

**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)	<u>Case No. ER-2010-0036</u>
Service Provided to Customers in the)	
Company's Missouri Service Area.)	

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

COMES NOW the Office of the Public Counsel and for its Reply to Response to Motion to Compel AmerenUE to Respond to Data Requests states as follows:

1. This Reply will briefly address two points raised in AmerenUE's Response. First, Public Counsel will counter AmerenUE's argument that recovery of expenses in rates is like the recovery of costs in civil litigation. Second, Public Counsel will counter AmerenUE's blatant lie that it "hear[d] nothing from OPC on this matter in January and February."

2. AmerenUE cites Chase Resorts¹ for the proposition that "the filing of a claim for reasonable attorney's fees ... does not result in an anticipatory waiver..." (UE Response at page 5). It cites Keller v. Keller² for the same point. AmerenUE mischaracterizes these cases. Both cases are grounded on the fundamental principle that in civil litigation, the award of attorneys fees is a question of law, not fact. Chase Resorts states:

The trial court, as an expert on attorney's fees, may award reasonable amounts as a matter of law.

...

As discussed above, once liability therefor has been established, **the reasonableness of attorney's fees is a question of law, not a question of fact.**

¹ State ex rel. Chase Resorts v. Campbell, 913 S.W.2d 832 (Mo. Ct. App. 1995)

² Keller v. Keller, 224 S.W.3d 73 (Mo. Ct. App. 2007)

Particularly instructive in this regard is American Bank of Princeton v. Stiles, *supra*. In that case, the court held that even if a defendant files affidavits challenging the reasonableness of attorney's fees, this does not create a genuine issue of material fact precluding summary judgment. 731 S.W.2d at 339. A *fortiori* it does not create an issue of fact necessitating a trial by jury.³

And Keller v. Keller is premised on the same principle: "The trial court is expert on attorney fees and may award attorney fees **as a matter of law**."⁴

3. The question of including particular expenses in the calculation of rates is, on the other hand, very much a question of fact. In a Laclede Gas Company case,⁵ the Western District Court of Appeals considered the question of whether the PSC could exclude expenses which had not been shown to benefit ratepayers from the ratemaking calculation, specifically goodwill-type advertising. The court concluded:

The order of the P.S.C. does not prohibit advertising by Laclede. If it had, this order would, without question, have violated the constitutional and managerial rights of Laclede. What the order prescribes is that advertising cost items directly related to the benefit of ratepayers are justified operational costs permitted to be included within the rate schedule. All other such expenses, while they too are decisions of management, are not operational costs includable in the rate schedule.

This court is persuaded that § 393.140(5) and § 393.270(4), RSMo 1978 authorize the P.S.C. to examine the methods, practices, regulation and property employed by public utilities, and that such authorization extends to examination of advertising cost. This court finds of particular persuasion the case of State of Oklahoma v. Oklahoma Gas and Electric Company, *supra*, at 894, in that it adopts the principle therein when it states: "We conclude the Commission may disallow any institutional advertising expenditures from operating expenses for ratemaking purposes unless the utility establishes such expenditures benefit all ratepayers." By the adoption of such a rule, the managerial prerogatives of Laclede are maintained, and the right of Laclede to continue to exercise its right of free speech is preserved, while at the same time the P.S.C. can perform its regulatory role of balancing the integrity of regulated utilities against the protection of the ratepayer.

³ Chase Resorts, *supra*, at 836; emphasis added.

⁴ Keller v. Keller, *supra*, at 83; emphasis added.

⁵ State ex rel. Laclede Gas Co. v. Public Service Com., 600 S.W.2d 222, 228-229 (Mo. Ct. App. 1980)

The Commission could – and should – take a similar approach to rate case expense as it does to advertising: the Commission should allow the utility to spend as much as it wants to prosecute a rate case, but the Commission should only consider in setting rates those expenses that are reasonable, prudent and beneficial to ratepayers. Prudence, reasonableness and benefit to ratepayers are all matters of fact that must be decided based upon evidence. If AmerenUE cannot or will not provide evidence showing that all of its expenses⁶ for outside experts and outside counsel are reasonable, prudent and beneficial, then the unsupported portion of those expenses should be excluded from the rate calculation.

4. This approach would be consistent with that taken by the Court in the first UCCM case,⁷ which stated: “If [the Company] seeks to rely on proprietary information to carry its burden of proof and, thereby, benefit from the use of such information, then it may not protect that information from scrutiny by claiming it need not disclose.” Thus the approach in ratemaking is very different from the approach to attorney’s fees in civil litigation, and AmerenUE’s reliance on cases from that arena is misplaced.

5. Public Counsel must also respond to the patently false accusation that Public Counsel did nothing with respect to this discovery dispute for several months. AmerenUE states that it heard nothing on this matter from Public Counsel in January and February. A true timeline of events is as follows:

⁶ AmerenUE repeatedly points out that only a relatively small portion of the invoices are redacted, which means that only a relatively small amount of the expenses related to outside counsel and outside experts would be excluded from rates on the basis of AmerenUE’s refusal to provide evidence supporting those expenses.

⁷ State ex rel. Utility Consumers Council v. Public Service Com., 562 S.W.2d 688, 694 (Mo. Ct. App. 1978)

December 21, 2009	DRs sent
December 28, 2009	Objection letter sent
January 11, 2010	Partial responses received
January 14, 2010	Face-to-face discussion concerning the invoices at issue with AmerenUE counsel at technical conference in Room 315, Governor Office Building
January 25, 2010	Email sent to follow-up on 1-14 discussion (attached hereto as Exhibit 1)
January 28, 2010	First request for a 4 CSR 240-2.090(8)(B) conference with presiding officer (attached hereto as Exhibit 2); no response until February 4 phone call
February 4, 2010	Phone call with AmerenUE counsel, resulting in an agreement that AmerenUE would provide a sample redacted invoice on February 8
February 9, 2010	AmerenUE provides a sample redacted invoice; several emails exchanged; second request for a 4 CSR 240-2.090(8)(B) conference with presiding officer (attached hereto as Exhibit 3)
February 23, 2010	Third request for a 4 CSR 240-2.090(8)(B) conference with presiding officer (attached hereto as Exhibit 4)
February 28, 2010	4 CSR 240-2.090(8)(B) conference with presiding officer; AmerenUE agrees to provide redacted invoices on March 1
March 2, 2010	AmerenUE provides redacted invoices
March 4, 2010	Public Counsel files motion to compel

With the exception of a period from February 9 through February 23 (which included several state holidays, business-related travel, etc.), Public Counsel has constantly and vigorously pursued this discovery issue. The amount of time between propounding the discovery and filing the motion to compel is not due to AmerenUE hearing nothing from Public Counsel for two

months, but rather due to Public Counsel working diligently with AmerenUE to resolve the dispute without involving the Commission.

WHEREFORE, Public Counsel respectfully requests that the Commission compel AmerenUE to provide unredacted copies of invoices in response to Data Requests 1008, 1010, 1011, and 1012.

Respectfully submitted,

OFFICE OF THE Public Counsel

/s/ Lewis R. Mills, Jr.

By: _____

Lewis R. Mills, Jr. (#35275)
Public Counsel
P O Box 2230
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX
lewis.mills@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 9th day of March 2010.

/s/ Lewis R. Mills, Jr.

Mills, Lewis

From: Mills, Lewis
Sent: Monday, January 25, 2010 5:01 PM
To: 'Tatro, Wendy K'
Subject: DRs asking for invoices
Attachments: ER 2010 0036 Trippensee DRs 1008 thru 1014.pdf

Wendy,

All but one of the DRs attached asks for invoices. The responses just listed dates and amounts, and did not provide any invoices.

Lewis

Mills, Lewis

From: Mills, Lewis
Sent: Thursday, January 28, 2010 8:34 AM
To: 'Tatro, Wendy K'
Subject: RE: DRs asking for invoices

Please let me know when you will be available to discuss this with Judge Woodruff.

From: Tatro, Wendy K [mailto:WTatro@ameren.com]
Sent: Wednesday, January 27, 2010 5:25 PM
To: Tatro, Wendy K; Mills, Lewis
Cc: Byrne, Thomas M; Jim Lowery
Subject: RE: DRs asking for invoices

As Jim reminded me, this was set forth in our objection letter to these DRs. It is attached.

Wendy Tatro

Associate General Counsel

Ameren Services

1901 Chouteau Avenue

PO Box 66149, MC 1310

St. Louis, MO 63166

314.554.3484

314.554.4014 fax

WTatro@ameren.com

From: Tatro, Wendy K
Sent: Wednesday, January 27, 2010 4:32 PM
To: Lewis Mills
Cc: Byrne, Thomas M; Jim Lowery
Subject: RE: DRs asking for invoices

Lewis – I wanted to let you know that I haven't had time to look at these DRs but will do so yet this week. However, just to make sure there is no confusion, we believe any invoices from law firms/attorneys are privileged and so we will not be providing. That is why there were no invoices provided in those answers. I realize a couple of the DRs are not asking about law firms/attorneys and I need to follow up on those.

Thanks

Wendy Tatro

Associate General Counsel

Ameren Services

1901 Chouteau Avenue

PO Box 66149, MC 1310

St. Louis, MO 63166

314.554.3484

314.554.4014 fax

WTatro@ameren.com

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Mills, Lewis

From: Mills, Lewis
Sent: Tuesday, February 09, 2010 10:17 AM
To: 'Byrne, Thomas M'
Subject: RE: Replacement Bill

Tom,
Murray's is not redacted at all, so that's fine. With respect to Smith Lewis, if you will agree to remove the dollars associated with the redacted portions, we would be OK with that. Otherwise, I would like to proceed with a conference with the judge.
Lewis

From: Byrne, Thomas M [mailto:TByrne@ameren.com]
Sent: Tuesday, February 09, 2010 9:59 AM
To: Mills, Lewis
Subject: FW: Replacement Bill

Lewis: Here are legal bills for the period June-September, 2009 with limited redactions. Does this work for you? If so we can go through all the others and make similar types of redactions. If not, I guess we need to go to the judge. Let me know. Tom

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Mills, Lewis

From: Mills, Lewis
Sent: Tuesday, February 23, 2010 3:22 PM
To: 'Byrne, Thomas M'
Subject: late DR responses and other discovery issues

Tom,
DR Nos. 2069, 2072, and 2073 were sent to UE on 1/14/10 and are now more than 3 weeks overdue. Can you please check? And can you (or whichever attorney is going to be involved) give me times this week you are available to have a call with Judge Woodruff about the Smith Lewis invoices? I am free any time except Wednesday from 1:00-4:00.

Thanks,
Lewis