

Commission Rule 20 CSR 4240-20.134(4) and (10). It was required to have done so nearly two months ago, on January 18, 2022, when it filed its Application -- it did not do so. *See* § 386.800.3 (requiring such applications to comply with 20 CSR 4240-20.134(4) and (10), including submission of a feasibility study compliant with the rule). Second, Co-Mo has not complied with the Commission's *Order Setting Procedural Schedule* because its direct testimony does not include "all testimony and exhibits asserting and explaining its entire case-in-chief," as required by 20 CSR 4240-2.130(7)(A) (emphasis added). Co-Mo should not be rewarded with an order granting its Motion under these circumstances.

3. Co-Mo attempts to justify its Motion by stating that as a rural electric cooperative, it does not "generally anticipate a requirement to produce such documents." Reply at para. 3. It was Co-Mo that initiated this docket, and thus voluntarily chose to submit itself to the Commission's jurisdiction, thereby obligating it to fulfil its obligations under § 386.800.3 and the Commission's certificate of convenience and necessity ("CCN") rules. Its voluntary participation also thereby entitles Ameren Missouri and any other party to conduct discovery on, test, challenge, and rebut the evidence upon which Co-Mo seeks to rely in addressing the CCN rule and the seven factors specified in § 386.800.2 (which, under § 386.800.3 must be considered and addressed by the Commission in this docket).

4. The relief Co-Mo seeks is an attempt to deprive the Company of any meaningful ability to contest Co-Mo's perspective and evidence on those seven factors by limiting access to the subject information to counsel, who is neither a rate specialist, economist, engineer, or finance person, and who in any event is not and cannot be a witness in this case. Consider the seven factors at issue, together with, arguably, the *Tartan* factors¹ that are implicated by this case:

- (1) The preference of landowners and prospective electric customers;
- (2) The rates, terms, and conditions of service of the electric service suppliers;

¹ See *In Re Tartan Energy*, GA-94-127, 3 Mo.P.S.C.3d 173, 177 (1994).

- (3) The economic impact on the electric service suppliers;
- (4) Each electric service supplier's operational ability to serve all or portions of the annexed area within three years of the date the annexation becomes effective;
- (5) Avoiding the wasteful duplication of electric facilities;
- (6) Minimizing unnecessary encumbrances on the property and landscape within the area to be annexed; and
- (7) Preventing the waste of materials and natural resources.

§ 386.800.2

5. The Company's rates and tariff department personnel need to be able to access, review, and provide evidence on at least factors (2) and (3), including addressing Co-Mo's evidence respecting those factors, yet if Co-Mo's Motion is granted, they will be precluded from or severely hampered in doing so. The Company's engineers need to be able to access, review, and provide evidence respecting factors (4) to (8), including addressing Co-Mo's evidence respecting those factors, but again, granting Co-Mo's Motion would deprive them of or impede their ability to do so. Counsel for the Company cannot properly represent the Company in this case based on merely filing "pleading[s] and arguments," as Co-Mo incorrectly suggests in its Reply. ¶ 4. To the contrary, Commission decisions must be based on substantial and competent *evidence*, which the Company cannot develop if its subject matter experts and witnesses cannot access Co-Mo's evidence.²

6. Co-Mo's Motion, at its core, is much ado about nothing given the Commission's rules. As the Company pointed out in its initial response to the Motion, the information may only be disclosed to employees acting as subject matter experts for the Company's attorneys or those

² In addition to needing the access described above to Co-Mo's Exhibit H (which the Company believes is the same as Schedule JS-01 to Mr. Schulte's direct testimony), the Company may need to conduct additional discovery related to the issues in this case which given Co-Mo's position, the Company expects will draw further claims by Co-Mo that as a cooperative the rules applicable to it when it submits itself to the Commission's jurisdiction should somehow be different. They shouldn't be.

who intend to file testimony. 20 CSR 4240-2.135(6) And such employees must be identified to the disclosing party and must *comply with the certification requirements of the rule*. This means they must keep the information secure, and they “may neither use nor disclose such information for any purpose other than preparation for and conduct of . . .” this case. 20 CSR 4240-2.135(13). The information must be returned or destroyed after this docket is concluded. *Id.*, section (15).

7. Co-Mo suggests that it is simply following the model from the Company’s prior wind facility CCN cases where a protective order was granted to provide additional protection to competitively sensitive information about the cost of wind generation resources and the terms of wind facility purchase agreements, but there are key differences between those cases and the tact Co-Mo is taking here. In those cases, the Company sought the protection because of the possibility that other renewable developers might seek to intervene in the case. Had they intervened (no developer did, and no party opposed the Company’s motion), they would have borne no burden in the case. No order coming out of the case could have bound them. They would not have been, for any purpose, subject to the Commission’s jurisdiction. Co-Mo is in a far different position. As noted, here, Co-Mo seeks affirmative relief from the Commission. It can’t have its cake and eat it too. If it wants to invoke the Commission’s jurisdiction, then it can’t pick and choose the information other parties to the case can access, or how then they can use it (within this docket *only*) in providing evidence to the Commission. And under the terms of Co-Mo’s proposed relief, the Company, effectively, is being denied any meaningful access necessary to actually evaluate and provide competent and substantial evidence in this case.

8. To-date, the only access Co-Mo has provided to the subject information is to the undersigned counsel, and only then after the undersigned counsel specifically made an additional request (in addition to communication to the Presiding Officer and Co-Mo’s attorneys Monday evening of this week) for access. Co-Mo would only provide the information to the undersigned

counsel upon the condition that the information not be shared even the Company's in-house counsel, who is responsible for this case. While the Company well understands that Co-Mo's counsel undoubtedly is acting on the instructions of their client, Co-Mo's stance is offensive to the Commission's process and to Ameren Missouri's in-house counsel (to be crystal clear, the Company claims no impropriety on the actions of Co-Mo's counsel, who of course has a duty to zealously advocate for and represent their client). Ameren Missouri's counsel – the undersigned and in-house counsel to whom the undersigned reports – are both bound by the Canons of Ethics and as officers of the court (the Commission here), to abide by the Commission's rules. Co-Mo's stance assumes that in-house counsel would not do so, given that under the Commission's rule, Co-Mo at this moment has the protection it has asked for: only counsel can view the information pending resolution of the Motion.

9. Co-Mo's motion – and its ongoing delay in allowing the Company to meaningfully evaluate its evidence, a delay that is continuing, prejudices the Company and impedes the Commission's ability to fairly and impartially adjudicate this case.³ The existing protections in the confidential information rule protect Co-Mo. The Company will follow the restrictions on use and disclosure in the Commission's rule to the letter.

³ Co-Mo first filed a defective Motion for Protective Order (on February 16), then refused to file its entire case on the due date. These actions have consumed approximately one-half of the time allotted by the procedural schedule for the conduct of discovery based on Co-Mo's direct case, and by the time Co-Mo's Motion is resolved, will likely have consumed more than one-half of that time, and probably 20% of the time allotted to prepare rebuttal testimony. These delays followed Co-Mo's failure to file a complete case on January 18 in the first place. Adjustments to the procedural schedule may be required to ensure a fair process for resolving this case.

WHEREFORE, for the reasons outlined herein, the Company prays that the Commission enter its order denying Co-Mo's Motion for Protective Order, allowing unrestricted access to the subject information by those persons authorized to access it, subject to their compliance with the Commission's confidential information rule.

Respectfully submitted,

/s/ **James B. Lowery**

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**ATTORNEYS FOR UNION ELECTRIC
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of March 2022, served the foregoing either by electronic means, or by U. S. Mail, postage prepaid addressed to all parties of record.

/s/James B. Lowery
James B. Lowery