BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval of a Special Rate for a Facility Whose Primary Industry is the Production or Fabrication of Steel in and Around Sedalia, Missouri	))))))	File No. EO-2019-0244

MECG REPLY TO GMO RESPONSE TO MECG
MOTION TO COMPEL

COMES NOW the Midwest Energy Consumers Group ("MECG"), pursuant to 20 CSR 4240-2.090, and for its Reply to KCP&L Greater Missouri Operations Company's ("GMO") Response to MECG Motion to Compel respectfully states as follows:

1. On September 12, 2019, MECG filed its Motion to Compel responses from GMO to certain data requests issued by MECG on September 6, 2019. On September 16, 2019, GMO filed its Response to the MECG Motion to Compel. In its Response, GMO asserts: (1) that the information sought by MECG is "highly confidential" and subject to "non-disclosure agreements"; (2) that the information sought is not relevant to the issues in this case; and (3) that the information sought is "privileged."

2. Through this pleading, MECG demonstrates that GMO's assertions are incorrect. Specifically, the Commission rules contemplate the disclosure of such confidential information. Second, the information, since it helps to inform GMO's rationale for failing to comply with Section 393.355 is relevant. Finally, the Advisory Notes to the Federal Rules of Evidence clearly indicate that the information sought is not only susceptible to discovery, it is also admissible in the hearing in this matter.

3. In its response, GMO argues that "MECG seeks to obtain highly sensitive and confidential communications (and related information) between GMO and other prospective customers which are subject to non-disclosure agreements between GMO and third parties who are not parties to this case."[1] Noticeably, GMO fails to provide any citation to Commission rules or statutes or the rules of evidence to support the assertion that such information is not discoverable.

4. In fact, the Commission's rule expressly contemplates the discoverability of such information. As MECG indicated in its Motion to Compel, at 20 CSR 4240-2.135 the Commission has provided procedures for the treatment of confidential information. Among the types of information that the Commission treats as "confidential" are customer specific information; information related to strategies employed, to be employed, or under consideration in contract negotiations; and information related to trade secrets.[2] Moreover, to the extent that GMO believes that the information sought by the MECG data requests falls outside the scope of the Commission's confidential information rule, 20 CSR 4240-2.135(3) allows for the issuance of a protective order in order to treat such information as confidential. Noticeably, the Commission's rule does not make such confidential information immune from discovery. Rather, the rule simply provides protections to maintain the sensitive nature of the information. Had the Commission intended such information to be immune from discovery, it would have been pointless to ever promulgate a rule discussing the procedure regarding the treatment of such information. A Commission order accepting

[1] GMO Response, page 1.
[2] 20 CSR 4240-2.135(2).

GMO's misplaced argument would radically diminish the types of information (i.e., fuel and shipping contracts, employee salary and payroll information, board presentations and minutes, etc.) that would be accessible in future cases.

RELEVANCE

5. Next, GMO objects to MECG's data requests on the basis of relevancy.

> GMO is constantly soliciting new business customers and works closely with the Missouri Department of Economic Development to bring new businesses to the State of Missouri and GMO's service area. The needs and existence of other prospective customers is not relevant to the issues in this case, and Nucor's desire to have a specific rate approved by January 1, 2020, to allow it to operate its steel plant in Sedalia, Missouri. Mr. Woodsmall on behalf of MECG has no right to delve into such sensitive and confidential discussions when there is no connection or relevance to issues raised by the Nucor special contract.

6. Relevant evidence is evidence that "has any tendency to make a fact more or less probable than it would be without the evidence . . . ."[3] Relevance "has been broadly construed to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[4] Evidence need not be admissible to be discoverable.[5]

7. In this case, GMO has proposed a mechanism which is violative of the ratemaking approach established by the General Assembly in Section 393.355. When questioned regarding its failure to follow the statutory section, GMO has pointed to the existence of negotiations with other, unidentified, potential customers. Given its failure to follow Section 393.355, and the fact that negotiations with other parties form, at least in part, the rationale for GMO's failure to comply with that statute, GMO has itself made the scope of such negotiations relevant in this matter. Certainly, to the extent that these

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[3] Federal Rule of Evidence 401.
[4] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (U.S. 1978).
[5] Federal Rule of Civil Procedure 26(b)(1).

other negotiations are relevant for purposes of GMO's failure to follow the policy established by the General Assembly, they are also relevant for the purpose of other parties obtaining discovery.

8. Again, there is a drastic difference between "discoverability" and "admissibility."[6] The Commission may later consider objections to the "admissibility" of the information sought by the data requests, but so long as the information that is sought "encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case", then the discovery is relevant and should be allowed.

PRIVILEGE

9. Finally, GMO argues that MECG has acted in violation of Commission rules and has created an "ethical problem". "Mr. Woodsmall has egregiously violated the Commission's rules against the disclosure of privileged settlement discussions. 20 CSR 4240-090(7) states that: "Facts disclosed in the course of a prehearing conference and settlement offers are privileged. . ."

10. Importantly to the Commission's consideration of this assertion is that the Commission's rules establish that "[t]he rules of privilege are effective to the same extent that they are in civil actions."[7] Given this, it is important that the Commission consider how information divulged in settlement discussions is treated in a civil context.

11. Rule 408 of the Federal Rules of Evidence addresses the admissibility of "compromise offers and negotiations." Contrary to GMO's current assertion, information divulged in such negotiations are not privileged.

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[6] *Id.*
[7] 20 CSR 4240-1.130(5).

12. At multiple places the Committee Notes to the Federal Rules of Evidence clearly indicate that information learned in settlement negotiations is not only discoverable, but that information regarding "statements of fact" divulged in such negotiations are also admissible.

13. The Notes of the Advisory Committee states that "statements of fact made during settlement negotiations, however are excepted from this ban [against disclosure] and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice."[8]

14. Still again, the Committee Notes provide that the rule should be interpreted to "insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."[9]

15. Finally, the same notes indicate that "the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."[10]

16. The logic underlying the situation for which GMO now complains is obvious. Contemplate the following situation, a driver who is high on heroin and texting on his phone strikes a pedestrian. Under GMO's theory, the defendant could preclude any discovery of these damning facts simply by informing the plaintiff in the context of a

[8] Federal Rules of Evidence 408 Advisory Committee Notes, 1974 enactment.
[9] Federal Rule of Evidence 408, Notes of the Committee on the Judiciary, Senate Report No. 93-1277.
[10] Federal Rule of Evidence 408, Notes of Conference Committee, House Report No. 93-1597.

settlement offer. Certainly, the rules of evidence do not allow for such a result. Rather, the advisory notes specifically note that such information is not only discoverable, but also admissible.

17. In its response, GMO asserts that "the Commission should not encourage such breaches of the PSC rules against disclosing privileged settlement discussions by entertaining Mr. Woodsmall's motion to compel, but instead should summarily reject it for the reasons stated herein." MECG asserts that GMO's concern is a red herring. The real concern here is not whether the rules preclude the disclosure of privileged settlement information. As demonstrated in this pleading, the rules do not preclude the discoverability and admissibility of such information. Rather, the real concern is whether a Missouri regulated utility should be permitted to use settlement discussions as a shield against discovery and thus preclude the Commission and the other parties from having possession of full facts on which to make informed policy decisions.

WHEREFORE, MECG respectfully requests that the Commission deny GMO's objections and order GMO to respond to MECG's relevant discovery.

Respectfully submitted,

____/s/_David Woodsmall_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

____/s/_David Woodsmall_____
David L. Woodsmall

Dated: September 17, 2019