phone

On Wed, Apr 29, 2020 at 8:59 AM Johnson, Paula <PJohnson4@ameren.com> wrote:

> Since you are also on the call also and therefore seeing the information in real time, if you could execute the attachment at the end of this (an electronic signature is fine, i.e., "/s/ Sunil Bector"), then we would appreciate it.
>
> **From:** Sunil Bector <Sunil.Bector@sierraclub.org>
> **Sent:** Wednesday, April 29, 2020 10:56 AM
> **To:** Berk, S Hande <HBerk@ameren.com>
> **Cc:** Tony Mendoza <tony.mendoza@sierraclub.org>; tyler.comings@aeclinic.org; Lauren Hogrewe <lauren.hogrewe@sierraclub.org>; Johnson, Paula <PJohnson4@ameren.com>; Tatro, Wendy K <WTatro@ameren.com>
> **Subject:** [EXTERNAL] Re: FW: Ameren Missouri 2020 IRP Stakeholder Meeting
>
> **EXTERNAL SENDER** **STOP.THINK.QUESTION.**
> Verify unexpected requests before opening links or attachments.
>
> ---
>
> Hande--I haven't signed the NDA & so I'll be deleting this email without looking at the slide deck. If I'm allowed to look at it, please resend it.

Best,

Sunil

Sunil Bector
Staff Attorney
Sierra Club

2101 Webster, Suite 1300

Oakland, CA 94612

415.977.5759 phone

On Wed, Apr 29, 2020 at 7:10 AM Berk, S Hande <HBerk@ameren.com> wrote:

> Please find attached the slide deck for today's meeting.
>
> Thanks,
>
> Hande
>
> ---
>
> **From:** Berk, S Hande
> **Sent:** Tuesday, April 28, 2020 3:25 PM
> **To:** Michels, Matt R <MMichels@ameren.com>; Tatro, Wendy K <WTatro@ameren.com>; Johnson, Paula <PJohnson4@ameren.com>; Andrew Lindhares <andrew@renewmo.org>; Ashok Gupta <agupta@nrdc.org>; Barb Meisenheimer <barb.meisenheimer@dnr.mo.gov>; Brad Fortson <brad.fortson@psc.mo.gov>; Bruce Morrison-NAACP <bamorrison@greatriverslaw.org>; David Roos <david.roos@psc.mo.gov>; David Woodsmall-MECG <david.woodsmall@woodsmalllaw.com>; Eric Wright <Eric.Wright@dnr.mo.gov>; geoff.marke@opc.mo.gov; Henry Robertson <hrobertson@greatriverslaw.org>; J Luebbert <j.luebbert@psc.mo.gov>; john.robinett@opc.mo.gov; Lisa Kremer <lisa.kremer@dnr.mo.gov>; Martin Hyman (martin.hyman@dnr.mo.gov) <martin.hyman@dnr.mo.gov>; Maurice Brubaker <mbrubaker@consultbai.com>; Suggett, Gaye L <GSuggett@ameren.com>; Terry Jarrett-MJMEUC <terry@healylawoffices.com>; Mers, Nicole <Nicole.Mers@psc.mo.gov>; Jeff.Keevil@psc.mo.gov; wdavis2@ameren.com; Aubuchon, Craig <CAubuchon@ameren.com>; Noonan, Matthew E <MNoonan2@ameren.com>; Shil, Prasenjit <PShil@ameren.com>; Deffenderfer, Scott D <SDeffenderfer@ameren.com>; Davies, Justin T <JDavies@ameren.com>; Renner, Stephanie <SRenner2@ameren.com>; Siracusa, John R <JSiracusa@ameren.com>; Thielemann, Kelley L <KThielemann@ameren.com>; Huss, James D <JHuss@ameren.com>; Schmidt, Jon M <JSCHMIDT3@ameren.com>; Jenkins, Rex W <RJenkins2@ameren.com>; Savage, Elizabeth A <ESavage@ameren.com>; Cherylyn.Kelley@dnr.mo.gov; Brown, Brad <BBrown8@ameren.com>; Giesmann, Craig J <CGiesmann@ameren.com>; Mizell, Gwen <GMizell@ameren.com>; Tiemann, Julie A <JTiemann@ameren.com>; Anders, Kevin D <KAnders@ameren.com>; Sean Brady (sbrady@cleangridalliance.org) <sbrady@cleangridalliance.org>; Poudel, Krishna <Krishna.Poudel@psc.mo.gov>; Hall, Caleb <Caleb.Hall@opc.mo.gov>;

Krcmar, Aubrey M <AKrcmar@ameren.com>
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--

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