BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service	)))	**File No. ER-2010-0036** Tariff No. YE-2010-0054

ORDER REGARDING THE OFFICE OF THE PUBLIC COUNSEL'S MOTION TO COMPEL

Issue Date: March 16, 2010 Effective Date: March 16, 2010

Background

On March 4, 2010, the Office of the Public Counsel filed a motion to compel Union Electric Company, d/b/a AmerenUE ("AmerenUE") to fully respond to certain data requests. Public Counsel's motion explains that it has submitted data requests to AmerenUE seeking billing records for the expert witnesses and attorneys who have participated in this case. AmerenUE produced the requested billing records, but redacted some information from those records, claiming attorney-client privilege and work product privileges.

The redacted records produced by AmerenUE reveal the identity of the person performing the work and the hours that they worked. The records also disclose the nature of much of the work performed, but the description of some specific areas of work performed by the attorneys or consultants are redacted, and thus not fully disclosed. AmerenUE contends the redacted information reveals aspects of its trial strategy and that it is privileged and protected from disclosure.

On March 10, 2010, the Commission appointed a Special Master to review the un-redacted billing records *in camera*, and make a determination as to whether the

redacted information was privileged and protected from disclosure. AmerenUE provided the Special Master with un-redacted versions of the disputed invoices and a conference call was held between the Special Master, and counsel for AmerenUE and Public Counsel. The conference allowed for clarification regarding the individual redactions and further argument from the parties.

Discovery Standards and Assertion of Privilege

Commission Rule 4 CSR 240.090 provides that: "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." Data requests are frequently used during Commission proceedings in forms similar to interrogatories or requests for production of documents and the rule further provides that: "If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within ten (10) days after receipt of the data requests, unless otherwise ordered by the commission."

Rule 56.01 governs the scope of discovery in civil actions in the circuit court, and generally, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action...."[1] Relevance, for purposes of discovery, is "broadly defined to include material "reasonably calculated to lead to the discovery of admissible evidence."[2] The party seeking discovery shall bear the burden of establishing relevance.[3]

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[1] Rule 56.01(b)(1); *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546 -547 (Mo. App. W.D. 2008).

[2] *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 643 (Mo. App. E.D. 1997); *State ex rel. Pooker ex rel. Pooker v. Kramer*, 216 S.W.3d 670, 672 (Mo. banc 2007).

[3] *State ex rel. Collins v. Roldan*, 289 S.W.3d 780, 786 (Mo. App. W.D. 2009).

"The discovery process' purpose is to give parties access to relevant, non-privileged information while reducing expense and burden as much as is feasible."[4] "The circuit court must ascertain that the process does not favor one party over another by giving it a tactical advantage: 'The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants.'"[5]

As noted, the information sought in discovery must not only be relevant, it must not be protected by a legally recognized privilege. "According to Black's Law Dictionary, a privileged communication is a "communication that is protected by law from forced disclosure."[6] "Claims of privilege present an exception to the general rules of evidence which provide that all evidence, material, relevant and competent to a judicial proceeding shall be revealed if called for."[7]

As Missouri courts have elucidated:

> Under subdivision [Rule 56] (b)(1), privileged matters are absolutely non-discoverable. *Id.*; *May Dep't Stores Co. v. Ryan,* 699 S.W.2d 134, 136, 137 (Mo. App. E.D. 1985). The attorney-client privilege prohibits "'the discovery of confidential communications, oral or written, between an attorney and his client with reference to ... litigation pending or contemplated.'" *State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn,* 363 Mo. 1065, 257 S.W.2d 69, 73 (Mo. banc 1953) (citation omitted). To be privileged, the purpose of a communication between an attorney and client

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[4] *State ex rel. American Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 529 (Mo. App. W.D. 2008), *citing to*, State ex rel. *Ford Motor Company v. Messina,* 71 S.W.3d 602, 606 (Mo. banc 2002).

[5] *Id*.

[6] *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44, 49 (Mo. banc 2004); Black's Law Dictionary 273 (7th ed. 1999).

[7] *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 229 (Mo. App. S.D. 1996).

> must be to secure legal advice. *St. Louis Little Rock Hosp., Inc. v. Gaertner,* 682 S.W.2d 146, 150 (Mo. App. E.D. 1984).[8]

In addition to the Attorney-Client privilege,[9] Missouri also recognizes the work-product privilege:

> The work product doctrine in Missouri protects two types of information from discovery: both tangible and intangible. *Ratcliff v. Sprint Mo., Inc.,* 261 S.W.3d 534, 547 (Mo. App. W.D. 2008). Tangible work product consists of documents and materials prepared for trial and is given a qualified protection under Rule 56.01(b)(3); its production may be required on a showing of substantial need. *State ex rel. Ford Motor Co. v. Westbrooke,* 151 S.W.3d 364, 367-68 (Mo. banc 2004). Intangible work product consists of the mental impressions, conclusions, opinions, and legal theories of an attorney. *Ratcliff,* 261 S.W.3d at 547. Intangible work product has absolute protection from discovery. *Bd. of Registration for Healing Arts v. Spinden,* 798 S.W.2d 472, 476 (Mo. App. W.D. 1990). The doctrine limits discovery in order to prevent a party in litigation "from reaping the benefits of his opponent's labors" and to guard against disclosure of the attorney's investigative process and pretrial strategy. *Westbrooke,* 151 S.W.3d at 366 n. 3; *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley,* 898 S.W.2d 550, 553 (Mo. banc 1995).[10]

The party claiming that a privilege precludes discovery of a matter bears the burden to show the privilege applies.[11]

Disputed Data Requests

Public Counsel submitted the disputed Data Requests, Numbers 1008, 1010, 1011 and 1012, to AmerenUE on December 21, 2009. AmerenUE answered on December 28, 2010, asserting their objections to the extent these requests sought information protected by attorney-client and work product privileges. The disputed Data Requests read as follows:

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[8] *Ratcliff*, 261 S.W.3d at 546-547.

[9] Privilege communications also include spousal, physician-patient, clergy, etc., but those privileges are not at issue in this matter and will not be discussed.

[10] *Kenney v. Vansittert*, 277 S.W.3d 713, 719 (Mo. App. W.D. 2008).

[11] *Ratcliff,* 261 S.W.3d at 549.

No. 1008: Information Requested: RE Response to MPSC DR 256:

Please provide copy of contract with and all invoices received from Connie Murray to date for Case No. ER-2010-0036. Please update as invoices occur through January 31, 2010.

* Eight pages of invoices were submitted with two phrases redacted.

No. 1010: Information Requested: RE Weiss w/p GSW-WP-E454

Please provide copies of all invoices received to date for Case No. ER-2010-0036 from Brattle Group. Please update as invoices occur through January 31, 2010.

* Twenty-two pages of invoices were submitted with one redaction.

No. 1011: Information Requested: RE Weiss w/p GSW-WP-E454

Please provide copies of all invoices received to date for Case No. ER-2010-0036 from Smith Lewis LLP. Please update as invoices occur through January 31, 2010.

* Forty-four pages of invoices submitted with fifty redactions.

No. 1012: Information Requested: RE Weiss w/p GSW-WP-E454

Please provide copies of all invoices received to date for Case No. ER-2010-0036 from Fischer & Dorrity. Please update as invoices occur through January 31, 2010.

* Two pages of invoices submitted with five redactions.

The largest redaction consisted of twenty-one words, but most redactions ranged between one and ten words. In only one instance was the entire description of the services redacted.

Public Counsel's Arguments and AmerenUE's Responses

Public Counsel claims that because AmerenUE seeks recovery from customers of the costs of the activities shown on the invoices that AmerenUE is, by the act of filing its case, asserting that the costs were prudently incurred and necessary to pursue this

rate case. As such Public Counsel argues that AmerenUE has affirmatively put the relevant issue of the prudence of these costs "in play" and has implicitly waived any claim to privilege protection of the selectively redacted documents.

Public Counsels contends that since it may want to challenge AmerenUE's prudence in incurring the cost of the activities, or the appropriateness of considering them to be rate case expense, redacting the nature of the activity eliminates its ability to raise serious doubt about these expenditures. Thus, according to Public Counsel, it is vital to its ability to try this issue to have access to the redacted information.

AmerenUE's Response

AmerenUE asserts that it 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. AmerenUE argues that the analysis concerning whether certain information in the invoices for legal services is protected by privilege begins with a determination if the invoice contains descriptions which reveal confidential legal strategy, including legal issues researched and the contents of attorney-client discussions.

AmerenUE maintains it only redacted a small number of entries, and retained its privilege claim on far less of the information than it could have claimed privilege. AmerenUE contends it did not expressly or implicitly waive its privilege and that 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.

AmerenUE observes that 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. Public Counsel has been provided the hourly rate and billing hours for all invoices responsive to OPC's data requests and AmerenUE has made available information which specifies exactly what the attorney or non-testifying expect worked on during that time for which he or she billed the Company, except where that information constituted legal strategy or the mental impressions of the attorneys. AmerenUE further argues that OPC makes no demonstration that it lacks sufficient information to determine the prudence of AmerenUE's expenditures and sufficient information was provided through the redacted invoices to allow OPC to make its determination as to the necessity of those expenditures. AmerenUE believes that Public Counsel's standard, if applied, effectively nullifies every claim of attorney-client or work product privilege.

Public Counsel's Reply to AmerenUE's Response

Public Counsel claims that the fundamental error with AmerenUE's analysis is that it is grounded on the principle that in civil litigation, the award of attorney's fees is a question of law, not fact. Public Counsel maintains that determination of the prudency of legal expenses by this administrative tribunal is an issue of fact and not law.

Analysis

Both parties cite to what they believe is relevant case law, but neither quite hits the mark. Both address the legal versus factual nature of determining legal expenses, but not in the same context as when a case is prosecuted before this tribunal. Neither party discusses the actual factual analysis routinely employed when determining

appropriate fees, nor do they discuss the actual legal standard applied when the Commission evaluates the prudence of a company's rate case expenses.

A. Attorney's Fees

While there are clearly differences between this tribunal and the courts, it is valuable to review the factors that all tribunals routinely review when making determinations on attorney's fees, because these factors demonstrate the information about the nature of those fees that would be necessary for any party to challenge their prudency. The trial court sits as an expert in consideration of attorney fees due after consideration of all relevant factors.[12] It is well-settled law that "the court that tries a case and is acquainted with all the issues involved may fix the amount of attorneys' fees without the aid of evidence," and in "the absence of contrary evidence, the trial court is presumed to know the character of services rendered in duration, zeal and ability."[13]

Factors the courts routinely examine in association with determining attorney's fees include: (1) whether the litigation itself was reasonable; (2) the nature and importance of the litigation; (3) the amount of money or property involved; (4) degree of responsibility imposed on or incurred by the attorney or attorneys, (5) the degree of professional ability, skill and experience called for and used, and the value of those services; (6) the time, nature, character and amount of services rendered, including the number of hours spent preparing for trial; (7) whether the amount requested was, in fact, billed or paid; (8) whether multiple attorneys were needed at trial; and, (9) the

[12] *Goldstein and Price, L.C. v. Tonkin & Mondl*, L.C., 974 S.W.2d 543, 549 (Mo. App. E.D. 1998).

[13] *Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc*., 300 S.W.3d 602, 612-613 (Mo. App. E.D. 2009).

result achieved.[14] Additionally, the trial court may look at the contingency or certainty of compensation and whether acceptance of this employment involved loss of other employment. [15] The trial court, as would this tribunal, has the discretion to find that the services rendered have no value for purposes of a fee award.[16]

The trial court does not have to evaluate or make findings for each factor it considers to make its determination on fees.[17] And therein lies one fundamental difference between a trial court and this tribunal, this tribunal is required to make findings of fact and conclusions of law when it decides a contested case.[18]

An apt example of how the Commission has applied these factors when determining the prudence of attorneys' fees is illustrated in Missouri Gas Energy's ("MGE") 2004 general rate case.[19] In this case, the Commission disallowed or reduced fees to certain attorneys representing MGE, finding their hourly rates to be excessive. It also disallowed completely another law firm's fees involved with MGE's representation

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[14] *Id*.; *Reid v. Reid*, 906 S.W.2d 740, 743 (Mo. App. E.D. 1995). See also S. Ct. Rule 4-1.5(a).

[15] *Goldstein and Price, L.C. v. Tonkin & Mondl*, L.C., 974 S.W.2d 543, 549 (Mo. App. E.D. 1998).

[16] *Reid v. Reid,* 950 S.W.2d 289, 291 -292 (Mo. App. E.D. 1997). See also footnote 19, *infra*.

[17] *Kansas City Area Transp. Authority v. 4550 Main Associates*, 893 S.W.2d 861, 870 (Mo. App. W.D. 1995).

[18] In contrast, when interpreting Section 386.420, the statute delineating the Commission's procedural requirements for conducting hearings and making its reports, Missouri Courts have held that in contested cases the Commission ***must*** include findings of fact in its written report. Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-795 (Mo. banc 1986); State ex rel. *Rice v. Public Serv. Comm'n,* 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n,* 645 S.W.2d 39, 42-43 (Mo. App. 1982). The Commission cannot merely adopt agreements or positions of the parties on the ultimate legal issues presented because such action fails to satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18. *Id*. Litigants cannot stipulate as to questions of law. *State v. Biddle*, 599 S.W.2d 182,186 and n. 4 (Mo banc 1980). The Commission must independently and impartially review the facts and make a separate and independent determination. *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 457 (Mo. App. 1988).

[19] *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Missouri Service Area; c*ited as *In Re Missouri Gas Energy, a Division of Southern Union Company*; 235 P.U.R. 4th 507, 2004 WL 2267213 (Mo.P.S.C.); Case No. GR-2004-0209; Report and Order, issued September 21, 2004; effective October 2, 2004. See in particular pp. 34-37.

finding the services performed to be *de minimis*. And it reduced fees of an additional law firm once the final bill for those services confirmed a lower amount than originally requested. The net effect was a $425,799.25 disallowance, and the case illustrates how challenges to prudence require general knowledge of the services performed as opposed to requiring the specifics of attorney-client communications, the thoughts or impressions of attorneys, or knowledge of the elements of a party's trial strategy.

B. The Presumption of Prudence and the Prudence Standard

"In ratemaking cases, a utility receives the benefit of a presumption of prudence with regard to its costs until another party raises a serious doubt regarding the prudence of its expenditure."[20] When another party raises a serious doubt regarding an expenditure the burden shifts to the utility to prove the prudence of the expenditure."[21] "To determine whether the costs were appropriately incurred, the Commission uses a prudence standard."[22] "Under the prudence standard, the Commission looks at whether the utility's conduct was reasonable at the time, under all of the circumstances."[23] The prudence standard is a legal standard that is applied to the factual findings of the Commission. The ultimate determination of the prudence of the expenses in any disputed invoices lies with the Commission, and while the actual dollars billed for any

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[20] *State ex rel. Public Counsel v. Public Service Com'n*, 274 S.W.3d 569, 586 (Mo. App. W.D. 2009).

[21] *Id*.

[22] *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo*., 116 S.W.3d 680, 693 -694 (Mo. App. W.D. 2003).

[23] *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo*., 116 S.W.3d 680, 693 -694 (Mo. App. W.D. 2003). The "reasonable care standard" was described by the Commission in *Re: Union Electric Company,* 27 Mo.P.S.C. (N.S.) 183, 194 (1985) as follows: "The Commission will assess management decisions at the time they are made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?' " *State ex rel. Capital City Water Co. v. Missouri Public Service Com'n,* 850 S.W.2d 903, 911 -912 (Mo. App. W.D. 1993).

specific service provided are factual determinations, whether such expenditures are prudent is a conclusion of law.

Decision

The relevant purpose of examining the AmerenUE's legal invoices is to determine the prudency of the expenditures outlined in the invoices to decide if they should be recovered as properly incurred rate case expenses. Bearing the appropriate construction of the prudence standard in mind and how the presumption of prudence operates, Public Counsel's first claim regarding AmerenUE making an assertion that its rate case expenses are prudent simply by the act of filing its rate case and seeking recovery of those expenses is simply incorrect. AmerenUE isn't required to make such an assertion because there is a presumption they are prudent. AmerenUE would only be making such an assertion after the expenses are challenged. The fact that rate case expense is an issue requiring decision by the Commission once a case is filed does not somehow translate into a waiver of validly asserted privilege with the regard to all of the subject matter involved.

Secondly, Public Counsel's claim that it has inadequate information to assert a challenge to these expenses without knowing the exact nature of the specific services performed in association with those fees is also incorrect. Public Counsel has significant experience prosecuting rate cases before this Commission. Without knowing the exact details of the legal or expert services performed, Public Counsel can still challenge the prudency of these expenses in terms of time and amount of services rendered, the general nature and character of the services revealed by the invoices, the background and expertise of the persons providing the expert services, whether the

attorneys or experts involved made appearances before the Commission or if tangible work product of these attorneys or experts was offered into evidence, the nature and importance of this litigation, the amount of money or property involved, the degree of professional ability, skill and experience called for and used – all factors that trial courts and this Commission routinely examine when determining appropriate legal fees. In fact, the assertion of the privilege itself supplements the invoice descriptions of the services provided. AmerenUE has disclosed the nature of the work being performed, i.e. trial preparation and trial strategy.

Finally, AmerenUE's assertion of privilege, in all instances except one, was appropriate. The *in camera* review provides an extra procedural safeguard that assertion of privilege will not be abused. In almost all instances in which material was redacted, there was sufficient description of the services provided, along with who provided those services, the number of hours being billed, and the hourly rate for those services. With regard to the invoices for the Brattle Group, the one redaction involved the services of a testifying witness so there can really be no mystery as to what the services involved. The nature and character of the service provided has been adequately described to Public Counsel and Public Counsel is certainly free to challenge the invoices and raise doubt as to the amount of legal services obtained in order to construct its trial strategy.

The one instance where privilege was improperly raised involves one redaction in association with data request 1008, the invoices of Connie Murray, Consultant. That four word redaction in Invoice Number 1008, dated December 15, 2009, involves a description of a method of trial preparation. It does not involve a direct attorney-client

communication, the intangible mental impressions or opinions of attorneys, nor an actual legal strategy that would be employed at trial. The Commission will direct AmerenUE to provide an un-redacted version of that invoice to Public Counsel.

The attorney-client privilege and the intangible work product privilege are both absolute privileges and serve to the benefit of all parties to litigation. To accept Public Counsel's legal theory has the potential to essentially eliminate the use of these time-honored privileges when practicing before this tribunal, because any legal consultation in a rate case necessary will involve the subject matter at issue in the case. Applying Public Counsel's theory could require the content of all attorney-client communications and mental impressions with regard to those issues be disclosed, contrary to all legal precedent.

THE COMMISSION ORDERS THAT:

1. The Office of the Public Counsel's motion to compel is granted in part and denied in part.

2. No later than March 16, 2010, Union Electric Company, d/b/a AmerenUE shall provide the Office of the Public Counsel and un-redacted copy of Invoice Number 1008, dated December 15, 2009, it received from Connie Murray, Consultant.

3. To the extent the Office of the Public Counsel's March 4, 2010 Motion to Compel AmerenUE to Respond to Data Requests seeks further disclosure in relation to data requests numbers 1008, 1010, 1011 and 1012, it is denied.

4. This order shall become effective immediately upon issue.

BY THE COMMISSION

Steven C. Reed
Secretary

(S E A L)

Harold Stearley, Senior Regulatory Law Judge,
by delegation of authority under
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 16th day of March, 2010.