

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

In the Matter of Union Electric Company, d/b/a	)	<b><u>File No. ER-2012-0166</u></b>
Ameren Missouri's Tariff to Increase Its Annual	)	Tariff No. YE-2012-0370
Revenues for Electric Service	)	

## **PROTECTIVE ORDER QUASHING THE NOTICE OF DEPOSITION OF MARY HOYT**

Issue Date: September 11, 2012

Effective Date: September 11, 2012

This order concerns one aspect of a discovery dispute between the Staff of the Commission and Ameren Corporation. On September 5, 2012, Staff served a notice of records deposition and a subpoena duces tecum on Ameren Corporation seeking the production of certain documents in the possession of Ameren Corporation. That records deposition was scheduled for September 13. Also on September 5, Staff served a notice of telephone deposition by which Staff announced its intention to depose Mary Hoyt, a paralegal working for Tom Byrne, one of the attorneys representing Ameren Missouri in that company's ongoing rate case. That deposition was scheduled to take place on September 12.

On September 10, Ameren Corporation filed a motion seeking to quash the records deposition and subpoena duces tecum. On the same date, Ameren Missouri filed a motion to quash Staff's deposition of Mary Hoyt. Staff responded to both motions on September 11. The Commission will deal with Ameren Corporation's motion to quash in an order to be issued at its September 12 agenda meeting. Since Staff proposes to depose Mary Hoyt before that agenda meeting, the Commission will address the motion to quash that deposition in this order.

In its subpoena duces tecum directed to Ameren Corporation, Staff seeks the production of certain financial documents that were redacted from the records of Ameren Corporation board meetings that Staff was allowed to review at Ameren's corporate headquarters on August 30 and 31. In its response to Ameren Missouri's motion to quash the deposition of Mary Hoyt, Staff states that it wants to depose Ms. Hoyt because it "wants to know exactly what instructions she was given, and by whom, when she prepared the Board of Directors records for review by Mr. Murray." Staff goes on to state: "In particular, Staff wants to know more about the documents she removed."

Ameren Missouri objects that "the steps Ms. Hoyt took in preparing discovery responses (which included compiling documents that the Staff inspected at the Company's offices provided pursuant to discovery requests) were taken at the direction of undersigned counsel and other attorneys representing the Company in this case." Ameren Missouri further asserts that "those directions reflected the mental impressions, conclusions, opinions, analyses and thought processes of attorneys representing the Company." On that basis, Ameren Missouri asserts that Ms. Hoyt's testimony at deposition would necessarily be absolutely privileged as opinion work product or intangible work product.

Under Missouri law, specifically Civil Rule 56.01(b)(3), opinion work product, which includes "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party", is absolutely immune from discovery.<sup>1</sup> In seeking to ask Ms. Hoyt about the Ameren Missouri's legal counsel's instructions about what portions of documents should be protected from discovery Staff is clearly seeking to intrude on the opinion work product of the company's attorneys, which is absolutely immune from discovery.

In its response, Staff claims the work product privilege does not apply in this situation because the Ameren Corporation documents that it seeks to learn more about are not themselves privileged. That argument misses the point. Staff may be entitled to review the documents themselves. That question will be resolved in a separate order regarding the motion to quash Staff's subpoena duces tecum. However, Staff is not entitled to question a paralegal representing the company about why the company's attorneys may have instructed her to assert a claim of privilege to protect certain documents from disclosure.

Staff further defends its intent to depose Ms. Hoyt by claiming that it should be allowed to proceed with the deposition and that Ameren's legal counsel can object to and instruct the witness not to answer any specific questions that may lead to the disclosure of privileged information. Staff's argument is not persuasive in these circumstances. According to Staff, it has only two bases for seeking to depose Ms. Hoyt. The first is to question her about the instructions she received about redacting certain documents. All such questions would run directly into the absolute privilege afforded to opinion work product. Staff's second asserted basis for questioning Ms Hoyt is that it wants to know more about the documents that she redacted. Staff's best means of learning about the contents of those documents is to subpoena them from their source, which Staff has done. There is no need to question Ms. Hoyt to obtain that information.

Under those circumstances, the proposed deposition of Ameren's paralegal would be pointless and could only serve to harass the company and the witness. The Commission will quash the notice of deposition and will issue the protective order sought by Ameren Missouri.

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<sup>1</sup> *Edwards v. Mo. State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 26, (Mo. App. W.D. 2002).

**THE COMMISSION ORDERS THAT:**

1. Staff's Notice of Deposition of Mary Hoyt is quashed.
2. Staff shall not proceed with the deposition of Mary Hoyt.
3. This order shall become effective immediately upon issuance.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Morris L. Woodruff, Chief Regulatory  
Law Judge, by delegation of authority  
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 11<sup>th</sup> day of September, 2012.