

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

In the Matter of Union Electric Company)	
d/b/a AmerenUE for Authority to File)	
Tariffs Increasing Rates for Electric)	Case No. ER-2007-0002
Service Provided to Customers in the)	
Company's Missouri Service Area.)	

**AMERENUE'S RESPONSE TO PUBLIC COUNSEL'S
MOTION TO COMPEL DISCOVERY
AND REQUEST FOR EXPEDITED TREATMENT**

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or Company), and for its Response to Public Counsel's Motion to Compel Discovery and Request for Expedited Treatment (Motion to Compel), states as follows:

1. On July 7, 2006, AmerenUE filed, in this case, its request for a general rate increase for electric service provided in its Missouri service area.

2. On September 12, 2006, the Missouri Public Service Commission (MPSC) issued its Order Adopting Procedural Schedule and Test Year. This order scheduled this case for hearing, to begin at 8:30 a.m. on March 12, 2007.

3. Since the filing of this case, the Office of Public Counsel (OPC) has sent AmerenUE approximately 414 data requests, not counting subparts. Of that number, 23 dealt with issues connected with AmerenUE's interactions with Electric Energy, Inc. (EEInc.), an affiliate of AmerenUE.

4. During the course of the discovery process, AmerenUE lodged objections to several of OPC's data requests, including 2005, 2118HC, 2119HC, 2142HC, 2170HC, 2171HC, 2181, 2184 and 2187. These objections were contained in letters emailed to Lewis Mills; these letters were dated November 9, 2006, December 21, 2006 and January 12, 2007, respectively. All objections were made in a timely manner.

5. On March 7, 2007, at 5:12 p.m., OPC filed Public Counsel's Motion for Expedited Discovery Conference (Discovery Motion). The Discovery Motion requested a discovery conference to be held no later than the morning of March 9, 2007.

6. The Discovery Conference was held on March 9, 2006 at 9:00 a.m. The subjects of the Discovery Conference included objections made to OPC data requests 2005, 2118, 2119, 2142, 2170, 2171, 2181, 2184 and 2187 and certain data request answers which were outstanding.

7. After 5:00 on Friday, March 9, 2007, OPC filed its Motion to Compel, which included the issues discussed previously with AmerenUE Counsel but also included new complaints about answers that had been provided by AmerenUE.

8. On March 12, 2007, at 4:11 p.m. (served on AmerenUE at 4:45), OPC filed Public Counsel's Amendment to Motion to Compel Discovery and Request for Expedited Treatment (Amended Motion to Compel). The Amended Motion to Compel requested the Commission hold in abeyance its Motion to Compel for OPC data requests 2248 and 2249 and clarified that AmerenUE had provided responses to certain OPC data requests that it had labeled unanswered in its Motion to Compel.

Discovery Standards

9. In its Motion to Compel, OPC asserts a claim to unfettered discovery and goes so far as to claim that AmerenUE does not have the right to object on the basis of relevance or any other objection typically available to it under the Missouri Rules of Civil Procedure. *Public Counsel's Motion to Compel Discovery and Request for Expedited Treatment*, March 9, 2007, pp. 5-6.

10. OPC cites a February 2, 2000 order from Case No. WR-2000-281, *In the Matter of Missouri-American Water Company's Tariff*, as the basis of its claim to the right of unfettered discovery (Missouri-American Water Order). AmerenUE notes that this order was issued by delegation and so it appears the full Commission has not discussed or determine the legitimacy of OPC's extraordinary claim.

11. AmerenUE does not believe the Missouri-American Water Order can properly be interpreted as broadly as OPC has done. The relevant portion of the Order states that the Staff of the Commission (Staff) and OPC enjoy broader discovery powers than other litigants. WR-2000-281, *Order Concerning Motions to Compel*, February 15, 2000, p. 8. This portion of the Order, however, is discussing OPC discovery rights outside of a contested case. The Order cites Section 386.450, RSMo, which authorizes the Public Counsel to examine books, accounts, papers or records of a public utility. This power, contrary to OPC's assertions, is not without restriction. The statute only allows Public Counsel, upon good cause shown, to request the Commission to require the utility to provide this information to Public Counsel. The requirement to demonstrate good cause, by definition, is not a right of unfettered access.

12. The Missouri-American Water Order continues to cite previous orders of the Commission which compelled answers to data requests issued by OPC outside of a pending proceeding. The current dispute occurs within a pending proceeding, so this portion of the cited Order is not germane to a question of discovery in this rate case.

13. OPC's Motion to Compel also cites the Missouri Rules of Civil Procedure (Mo Rule Civ. Pro. 56.01(b)(1) and Commission Rule 4 CSR 240-2.090(1) and, incredibly, states that they do not apply to OPC. The Motion to Compel, however, does not contain an explanation of this implausible statement. The language contained in both of these citations provides that the

scope of discovery is limited to that which is relevant to the subject matter of the pending dispute or which is reasonably calculated to lead to discovery of admissible evidence. In fact, 4 CSR 240-2.090 states, “Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court.” There is no statute or Commission rule to which shield OPC from relevance objections.

14. Certainly, despite the issuance of the cited Orders, the Commission has not allowed discovery by OPC without limitation. In previous orders, issued by the Commission rather than by an ALJ, and issued *after* the Missouri-American Water Order, when resolving discovery disputes over OPC issued data requests, the Commission has held that “...the scope of discovery is the same as in civil cases generally under Supreme Court Rule 56.01(b)(1)...” EO-2004-0108, *Order on Reconsideration Concerning Discovery*, February 26, 2004, p. 4. The Commission, as part of its decision making process on this issue, determined whether a specific data request was relevant, stating in part, “Relevant evidence, in turn, is that which tends to prove or disprove a fact o[r] consequence to the pending matter...discoverable matter need not be admissible, but must always be relevant.” *Id.*, p. 5. In EC-2002-1, the same case from which OPC claims provides for unlimited discovery, the Commission denied OPC’s Second Motion to Compel because, “The Commission is not persuaded that the information...has any relevance to this case or would be likely to lead to the discovery of relevant information.” *Order Denying Second Motion to Compel*, June 27, 2002, p. 2.

15. It is clear that the Commission applies the Missouri Rules of Civil Procedure to OPC data requests and, indeed, has ruled against requiring production of information not relevant to the issue before the Commission. Relevance remains a valid objection, whether the data request is asked by an intervener or by OPC.

16. OPC's Motion to Compel next argues that the Commission's rules, specifically 4 CSR 240-20.015, require access to records of affiliate entities during the discovery process when a case is pending before the Commission. *Public Counsel's Motion to Compel Discovery and Request for Expedited Treatment*, pp. 6-7. OPC's summary view of this rule misses important portions of the rule. First, the portion cited by OPC states that the Commission has authority to review records "...for the sole purpose of ensuring compliance with this rule..." The "rule" is found in 4 CSR 240-20.015(2) and it requires that the regulated entity shall not provide a financial advantage to an affiliated entity in *transactions* between the two entities. This limitation is clearly the intent of the rule, as stated in the *Purpose* section "...rule sets forth financial standards, evidentiary standards and record-keeping requirements applicable to any Missouri Public Service Commission regulated electrical corporation when such corporation participates in *transactions* with any affiliated entity." (emphasis added.) When the data request propounded by OPC have dealt with a *transaction* between AmerenUE and EEInc. (ie, the purchased power contract), AmerenUE has provided the requested information. AmerenUE has only objected when the data request has gone beyond any transaction between AmerenUE and EEInc.

**OPC Data Requests 2139, 2140, 2151, 2152, 2210,
2239, 2245, 2246, 2250, 2257, 2258, 2260 and 2265**

17. OPC's Motion to Compel asks the Commission to compel AmerenUE to respond to these data requests. OPC's Amended Motion clarifies that AmerenUE had provided answers to some of the data requests, but that OPC was not satisfied with those answers.

18. OPC data requests 2139, 2140, 2151 and 2152 are all related. OPC's Motion to Compel argues that because AmerenUE did not reference the definition of "voluminous material" in its objections to these data requests, there is no way for OPC to know if the answers are

indeed, voluminous. OPC data requests 21139 and 2140 request documentation from quarterly performance management strategy reviews and corporate action plans. AmerenUE's initial answer asked OPC to view these documents at its St Louis location. Since that time, AmerenUE has brought copies of the information, which indeed are over 150 pages in length, to provide to OPC.

19. OPC data requests 2239, 2245, 2246, 2247, 2250, 2260 and 2265 had not been answered at the time of the filing of OPC's Motion to Compel, but will be answered this morning. AmerenUE would note that the answer to OPC 2246 and 2247 require a search of documents that are stored off-site and that process is occurring now. The Company will update these answers as soon as possible.

20. OPC data request 2257 was responded to by AmerenUE on March 6, 2007. The data request asked about the response to OPC 2196 and asked AmerenUE to confirm that there were no documents responsive other than the document provided with AmerenUE's response to 2196. AmerenUE's response to 2257 was to clarify, as it had indicated in its initial response, that AmerenUE did have possession of documents other than what it had provided, but that the additional document was protected by Attorney-Client Privilege. OPC's Amended Motion to Compel refers to this answer as incomplete. AmerenUE's response points out that its response to OPC 2196 references two documents, which is more than the one cited in OPC 2257. AmerenUE's answer was complete and accurate.

21. This particular data request (OPC 2257) discussion is not properly before the Commission. Commission rules, specifically 4 CSR 240-2.090(8), requires that Counsel for the moving party, in good faith, confer by telephone or in person with opposing counsel concerning the issue. Counsel for OPC has not contacted counsel for AmerenUE to express concerns about

these answers or to ask that the response be supplemented. Accordingly, this issue should not be addressed by the Commission at this time.

22. OPC data request 2258 was responded to by AmerenUE on March 5, 2007. The data request referred to OPC 2197 and asked the Company to confirm that it was unable to specifically identify any other activities other than those identified in the response to OPC 2197. AmerenUE responded to OPC data request 2258 by stating that it provides training on an as-needed basis and that a permanent record of the training is not kept. The Company believes its response does address the data request. Training is done on an on-going, informal basis but records are not kept, so providing additional specific dates was not possible.

23. This particular data request (OCP 2258) discussion is not properly before the Commission. Commission rules, specifically 4 CSR 240-2.090(8), requires that Counsel for the moving party, in good faith, confer by telephone or in person with opposing counsel concerning the issue. Counsel for OPC has not contacted counsel for AmerenUE to express concerns about these answers or to ask that the responses be supplemented. Accordingly, this issue should not be addressed by the Commission at this time.

**OPC Data Requests 2005, 2118HC, 2119HC, 2142HC,
2170HC, 2171HC, 2181, 2184 and 2187**

24. OPC's Motion to Compel labels the [lack of a] power contract with Electric Energy, Inc. (EEInc.) as "one of the most important issues in the case" and, because the hearings begin on March 12, 2007, asks the Commission to grant expedited treatment of their request. *Public Counsel's Motion to Compel Discovery and Request for Expedited Treatment*, p. 2. AmerenUE notes that the issue of the EEInc. contract is not a newly discovered one. OPC raised the issue as early as in the Direct Testimony of Ryan Kind in this case, filed December 15, 2006.

In fact, OPC had raised the issue in previous cases at the Commission involving AmerenUE, including Case Nos. EC-2002-1, EO-2004-0108 and EO-2006-0240.

25. Second of all and perhaps more important for the Commission to consider, the data requests at issue in this Motion to Compel were objected to by AmerenUE several months ago. These objections were timely filed on November 9, 2006, December 21, 2006 and January 12, 2007. Yet, despite the claimed importance of this matter, OPC took no action to ensure access to this information. OPC did not file its Motion to Compel until March 9, 2007 at 5:15 p.m. on the Friday before the scheduled hearing. At that point, the first set of objections had been in OPC's possession for four months and the latest objection had been received more than two months prior. It was not until the eve of the three-week hearing that OPC decided to file its Motion to Compel. At the very least, this unreasonable delay on the part of OPC undercuts the veracity of its current plea regarding the importance of these documents.

26. OPC 2005 requests access to EEInc.'s Board of Director meeting minutes, committee meeting minutes and all related reports from January 1, 2003 through June 30, 2006. AmerenUE's objection letter, dated November 9, 2006, objects because the data request seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. It also objects on the grounds that the request is overbroad in that it request materials unrelated to a contract or transaction between AmerenUE and EEInc. Subject to those objections, the letter agreed to provide copies of requested documents during the time frame requested to the extent they relate or pertain to a power contract between AmerenUE and EEInc. or to EEInc.'s decision not to contract with AmerenUE for the sale of power after December 31, 2005. OPC's Motion to Compel argues that the power contract between EEInc. and AmerenUE is one of the most important issues in the case. AmerenUE's production of the minutes related to

that contract addressed OPC's concern and was an attempt to be responsive to OPC's requests while not forgoing the protections provided the Company by the Missouri Rules of Civil Procedure. AmerenUE objected to the breadth of the request, yet provided copies of the information requested related to the EEInc./AmerenUE power contract. This relevant information was provided to OPC on or around December 8, 2006.

27. At this late hour, OPC now expands its argument to argue it needs to see Board minutes pertaining to EEInc.'s decision to seek market-based rate (MBR) authority from the Federal Regulatory Energy Commission (FERC). The decision to seek MBR authority, of course, was an EEInc. decision and was not made by AmerenUE. Nor was it a decision made by EEInc. on behalf of AmerenUE. The information is different than the request for Board minutes related to the purchased power contract and AmerenUE has appropriately objected.

28. OPC 2118HC and 2119HC requests copies of the Board minutes from the May 13, 2005 and from the October 28, 2005 Board of Directors meetings referenced in the minutes AmerenUE had provided to OPC 2005. The only reference to these dates in the information provided in response to OPC 2005 was the notation of the next scheduled Board meeting. AmerenUE objected, in a letter dated December 21, 2005, on the grounds of relevance, because it is not reasonably calculated to lead to admissible evidence. In its objection, AmerenUE pointed out that it had provided all EEInc. Board minutes during the time frame requested, which would include those two dates, which contain information related or pertaining to a contract between AmerenUE and EEInc. or to EEInc.'s decision not to contract with its shareholders for the sale of power after December 31, 2005.

29. OPC 2142HC requests a copy of Ameren's quarterly Key Performance Indicator Reports for the last two years as they relate to EEInc. AmerenUE objected to this data request

on January 12, 2007, because it seeks information relating to the business, affairs or operations of affiliates of AmerenUE rather than relating to AmerenUE, because it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Ameren Corporation is a parent to AmerenUE and AmerenUE is an affiliate of EEInc. However, those circumstances do not make every fact about EEInc. or Ameren Corporation discoverable by OPC. It is a *transaction* between the regulated entity and any unregulated affiliate that makes brings the records of the unregulated affiliate into the Commission's purview. The Commission may examine the dealings of regulated entities with their unregulated affiliates. Section 393.140(12), RSMo. OPC is seeking to discover information held between the unregulated parent corporation and an unregulated affiliate. The Commission, and accordingly OPC, lacks the general authority to pry into the relationship of the unregulated companies merely because one of them is also an affiliate of a regulated utility. The Commission has historically recognized this restriction. *See Order on Reconsideration Concerning Discovery*, EO-2004-0108, February 26, 2004, p. 8. Accordingly, AmerenUE's objection to this data request is proper.

30. OPC 2170HC and OPC 2171HC request a copy of all documents AmerenUE or its affiliates possess regarding a "team," referenced in the minutes provided in response to OPC 2005, to address the matter of a Power Supply Agreement beginning in 2006, requests the members of the referenced "team" and asked for their relationship to the EEInc. sponsors. AmerenUE objected, in a letter dated January 12, 2007, on the grounds that the information requested is that of an affiliate of AmerenUE who is not doing business on behalf of AmerenUE. Subject to this objection, AmerenUE provided answers to both of these data requests on March 5, 2007. These answers named the members of the "team," provided a short description of what the team did and stated that there were no formal reports generated. Accordingly, there were no

documents to provide in response to this data request. OPC's Motion to Compel argues that AmerenUE's answer that there are no formal documents is not the same as stating there are no documents responsive to the request. To clarify, no documents were generated by the team referenced in this data request, formal or informal. As AmerenUE has informed Counsel for OPC on at least one occasion, there are no documents to produce.

31. OPC 2181 requests a detailed description of the process AmerenUE has available to it to elect/appoint individuals to represent the interests of AmerenUE on the EEInc. Board of Directors. AmerenUE did not object on the grounds of relevance and indeed provided a response to the data request. OPC's Motion to Compel fails to set forth this relevant fact. The objection lodged by the Company, in its January 12, 2007 letter, was due to the fact that the data request improperly calls for a legal conclusion. However, the objection letter went on to note that EEInc., as a corporation, would be subject to state law and by its Bylaws and Articles of Incorporation, which had already been provided to OPC.

32. OPC 2184 and OPC 2187 request a detailed description of the process available to Ameren Energy Resources and to Ameren Corporation to elect/appoint individuals to represent their respective interests on the EEInc. Board of Directors. AmerenUE objected, in its letter of January 12, 2007, because the data requests seek information relating to the business, affairs or operations of affiliates of AmerenUE rather than of AmerenUE. In addition, the letter stated that the data requests were irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Finally, the objection letter pointed out that Ameren Corporation owns no EEInc. stock and, consequently, does not elect or appoint EEInc. Directors. As previously discussed, OPC is seeking to discover information held between the parent corporation and an unregulated affiliate and, in OPC 2187, seeking to discover information held between two

unregulated affiliates. OPC lacks the general authority to pry into the affairs of an unregulated company merely because it is an affiliate of a regulated utility.

OPC Data Requests 2126 and 2127

33. Answers to OPC 2126 and 2127 were provided on March 9, 2007, shortly before OPC filed its Motion to Compel. The two data requests seek information containing references to cost increases in the construction of AmerenUE's Peno Creek generating facility related to efforts to get the plant in service prior to June 1, 2002. The individual providing the answer indicated that there may be a few work change orders which could be related to the start-up date. If such documents exist, then they would be responsive to these data requests. Any such work change orders have not yet been located, so in order to answer the data request, the Company provided an explanation which included the statement that it continues to look for relevant documentation. The Peno Creek facility was constructed pursuant to an Engineer-Procure-Construct contract, which means the Company paid a set amount and the contractor was responsible for any change in costs. However, recognizing that a change by AmerenUE to the work originally bid could have resulted in a modest change in the price, AmerenUE is attempting to determine if that occurred and, if so, to locate the information. To date, nothing responsive has been found.

34. This particular data request discussion is not properly before the Commission. Commission rules, specifically 4 CSR 240-2.090(8), requires that Counsel for the moving party, in good faith, confer by telephone or in person with opposing counsel concerning the issue. Counsel for OPC has not contacted Counsel for AmerenUE to express concerns about these answers. Accordingly, this issue should not be addressed by the Commission at this time.

Timing Issues

35. AmerenUE notes that OPC's Motion to Compel was filed on March 9, 2007 at 5:15 p.m. This is the first Motion to Compel filed in this case. The majority of the pleading deals with objections lodged by AmerenUE as far back as four months and in no case shorter than two months prior the filing of the Motion to Compel. In fact, OPC has waited until the Friday before the three week hearing of this case to voice its concerns over a discovery dispute. This inaction makes OPC's actions appear to be less about obtaining the information sought and more about making AmerenUE appear unreasonable and uncooperative; an appearance that the facts do not substantiate.

WHEREFORE, AmerenUE respectfully requests that the Commission deny the Office of Public Counsel's Motion to Compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to all parties listed on the service list in Case No. ER-2007-0002 on the 13th day of March, 2007.

/s/Wendy K. Tatro

Wendy K. Tatro