

**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) Case No. ER-2010-0036
Rates for Electric Service Provided to Customers in)
The Company's Missouri Service Area.)

**RESPONSE TO MOTION TO COMPEL AMERENUE
TO RESPOND TO DATA REQUESTS**

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or Company) and, for its *Response to Motion to Compel AmerenUE to Respond to Data Requests* (Motion to Compel), states as follows:

1. On December 21, 2009, AmerenUE received data requests 1008, 1010, 1011 and 1012 from the Office of Public Counsel (OPC). Correct copies of those data requests are attached to OPC's Motion to Compel.

2. On December 28, 2009, AmerenUE timely objected to the above listed data requests as they requested information protected by the attorney-client and work product privileges. Subject to its objection, the Company indicated it would provide the invoice dates, sums billed broken out by fees charged and expenses reimbursed. A correct copy of the objection letter is attached to OPC's Motion to Compel.

3. After hearing nothing from OPC on this matter in January or February, a March discussion between OPC and AmerenUE resulted in the Company agreeing to provide redacted copies of the invoices requested. By agreeing to produce the invoices in their redacted form, AmerenUE did not waive its claim of privilege. These answers were designated Highly Confidential.

4. On March 4, 2010, OPC filed its Motion to Compel. OPC alleges AmerenUE has impliedly waived the attorney-client privilege and work product

protection by including costs for outside counsel in its revenue requirement in this case. OPC points to a three prong test to support its claim that AmerenUE has waived the attorney-client privilege. Specifically, OPC alleges AmerenUE, through its own affirmative action (prong one), put the protected information at issue (prong two) and that the application of the privilege would deny OPC access to information it deems vital to the case (prong three).

ANALYSIS

5. Any discussion of whether AmerenUE has waived its attorney-client privilege must begin with the acknowledgement that the sought-after information is, indeed, protected by the attorney-client privilege. In point of fact, OPC has not challenged AmerenUE's claim that attorney billing statements are privileged to the extent that they contain information about the nature of the services rendered. *See Brennan v. W. Nat'l Mut. Ins.Co.*, 199 F.R.D. 660, 662 (D.S.D. 2001). "[B]illing statements which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of the law, fall within the privilege." *See also, Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 304 (4d Cir. 1999) (attorney-client privilege); *Nesse v. Shaw Pittman*, 202 F.R.D. 344, 356 (D.D.C. 21) (work product doctrine); *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 659-60 (M.D.N.C. 1995) (work product doctrine). "...[C]orrespondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the [attorney-client] privilege." *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992.) While a

simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the attorney-client privilege. Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999). Consequently, where an invoice for legal services contains descriptions which reveal confidential legal strategy, including legal issues researched and the contents of attorney-client discussions, it is clearly protected by privilege.

6. The attorney billing statements at issue in this case contain information revealing the specific nature of the services and strategies to be provided by the attorney. Many reveal conversations with specific AmerenUE personnel and the topics discussed, many set forth issues researched, etc. Despite the fact that this information is privileged under Missouri law and would not have to be revealed to OPC, in an attempt to resolve this discovery dispute, AmerenUE provided redacted versions of these bills and, in most instances, only redacted a small number of entries, retaining its privilege claim on far less of the information than it would be entitled to assert.

7. A similar analysis is applicable to the invoices submitted by The Brattle Group, hired to provide assistance to the attorneys in the development of AmerenUE's rate case, which are also sought by OPC in their Motion to Compel. Because The Brattle Group was retained by AmerenUE as a consultant for preparation of this matter for hearing, these invoices would constitute materials protected by the work product doctrine under Rule 56.01(b)(3); even in the limited circumstances where work product is discoverable, the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representatives of a party concerning the litigation." Mo. Sup. Ct. R. 56-01(b)(3). As a result, any trial strategy

contained within those invoices has the same protection as attorney-client privileged information.

As it did with the attorney billing records, AmerenUE provided OPC with a redacted version of these bills. In fact, the Company went so far as to redact only **one entry** (which AmerenUE asserts contains information regarding the legal theories and opinions for this case), thus retaining privilege for far fewer entries than the law would allow the Company to claim. This is not a case where OPC is left wondering what the charges by AmerenUE's outside attorneys or The Brattle Group represent.

8. The first two prongs of the test set forth by OPC can be summed up as to whether or not AmerenUE took an affirmative action that placed its attorney's conduct at issue in this case, thereby waiving the attorney-client privilege protecting against the disclosure of the invoices. The cases cited by OPC in making this argument are far different than the situation before the Commission in this matter in that each places the advice or conduct of the attorney directly at issue. Sappington v. Miller, 821 S.W.2d 901 (Mo. Ct. App. 1992), involved a claim of fraud; the plaintiff alleged her attorneys did not have the authority to allow plaintiff's stepfather to sign an agreement on her behalf. Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), was a civil rights action in which the defendants alleged they acted in good faith reliance on legal advice received. In both instances and unlike the current case before the Commission, the legal communication itself was the central issue of the claim or defense. As explained by the court in Chase Resorts, "Most commonly, waiver may be invoked where proof of the elements of a party's claim will necessarily entail proof of the contents of an attorney-client communication, such as a claim of reliance on legal advice as an element of a claim or

defense.” State ex rel. Chase Resorts, 913 S.W.2d 832, 837 (Mo.App. E.D. 1995). In the instant case, the issue is not whether or not any particular advice was given or whether or not the advice given was correct. Instead, AmerenUE includes its attorney’s fees and consulting fees in its historical rate case cost as representative of what future rate case expenditures are expected to be, for purposes of determining an appropriate revenue requirement.

9. OPC’s assertion is that AmerenUE undertook affirmative action merely because it filed a rate case at the Commission. If that is the standard, then there would never be a privileged attorney-client communication for any utility in the State of Missouri. OPC then asserts that because attorney and expert witness costs are included in AmerenUE’s revenue requirement, the Company has placed those bills at issue in the case. According to OPC’s logic, whenever a litigant files a lawsuit which requests attorney fees, the plaintiff would then be compelled to turn over all data and information regardless of any privilege. Notably, OPC cites no case law to support this proposition.

In fact, in civil cases where Missouri law allows plaintiffs to seek recovery of attorney fees, Missouri courts have held the request for attorney fees does not constitute a waiver of attorney-client privilege. In Keller v. Keller, 224 S.W.3d 73, 82 (Mo.App. S.D. 2007), the court held that “[i]nformation relevant to attorney fees does not require waiver of attorney-client privilege.” The courts have also stated, “We hold that the filing of a claim for reasonable attorney's fees...does not result in an anticipatory waiver of any privileges that would otherwise be applicable to documents in the legal file.” State ex rel. Chase Resorts, *supra*.

Fee awards in civil cases are routinely affirmed as reasonable based solely on attorney affidavits as to hours and services and oral testimony as to the charges made, received and paid. *See, e.g. Gorman v. Cornwell Quality Tools*, 752 S.W.2d 844, 852-53 (Mo.App. 1988); *Davis v. Stewart Title Guaranty Co.*, 726 S.W.2d 839, 847 (Mo.App. 1987). In the instant case, OPC has been provided the hourly rate and billing hours for all invoices responsive to OPC's data requests. In fact, AmerenUE has gone beyond that which it was required to provide and, in most instances, has made available to OPC information which specifies exactly what the attorney or non-testifying expert worked on during that time for which he or she billed the Company.

10. The third prong of the test is whether the application of the privilege would deny the opposing party access to information which is vital to its position. OPC argues it needs this information to be able to determine if the costs were prudently incurred. OPC's argument rings hollow. OPC makes no demonstration that it lacks sufficient information to determine the prudence of AmerenUE's expenditures; indeed, it would be a difficult case for OPC to make given AmerenUE's limited use of redaction in the documents provided. Sufficient information has been provided through the redacted invoices to allow OPC to make its determination as to the necessity of those expenditures. As recently as December of 2009, the Commission upheld Kansas City Power and Light Company's (KCPL) claims of attorney-client privilege and work product for its redacted invoices from its outside attorneys and held that sufficient information had been provided from which a determination could be made to evaluate the prudence of KCPL's expenditures. (Case No. ER-2009-0089, Order Regarding Staff's

Motion to Compel, December 9, 2009, p. 19.) A similar finding should be made in this case.

Taken to its logical conclusion, OPC's argument would mean that attorney research, memoranda, advice and indeed, entire legal files, would no longer be privileged, as review of that information would be necessary to determine if the legal expense is prudent. Clearly, that result would fly in the face of the tradition of privilege in Missouri. Much as filing a request for reasonable attorney fees in a civil case does not constitute an anticipatory waiver of any privilege (State ex rel. Chase Resorts, supra), the Company's request to recover its rate case expense in this case cannot be a waiver of any privilege. Given the relatively small amount of information redacted by AmerenUE in the invoices provided, OPC's Motion to Compel amounts to nothing more than an improper attempt to discover AmerenUE's litigation strategy.

11. Absent a waiver, which does not exist in this case, privileged materials are immune from discovery and the Commission must reject the request to pry further into AmerenUE's privileged records. Rule 56.01(b)(1); Board of Registration for the Healing Arts v. Spinden, 798 S.W.2d 472, 475 (Mo.App. 1990). "Application of the attorney-client privilege is a matter of law, not judicial discretion, and is properly a matter for prohibition." State ex rel. McBride v. Dalton, 834 S.W.2d 890, 891 (Mo.App. 1992).

WHEREFORE, AmerenUE respectfully requests that the Commission issue an order rejecting the Office of the Public Counsel's Motion to Compel AmerenUE to Respond to Data Requests.

Respectfully submitted,

UNION ELECTRIC COMPANY,
d/b/a AmerenUE

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing have been e-mailed or mailed, via first-class United States Mail, postage pre-paid, to the service list of record this 8th day of March, 2010.

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