

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 19th day of June, 2014.

In the Matter of)	
Summit Natural Gas of Missouri Inc.'s)	File No. GR-2014-0086
Filing of Revised Tariffs to Increase Its)	Tracking No. YG-2014-0285
Annual Revenues for Natural Gas Service)	

ORDER GRANTING MOTION TO COMPEL

Issue Date: June 19, 2014

Effective Date: June 19, 2014

Staff's motion to compel¹ ("motion") seeks information from Summit Natural Gas of Missouri, Inc. ("Summit"). The information is reasonably calculated to lead to the discovery of admissible evidence and is within Summit's practical ability to obtain. Therefore, the Commission is granting the motion.

A. Background

In this action, the issue is the "propriety" of pending tariffs. Tariffs are Summit's proposed schedules of rates and terms governing natural gas service. The pending tariffs propose to increase the price of natural gas for Summit's customers. The propriety of those tariffs includes whether the increased rates are just and reasonable.² To help the Commission³ determine the tariff's propriety, the parties have the right to discovery.⁴

¹ Included in *Staff Statement Describing Discovery Concern and Motion for Reconsideration*, Electronic Filing and Information System No. 49, filed on June 10, 2014.

² Section 393.150.1, RSMo 2000.

³ *J.B.C. v. S.H.C.*, 719 S.W.2d 866 (Mo. App., E.D. 1986).

⁴ 4 CSR 240-2.090(2).

Discovery before the Commission includes the devices available in circuit court for a civil action, plus data requests.⁵ A data request is an informal written discovery device by which parties, without counsel, exchange information and documents.⁶ Data requests are enforceable by the same means as civil discovery in circuit court.⁷ Those means include a motion to compel.⁸

Staff served Summit with data requests dated January 29,⁹ March 12, and May 2. Summit served Staff with objections dated February 5, March 21, and May 12. The Commission heard argument on the motion on June 13, 2014.

B. Relevant or Reasonably Calculated

The data requests sought information about the finances of Summit and related entities. Summit argues that such information is beyond the scope of discovery. The scope of discovery includes more than admissible evidence.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party [.] It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. [¹⁰]

Staff has “the burden of establishing relevance.”¹¹

⁵ 4 CSR 240-2.090(2).

⁶ 4 CSR 240-2.090(2).

⁷ 4 CSR 240-2.090(1).

⁸ Mo. Rule 61.01(g).

⁹ All dates are in 2014.

¹⁰ Mo. Rule 56.01(b)(1).

¹¹ Mo. Rule 56.01(b)(1), last sentence.

In support of the motion, Staff cites case law discussing a regulated utility's financial status from the perspective of the utility's owner.

[C]onsideration must be given to the actual equity owner in the ratemaking process. [Case law] specifically approves the Commission's consideration of the return to the "investor" or "equity owner." The use of a cost-of-capital approach as to the ultimate shareholder seems totally consistent with that language. The conscious and voluntary corporate business decision that resulted in the hierarchy as exists here should not and cannot shield pertinent financial data from the Commission's scrutiny just because the ultimate owner does not provide the same service as the applicant and is not regulated. Also, once the utility asks for higher rates, a commission may inquire into the utility's capital structure and apply a hypothetical construct. This capital structure was determined by the management of the companies, not by the rate order of the Commission. Despite the Company's contention that it is operationally and financially independent from [its owners], it is hard to believe a wholly owned subsidiary could be as autonomous as is here claimed. [¹²]

That language supports the relevance of the information sought as to Summit and the related corporations.¹³

Therefore, the Commission concludes that the information sought is reasonably calculated to lead to the discovery of admissible evidence, and overrules Summit's objection.

C. Possession or Control

Summit's objections state in conclusory fashion that Summit does not have possession, custody, or control of the information because the information is in the

¹² *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n of Missouri*, 706 S.W.2d 870, 881 (Mo. App., W.D. 1985), (citations omitted).

¹³ That information includes financial reports, information on equity and debt, credit rating, capital structure, projected earnings per share growth rate, regulatory environment, cost of capital, capital structure, internal rate of return for investors direct and indirect, discounts, financial statements, and valuation of minority stock.

hands of another person. But each such other person is either Summit's owner or another closely related entity. That fact refutes Summit's objections.

The Missouri Supreme Court has instructed that the essence of the "possession, custody or control" principle is practical ability to obtain.

Plaintiff misses the thrust of Rule 58.01(a). The rule is not limited to documents only in the possession of a party. Instead, Rule 58.01(a) provides that "[a]ny party may serve on another party a request (1) to produce ... any designated documents ... which are in the possession, custody or control of the party upon whom the request is served" (emphasis added). Our Rule 58.01(a) is identical to Federal Rule of Civil Procedure 34(a). The "[b]asic test of the rule is 'control' rather than custody or possession." ("The true test is control and not possession."). " 'Control' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action." (A court may require a party to produce documents held by a non-party if the party has the "practical ability to obtain the documents ... irrespective of his legal entitlement to the documents."); ("The word 'control' is to be broadly construed...."). In [a criminal action], Missouri applied the "control" test in relation to discovery in a murder case holding that it was error for the trial court to allow into evidence a coat with bullet holes that had not been disclosed to the defense. [¹⁴]

Missouri Supreme Court affirmed the exclusion from evidence of documents in the hands of a non-party that the plaintiff had the "practical ability to obtain."¹⁵ In that case, the served party and possessing non-party were unrelated individuals: a dairy farmer and a veterinarian.

Much more persuasive are the facts of this case. Here the served party is a regulated utility and the possessing non-parties are owners of, or owned by, one

¹⁴ *Hancock v. Shook*, 100 S.W.3d 786, 796-97 (Mo. 2003), (citations and footnote omitted).

¹⁵ *Hancock v. Shook*, 100 S.W.3d 786, 797 (Mo. 2003).

another. The close relation of the corporate entities shows—and Summit has not denied—that Summit has the practical ability to obtain the information sought. And Staff seeks no exclusion of evidence, only compliance with discovery, as described under the case law cited.¹⁶

The enforceable reach of discovery is the practical reach of the party served, so the Commission will overrule the objection.

THE COMMISSION ORDERS THAT:

1. The motion to compel, set forth in the *Staff Statement Describing Discovery Concern and Motion for Reconsideration*, is granted.
2. Summit Natural Gas of Missouri, Inc. shall comply with the discovery requests described in the body of this order no later than June 20, 2014.
3. This order is effective immediately upon issuance.

BY THE COMMISSION



A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney
Hall, and Rupp, CC., concur.

Jordan, Senior Regulatory Law Judge

¹⁶ It is true that plaintiff did not object to the discovery, but waiver was not the basis of either ruling, circuit court or in the Missouri Supreme Court. *Hancock v. Shook*, 100 S.W.3d 786, 796-97 (Mo. 2003).