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January 9, 2002

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³

JAN 09 2002

Missouri Public
Service Commission

**RE: Union Electric Company,
Case No. EC-2002-1**

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of Proprietary and the original of the Non-Proprietary **PUBLIC COUNSEL RESPONSE REGARDING DISCOVERY DISPUTE. PUBLIC COUNSEL RESPONSE REGARDING DISCOVERY DISPUTE.** Please "file" stamp the extra-enclosed copy and return it to this office.

A copy of this pleading has also been hand delivered to each Public Service Commissioner.

Thank you for your attention to this matter.

Sincerely,

John B. Coffman
Acting Public Counsel

JBC:jb

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

STAFF OF THE MISSOURI)
PUBLIC SERVICE COMMISSION,)
Complainant,)
vs.)
UNION ELECTRIC COMPANY,)
d/b/a AmerenUE,)
Respondent.)

Case No. EC-2002-1

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Missouri Public
Service Commission

PUBLIC COUNSEL RESPONSE REGARDING DISCOVERY DISPUTE

COMES NOW the Office of the Public Counsel (Public Counsel), and for in response to the Public Service Commission's (Commission's) order Directing Filing Response Regarding Discovery, states as follows:

1. As Public Counsel explained in its November 30, 2001 Motion to Compel, Public Counsel propounded Data Requests Nos. 554 and 555 to Union Electric Company d/b/a AmerenUE (Company) relating to the Joint Dispatch Agreement (JDA) entered as a result of the Union Electric/CIPS merger and which allocates off-system sales revenues to Company's regulated ratepayers. Public Counsel is challenging Company's assertion of attorney-client privilege relating to these data requests. Public Counsel does not make such challenges lightly nor on a routine basis. This is an extremely important area of ratemaking analysis and could be worth several millions of dollars to Missouri ratepayers.

Public Counsel is attempting to review the prudence and reasonableness of Company actions that may or may not have the effect of decreasing the allocation of opportunity sales or off-system sales revenues to ratepayers. Public Counsel is concerned that Company may have

taken steps to minimize the benefits that ratepayers receive from the JDA have only been heightened by the Commission's recent decision regarding the test year and update periods for this case. The Commission's recent test year and update decision increases the revenue requirement dollars that are at stake in this important area.

2. Since the test year in this case may be updated through September 30, 2001, a controversial power purchase agreement that Company entered into for the purchase of several hundred megawatts of capacity and "must take" energy for the summer months of 2001 will likely become a controversial issue in this case. This power purchase agreement is controversial for two reasons. First, controversy arises from purchasing power from an Company affiliate at "market based" instead of "cost based" rates due to serious concerns when transmission constraints prevent Company's affiliate, Ameren Energy Marketing, from having any real competition from alternate suppliers that would put downward pressure on the "market based" rates. Second, Company chose to structure the power transaction with a "must take" energy provision that will likely have an adverse impact on JDA allocations between ratepayers and Ameren's non-regulated operations. Just yesterday, Public Counsel received Company's response to a data request sent by Staff's Chief Regulatory Economist, Dr. Michael Proctor, which requested Company to "please provide a written explanation of how the must-run contract with AEM for the summer of 2001 was treated in the Company's production cost model run" and "relate this to the Joint Dispatch Agreement between UE and AEG."

Any non-privileged documents that help shed light on the development of Company's "must take" energy agreement with its unregulated affiliate would be highly relevant to any determinations that the Commission may be asked to make regarding the impact of both (1) JDA allocations and (2) prudence of specific purchased power agreements on AmerenUE's cost

of service. Public Counsel believes that the documents listed in the privilege log are likely to include facts about the development of Company's "must take" energy agreement with its unregulated affiliate.

3. Public Counsel suspects that it has not received all of the non-privileged documents that would be responsive to its Data Requests No. 554 and 555. Company is asserting attorney-client privilege in a blanket fashion. For the documents which it claims an attorney-client privilege, Company will not even submit a redacted copy of these documents, claiming that even a redacted document would compromise the privilege. The provision of redacted copies which conceal the alleged attorney-client communications has been a practice for many years in Commission cases.

It is unusual for a utility to assert that most or all of the responsive documents to a specific data request are covered by attorney-client privilege. Company has indicated that it believes that many of the documents that would be responsive to Data Request No. 554 and all of the documents that would be responsive to Data Request No. 555 are covered by attorney-client privilege. In response to Public Counsel's inquiries, Company has confirmed that it believes its responses to Data Requests No. 554 and 555 are complete with the exception of the documents covered by attorney-client privilege and which are listed in the privilege log. See Attachment 1.

4. Public Counsel DR No. 555 requested Company to provide "a copy of documents created by or for Ameren or its affiliates within the last three years that contain descriptions or analysis of, or references to, possible plans for modifying or eliminating the JDA (Joint Dispatch Agreement) ratepayer payment terms (e.g. the terms under which a portion of Amern Energy trading margins are credited to UE's cost of service)." Public Counsel now believes that

there is at least one document within the scope of DR no. 555 that was not provided in response to this data request. On September 20, 2001, Company provided a copy of the "Competitive Electric Marketing Plan" for Ameren Energy Resources that is dated August 25, 2000. **

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It is significant to note that the vast majority of the documents listed in Company's privilege log were created subsequent to the creation of the "Competitive Electric Marketing Plan" for Ameren Energy Resources. Only one of the eighteen listed documents was created more than a few

months prior to date that the final draft of this marketing plan was completed and one of the listed documents was created on the exact same date that the final draft of this marketing plan was completed.

5. Public Counsel does not routinely nor lightly bring disputes regarding attorney-client privilege to the Commission's attention for resolution. The only other time Public Counsel is aware that the Commission has been asked to have a special master or neutral party review of assertions of privilege was in the Kansas City Power & Light Company rate case involving its Wolf Creek nuclear power plant, Case Nos. ER-85-128 et al., when the Commission Staff requested the appointment of a special master. Kansas City Power & Light Company, 27 Mo.P.S.C. (N.S.) 520(1985). In that case, the Commission delegated its authority to determine discovery matters regarding certain claims of privilege to one of its hearing examiners pursuant to the Commission's delegation power under Section 386.240. The Commission further determined that the decisions of its hearing examiner would be binding on the parties and the Commission and that the Commission would not review those decisions. Id at 521. The hearing examiner proceeded to conduct an en camera proceeding and made rulings upon each document and portions of each document in dispute.

6. Missouri law protects from discovery statements that are essential elements of an attorney-client consultation; however, this does not mean that factual information can be shielded from discovery simply because it is included in a communication between an attorney and their client. Board of Registration for the Healing Arts vs. Spinden, 798 S.W.2d 472, 476 (Mo.App. 1990), citing State ex rel. Great American Insurance Company vs. Smith, 574 S.W.2d 379 (Mo. banc 1978). Factual discoverable information does not become privileged simply because it is recited by an attorney or by a client within a confidential communication. Id.

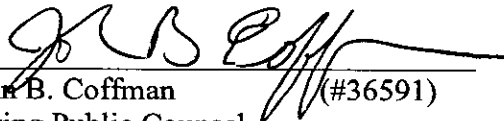
Simply including an attorney on a distribution list of a communication should not shield it from legitimate discovery.

7. Public Counsel is concerned that without a review by a neutral party, discoverable information will be concealed from legitimate review by Public Counsel. Public Counsel believes that, at a minimum, the Commission should require an independent review of the documents in question to ensure that the entirety of the documents contained in the privilege log have been legitimately withheld and thus provide greater confidence in the discovery process in this case.

WHEREFORE, Public Counsel respectfully requests that the Commission grant its Motion to Compel regarding Data Requests No. 554 and 555, or in the alternative, provide Public Counsel with redacted copies of the documents in question and require Company to submit the documents in question to a special master or regulatory law judge to rule on the disputed documents as it relates to the attorney-client privilege asserted.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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December 12, 2001



VIA FEDERAL EXPRESS MAIL

Mr. John B. Coffman
Office of the Public Counsel
200 Madison Street, Suite 650
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Jefferson City, MO 65101

Re: Case No. EC-2002-1
Staff's Excess Earnings Complaint Against Union Electric Company
OPC Data Requests 554 and 555

Dear Mr. Coffman:

Per your request, this letter confirms that our response to OPC data requests 554 and 555 included all documents within the scope those requested, with the exception of those documents that are covered by attorney-client privilege. Those documents covered by attorney-client privilege are listed in Ameren's privilege log.

To the best of our knowledge, no other documents exist.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Cook", is written over the typed name.

James J. Cook
Managing Associate General Counsel

JJC/dhb