LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-3847
E-MAIL: DEANBSE@SOCKET.NET

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
TIMOTHY T. STEWART
GREGORY C. MITCHELL
RACHEL M. CRAIG
BRIAN T. McCARTNEY
DALE T. SMITH

July 19, 1999

FILED
JUL 19 1999
Missouri Public Service Commission

Mr. Dale Hardy Roberts
Executive Secretary
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

**RE:** Case No. EX-99-442

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding on behalf of The Empire District Electric Company please find an original and fourteen copies of its Response to Motion to Compel.

If you have any questions, please give me a call.

Sincerely yours,

Gary W. Duffy

Enclosures
cc w/encl:

| | |
|---|---|
| Office of Public Counsel | Ricky Gunter |
| Bob Fancher | Tim Rush |
| Bill Niehoff | Bob Amdor |
| Mike Pendergast | Rob Hack |
| Jerry Reynolds | Gary Clemens |
| Jeff Keevil | Jim Fischer |

# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



In the matter of 4 CSR 240-20.015 proposed )
Rule - electric utilities affiliate transactions. ) Case No. EX-99-442

## RESPONSE TO MOTION TO COMPEL

Comes now The Empire District Electric Company ("Empire"), by and through its counsel, and for its response to the "Motion to Compel Data Requests Submitted To Empire District Electric" filed by the Office of the Public Counsel ("OPC") on July 9, 1999, respectfully states as follows:

1. The OPC's motion to compel should be denied for the reasons stated herein.

### Material Sought Is Beyond Commission's Jurisdiction

2. The Commission does not have subject matter jurisdiction or jurisdiction over the person sufficient to require Empire or anyone else to produce the material for which OPC seeks a motion to compel production. The information sought generally falls into the category of material which has no bearing whatsoever on Empire's operation of an electric utility under the Commission's jurisdiction. For example, in DR 507, OPC seeks "strategic plans ... for overall *non-regulated* electric operations." In DR 508, OPC seeks "most recent strategic plans for each of its *unregulated* business units and affiliates." In DR 512, OPC seeks contracts for "*non-regulated* products or services." In DR 514 and 515, OPC seeks documents regarding Empire's



29

use of "dark fiber[1]." In each of these situations, OPC specifically seeks documents or information regarding enterprises which are not subject to the subject matter jurisdiction of the Commission under § 386.250 RSMo. Empire provided responses to the requests which sought information regarding its regulated activities.

3. Empire is not required to produce this information in response to a general request such as this. Subsection (12) of Section 393.140 RSMo provides that if a utility is "engaged in carrying on any other business" than utility business

> which other business is not otherwise subject to the jurisdiction of the Commission, and is so conducted that its operations are to be substantially separate and apart from the owning, operating, managing or controlling of such gas plan, electric plant, water system or sewer system, ***said corporation in respect to such other business shall not be subject to any of the provisions of this chapter*** and ***shall not be required*** to procure the consent or authorization of the commission to any act in such other business or ***to make any report in respect thereof.***" (Emphasis supplied)

In very clear fashion, the General Assembly has authorized utilities to carry on non-regulated enterprises and, in accordance therewith, has specified that the utilities do not have to report to the Commission regarding those operations. As a result, the Commission clearly has no statutory authority to compel production of material which the statute says is beyond the subject matter jurisdiction of the Commission. Further, the Commission has no personal jurisdiction over any other entities that may possess the information sought by OPC in its motion to compel. As a result, the Commission should deny the Motion to Compel.

**OPC's Requests Are Not Relevant**

4. Alternatively, OPC has not demonstrated in its motion that what it requests is

[1] Although undefined in OPC's data request, Empire understands the term to mean fiber optic cable which is not energized.

relevant to any issue in this case, or even what the alleged "issues" in this case are. OPC recites in paragraph 1 of its Motion its intentions in asking the data requests. OPC says that it wants to "illustrate" an alleged "current trend toward diversification." The OPC's intentions are not relevant and the mere existence of a proposed rule on a topic cannot and does not enlarge the subject matter jurisdiction of the Commission. To that end, the courts will not recognize a *proposed* rule offered in support of an agency's position. ***St. Louis Christian Home v. Missouri Comm'n. on Human Rights***, 634 S.W.2d 508, 513-515 (Mo.App. 1982). Therefore, OPC cannot attempt to use a proposed rule to "bootstrap" itself into relevancy in this proceeding.

5. The Commission has recently ruled that the standard for granting a motion to compel is that "if the information sought is relevant or calculated to led to the discovery of relevant information, the Commission will compel its production unless the burden of producing it outweighs its value." ***In Re Osage Water Company***, Case No. SA-99-268, Order Denying Motion to Compel, May 11, 1999, p. 6. "Relevance" is an appropriate concept in a contested case. It is not a well-recognized concept in a legislative rulemaking because, ordinarily, there is no discovery and no evidentiary record. "Relevancy" according to ***Black's Law Dictionary*** *(West Publishing, Rev. 4th Ed. 1968, p. 1454)* means

> applicability to the issue joined. That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue between parties to a suit.

There is no "suit" in existence in Case No. EX-99-442. There has been no summons or service of process, there are no pleadings, and there are no official parties to Case No. EX-99-442. ***Osage Water Company,*** supra, in contrast, is a contested case. As will be explored further herein, it has not been determined at this time whether this case is a "contested case" or not. As long as it is considered a pure legislative type of rulemaking, OPC's Motion to Compel is not

something which is recognized as a procedure which is available since there has been no statute cited by OPC which authorizes the use of discovery in rulemaking proceedings before the Commission. Indeed, Sections 536.010 to 536.046 RSMo Cum. Supp. 1998 contain the general "rulemaking" proceedings for Missouri. Nowhere in any of those sections is there a grant of authority to agencies to allow the discovery methods recognized in civil actions and contested cases.

6. Before the Commission can determine whether OPC's data requests are "relevant," the Commission must first make the threshold decision of whether this case is a contested case (or requires contested case procedures) or whether it is a legislative rulemaking. Empire and other utilities, as reflected in the motions filed in this and accompanying cases, believe the Commission is required by statute to adopt contested case procedures in this and the associated proceedings of Case Nos. HX-99-443, GX-99-444, and GX-99-445. The Staff and OPC do not. *See*, "Public Counsel's Response in Opposition to Implement or Adopt Contested Case Procedures," dated July 12, 1999 and "Answer of the Staff of the Missouri Public Service Commission To Motion To Adopt Contested Case Procedures" of the same date. The Staff and the OPC ignore a clear statutory requirement and thus are mistaken in their interpretation of the law. The OPC's position is quite ironic since the original Public Counsel, the late William Barvick, obtained a writ of prohibition from the Circuit Court of Cole County against the Commission requiring the Commission to allow cross-examination in a rulemaking proceeding regarding what is now Chapter 13 of the Commission's rules.

7. In the Staff's "Answer" at page 3, it quotes the definition of a "contested case" from ***Hagely v. Board of Education of Webster Groves School Dist.***, 841 S.W.2d 663, 668 (Mo. 1992) in order to convince the Commission that this is not a contested case. The quoted material

proves exactly the opposite of what the Staff is contending. In ***Hagely***, the Supreme Court said a contested case is *one where there is a "requirement* (by constitutional provision, *statute,* municipal charter provision, or ordinance ...) *for a hearing before it [the agency] of which a record must be made* unless waived." (Emphasis supplied) Is there a requirement for a hearing in this case on the record? Absolutely. The Commission cited § 386.250 RSMo. as authority for promulgation of this and accompanying rules. As pointed out by various utilities in the Motions to Adopt Contested Case Procedures, that statutory section *explicitly* requires a hearing and -- additionally, lest there be any doubt that it is just a "legislative" type hearing -- it also says there has to be "evidence" to support such rules. The concept of "evidence" is generally alien to notice and comment rulemaking as the Commission is attempting here, and even in a pure legislative type hearing because there is no sworn testimony subject to cross examination, no briefs, etc. But overshadowing all of this theory is the General Assembly's explicit requirement applicable to the Commission that there be a "hearing" and "evidence." That is therefore ***more than sufficient*** to meet the ***Hagely*** test to require contested case procedures in this proceeding and the accompanying ones.

8. The statutory requirement of "evidence" inherently means there must be the formalities of a contested case procedure, such as cross-examination and the opportunity to make objections, in order for there to be an "evidentiary record." The dictionary definition of "evidence" is

> Any species of proof, or probative matter, legally presented ***at the trial*** of an issue by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc. for the purpose of inducing the minds of the court or the jury as to their contention.

***Black's Law Dictionary*** *(Rev. 4th Ed., West Publishing, 1968, p. 656)* The Staff's "Answer"

quotes from Professor Neely's book entitled *Missouri Practice, Administrative Practice and Procedure*, to the general effect that there is no legislative intent to require contested case type proceedings when the Commission engages in its rulemaking function. The Staff either intentionally or unintentionally totally misses the point of the specific wording in § 386.250(6) RSMo requiring a hearing and evidence. Professor Neely is not adequate support for the Staff's argument either. The Professor acknowledges that the General Assembly can require contested case hearings if they so choose, as reflected in his discussion of some recent statutory changes in these areas:

> The first requirement regarding "proposed rules based upon substantial evidence on the record" seemingly would introduce a new and potentially cumbersome dimension to rulemaking in Missouri. A requirement of "substantial evidence on the record" evokes principles of formal rulemaking, or as it is also known, rulemaking on the record. In federal administrative law, formal rulemaking involves ...a great measure of procedural trappings of formal adjudication and judicial review to see if "unsupported by substantial evidence on the whole record." If something comparable is intended by the new "based upon substantial evidence of record" language, and such would be consistent with normal understandings in administrative law circles, this new requirement will greatly reduce the advantages customarily associated with informal, notice and comment rulemaking and move Missouri toward rulemaking by evidentiary hearings to accumulate formal records which in turn will be tested for substantiality. If so, rulemaking will be less desirable and less likely.

***Id.***, 1999 pocket part, p. 56. While the Professor is talking there about some changes to Chapter 536 RSMo which are not technically in effect at this time, what is significant is that he, almost begrudgingly[2] from his academic perspective, acknowledges that the General Assembly can require additional procedural due process in rulemaking proceedings such as that found at the federal level. The fact is, however, that in the specific case of the Commission, those "cumbersome" provisions have been in place for many years with the requirement referred to in

---

[2] What may be "cumbersome" in the eyes of the Professor are fundamental due process rights in the eyes of people resisting what is perceived as agency hegemony.

§ 386.250(6) RSMo. for a "hearing" and "evidence." There is absolutely no reason why the Commission cannot provide these additional procedural due process guarantees in a rulemaking. If the Commission, however, accepts the argument of Staff and OPC that these cases *are not* contested cases, it cannot then consistently and logically grant this motion to compel as requested by OPC because discovery is not something which is statutorily authorized in a rulemaking proceeding.

WHEREFORE, Empire requests that the Commission deny the OPC's Motion to Compel.

Respectfully submitted,

Gary W. Duffy MBE 24905
Brydon, Swearengen & England P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102-0456
(573) 635-7166 voice
(573) 635-3847 facsimile
Attorneys for The Empire District Electric Company

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was served on the Office of the Public Counsel by hand delivery this 19th day of July, 1999.

Gary W. Duffy

empresmotcompelaffil/gdwpmydocs/wp8