BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale and Transfer of Certain Assets of AmerenUE to St. James Municipal Utilities and Rolla Municipal Utilities.	)))))	**Case No. EO-2010-0263**

Staff's Response

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its Response to the Commission's *Order Directing Filing* of August 4, 2010, states as follows:

Introduction:

At its weekly Agenda meeting on August 4, 2010, the Commission took up the *Motion for Protective Order and Request for Expedited Treatment* previously filed in this matter by Rolla Municipal Utilities ("Rolla"). Rolla seeks to prevent a *pro se* party litigant, Donna Hawley, from obtaining an un-redacted copy of the 2007 Power Delivery Master Plan, an electrical engineering analysis and recommendations prepared for Rolla by an expert consultant, R. W. Beck & Associates. Rolla contends that free access by Ms. Hawley to the Master Plan is not necessary for the purposes of this case and might compromise the security of its facilities. Rolla further points out that the Master Plan has been designated both a closed record under Chapter 610, RSMo, and "Highly Confidential" (HC) under Commission Rule 4 CSR 240-2.135. Rolla urges the Commission to authorize it and the other parties to refuse to honor Ms. Hawley's data request seeking the un-redacted Master Plan or, in the alternative, to impose conditions on her use of the Master Plan.

The Commission's order of August 4, 2010, stated:

> The Commission will now order the parties to state what legal authority, if any, supports their position that a pro se litigant is, or is not, entitled to Highly Confidential information per Commission Rule 4 CSR 240-2.135, and what protective order, if any, Rolla may be entitled to per Commission Rule 4 CSR 240-2.085 or 2.135. Also, Rolla mentioned in its August 2 motion that the Commission could order its Staff to provide special counsel to assist Ms. Hawley in following the Commission's rules for Highly Confidential information. Thus, the Commission will order the parties to state what objection, if any, they would have to such a special counsel. Further, the Staff of the Commission will state what counsel would be available to assist Ms. Hawley with following the Commission's Highly Confidential procedures, should the Commission order its Staff to provide such counsel.

A Traditional Discovery Dispute:

At the outset, Staff suggests that this matter might most easily be resolved as a traditional discovery dispute. Rolla has challenged Ms. Hawley's need for the un-redacted Master Plan. Should the Commission determine that discovery of the un-redacted Master Plan by Ms. Hawley is not required for trial preparation, the inquiry is at an end.

As in the courts, discovery in a Commission proceeding extends to any matter relevant to the subject matter of the pending action so long as the matter is not privileged. Rule 4 CSR 240-2.090(1) ("Discovery may be obtained . . . under the same conditions as in civil actions in the circuit court."); ***State ex rel. Wright v. Campbell,*** 938 S.W.2d 640, 643 (Mo. App., E.D. 1997). The term "relevant" is broadly defined to include material "reasonably calculated to lead to the discovery of admissible evidence." *Id.;* S. Ct. Rule 56.01(b)(1). "[A] party seeking production of documents which contain trade secrets [or] confidential information must establish that the documents are relevant and that it has a specific need for the documents in order to prepare for trial."

Wright v. Campbell, *supra,* 938 S.W.2d at 643; ***State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson,*** 897 S.W.2d 167, 170 (Mo. App., S.D. 1995).

A reading of Ms. Hawley's *Application to Intervene* reveals that she opposes the proposed transaction as fiscally irresponsible on the part of the cities; she also doubts the reliability of the Master Plan, suggesting that its load and demand forecasts are now stale. These litigation objectives do not appear to require access to the sort of structural information redacted from the Master Plan.[1]

The Order Temporarily Prohibiting Release of Information:

Also on August 4, the Commission issued its *Order Temporarily Prohibiting Release of Information,* which states that "[a]ll parties are prohibited from releasing Highly Confidential information to Donna Hawley, pending the Commission's further deliberation on the issues raised in Rolla Municipal Utilities' August 2, 2010 Motion for Protective Order and the responses thereto." The Commission explained that it issued this order because "Rolla states that, at a minimum, it needs an order preserving the status quo[.]" Staff Counsel carefully followed the Agenda discussion and did not hear any mention of Staff's filing of August 2, in which Staff stated, "Pending resolution of the City of Rolla's motion, Staff plans to not provide the report to Ms. Hawley." Surprisingly, Rolla also neglected to mention it in its filing of August 3.

Discovery of the Master Plan:

What legal authority, if any, supports Staff's position that a *pro se* litigant is entitled to Highly Confidential information per Commission Rule 4 CSR 240-2.135?

[1] For that matter, Ms. Hawley appears to be in the wrong forum – the Commission will review the proposed transaction to determine whether it is prudent for AmerenUE to *sell* the assets, not whether it is prudent for the Cities to *buy* them.

It is not Rule 4 CSR 240-2.135 that entitles a *pro se* litigant to HC material, but the Due Process Clause and the statutes under which the Commission operates. The simple answer to the present conundrum is that Ms. Hawley is a party to this matter and necessarily enjoys all the same rights and obligations as any other party litigant.

First, it is a fact that the Due Process Clauses of the Missouri and United States Constitutions apply to this Commission and to its treatment of Ms. Hawley.[2] Missouri courts have held that the procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity. *State ex rel. AG Processing, Inc. v. Thompson,* 100 S.W.3d 915, 919 (Mo. App., W.D. 2003), *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. E.D.1990), *both citing Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975). "The cardinal test of the presence or absence of due process in an administrative proceeding is defined . . . as 'the presence or absence of rudiments of fair play long known to the law.'" *Jones v. State Dept. of Public Health and Welfare,* 345 S.W.2d 37, 40 (Mo. App., W.D. 1962). One of those well-known rudiments of fair play is equal treatment of the parties by the tribunal. While a *pro se* litigant is not due any favoritism by reason of being unrepresented, neither may a tribunal discriminate against that party.

Second, nothing in Chapters 386, 393 or 536, RSMo, authorizes this Commission to treat Ms. Hawley differently merely because she is a *pro se* litigant. For example, § 536.073.1, RSMo, states "**any party** may take and use depositions . . . " (emphasis added). The statute imposes no limitation on the discovery rights of *pro* se parties. Ms. Hawley has as much right to the un-redacted Master Plan as any other

[2] Mo. Const., Art. I, § 10; U.S. Const., Amd. 14, § 1.

party. Having produced it for Staff and Public Counsel without raising any relevance objection, Rolla must now produce it for her.

Third, the Commission's own rules do not impose any limitation on the rights of *pro se* parties. Rule 4 CSR 240-2.010(11) provides that "Party means any applicant, complainant, petitioner, respondent, **intervenor** or public utility in proceedings before the commission" (emphasis added). The rule does not distinguish *pro* se parties. The Commission allowed Ms. Hawley to intervene, over Rolla's strenuous objection, and she is now a party like any other. Rule 4 CSR 240-2.090(2), pertaining to data requests, states "**[p]arties** may use data requests as a means for discovery" (emphasis added). The rule contains no limitation on the use of data requests by *pro se* parties.

Rolla relies on Commission Rule 4 CSR 240-2.135(4), which provides that "[h]ighly confidential information may be disclosed only to the attorneys of record, or to outside experts that have been retained for the purpose of the case." Rolla contends that this rule does authorize the Commission to treat *pro se* litigants differently from other parties. Rolla does not explain how that can be in view of the clearly contrary requirements of controlling constitutions and statutes. In particular, Rolla provides a lengthy explication of its view of the purpose and basis of the cited rule in ¶ 8 of its motion of August 2. That discussion is both incorrect and misleading, as is explained below.

The treatment of Highly Confidential ("HC") information by Rule 4 CSR 240-2.135(4) codifies a practice that originated long before that rule was promulgated and which had no particular basis in the special obligations of members of the Bar. Rather, it arose with the progressive de-regulation of telecommunications companies. Not so

very long ago, telephone service was provided by regulated, monopolistic public utilities just like electric service and gas service. With the introduction of competition into that industry, certain information – business plans and strategies, negotiated contract prices, incremental costs, measures of market share and market penetration, and the like – had to be kept secret because its disclosure would be advantageous to competitors.[3] When competing telephone companies litigated at the Commission, as they did with increasing frequency after the enactment of the Telecommunications Act of 1996, it was necessary to make such information available for the purposes of litigation without disclosing it to competitors. The solution was the practice now codified at Rule 4 CSR 240-2.135(4), which allows attorneys and outside experts who had signed a non-disclosure agreement to access the HC information for a party's benefit while keeping it from the party itself. This compromise meets the requirements of Due Process and the controlling statutes without forcing wholesale disclosure of competitively sensitive information.

With telecommunications companies, the issue now confronting the Commission simply did not arise – there were never any carriers that litigated *pro se*. It is Staff's view that the Commission should not apply its rule in a way that violates Ms. Hawley's constitutional and statutory rights. To do so will surely result in embarrassment to the Commission when this case is reviewed by the courts. Ms. Hawley has no attorney and no outside expert and, as a natural person, she cannot be compelled to retain either in order to engage in this litigation. She is acting as her own attorney and, as Staff has asserted, therefore has a right to access the un-redacted Master Plan on the same conditions as any other attorney. Having allowed her into the case as a party, the Commission must accord Ms. Hawley all the rights thereof.

[3] Monopolistic providers of utility services, like Rolla, don't have competitors.

What Protective Order is Rolla Entitled To?

What protective order is Rolla entitled to per Commission Rules 4 CSR 240-2.085 or 2.135?

Were this matter pending in circuit court, Rolla would be entitled to a protective order forbidding any party from further disclosing confidential information obtained through discovery:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following;
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> * * *
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> (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

Supreme Court Rule 56.01(c)(7).

However, no such protective order is required here because the Commission's rules already prohibit further disclosure. Rule 4 CSR 240-2.135(16) provides:

> All persons who have access to information under this rule must keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided. This rule shall not prevent the commission's staff or the Office of the Public Counsel from using highly confidential or proprietary information obtained under this rule as the basis for additional investigations or complaints against any utility company.

Neither Rule 4 CSR 240-2.085 nor 2.135 envisions the situation currently confronting the Commission. Rule 4 CSR 240-2.135(5) may authorize the *ad hoc* crafting of a protective order to meet unusual circumstances:

> If any party believes that information must be protected from

> disclosure more rigorously than would be provided by a highly confidential designation, it may file a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.

In Staff's opinion, such a protective order may not properly impose any restrictions or limitations on Ms. Hawley than apply to those parties to whom Rolla has already disclosed the un-redacted Master Plan.

The Confidential Status of the Master Plan:

Staff notes that the status of the Master Plan as a closed record under Chapter 610, RSMo, and its designation as HC by Rolla have never been reviewed or ratified by any authoritative body. Under Chapter 610, a record may be closed by the majority vote of the public governmental body that owns it; however, Rolla has never produced any evidence that such a vote ever occurred. Neither has Ms. Hawley ever challenged that designation in the courts.

However, Ms. Hawley ***has*** challenged the designation of the Master Plan as HC in this proceeding, a matter that the Commission has not yet ruled on and may have overlooked. Ms. Hawley's *Application to Intervene,* filed April 26, 2010, states in pertinent part:

> In addition, I am requesting that the MPSC require RMU to openly publish the entire RW Beck power system study to allow any citizen in Rolla or St. James an opportunity to evaluate the system studies' parameters and conclusions. I have requested to review a copy as a citizen and also as a City Council representative but was denied access by RMU management due to lacking the proper clearances for Homeland Security closed records. According to Timothy R Corrigan, RW Beck Executive Vice President, Energy Sector, there appears to be no "Homeland Security" clearance that can be obtained and even if there were, this study was characterized as, "fairly straightforward system improvement studies, and from our perspective it was engineering based,

not security based." **There is no reasonable justification for confidentiality with regard to this planning information** (emphasis added).

Staff is unaware whether or not Rolla complied with the requirements of Rule 4 CSR 240-2.135(2)(B) when it designated the Master Plan as HC, but the Commission's docket sheet shows that Rolla did not comply with the requirements of 4 CSR 240-2135(11)(A). Pursuant to 4 CSR 240-2.135(11)(B), the HC designation of the Master Plan may be void. In any event, the Commission should take up and determine Ms. Hawley's challenge to the HC designation.

The Provision of Special Counsel for Ms. Hawley:

What objection, if any, does Staff have to being required to provide a special counsel to Ms. Hawley? What counsel would be available to assist Ms. Hawley with following the Commission's Highly Confidential procedures, should the Commission order its Staff to provide such counsel?

At the Agenda discussion on August 4, there was a suggestion that the **General Counsel's Office** provide "shadow counsel" to Ms. Hawley. That would certainly be more appropriate than requiring the Staff Counsel's Office to do so in view of the fact that the latter is already representing Staff in this proceeding. To require Staff Counsel's Office to represent Ms. Hawley at the same time and in the same proceeding, would create an actual, impermissible, conflict of interest and would place the selected attorney or attorneys in an intolerable position. The recent split of the Commission's General Counsel's Office into two divisions was ostensibly taken in order to remove conflicts of interest that were nonetheless authorized by statute and rule – why would the Commission now act to create a conflict authorized by neither statute nor rule?

The Commission is without authority to waive or vary the Rules of Professional Conduct prescribed for Missouri attorneys by the Missouri Supreme Court. If an attorney-client relationship were to be established between an attorney employed by the Commission and Ms. Hawley, that attorney would be obliged to zealously represent her. While it appears that the Commission envisions some sort of limited representation, the Supreme Court allows a limited representation only where the client has consented. Staff is unaware whether Ms. Hawley would consent to a limited representation. Once such a representation was established, the Commission would have no ability to define the scope, goals, methods, or tactics of the representation, as those would be matters between Ms. Hawley and the designated attorney.

In addition, the members of the Staff Counsel's Office are without malpractice coverage. Will the Commission purchase such coverage for the attorney designated to represent Ms. Hawley? If not, would the Commission actually go so far as to compel its employee to undertake a representation so fraught with potential personal liability? That would be unfair, both to Ms. Hawley and to the selected attorney. Certainly, the Commission cannot immunize the designated attorney from a malpractice lawsuit or Bar complaint by an unsuccessful and disgruntled client.

Furthermore, the diversion of state resources for private use is a both a state and federal crime.[4] Unlike the Public Defender's Office, the PSC is not an agency established by the General Assembly for the purpose of providing representation to private persons. Nothing in the Public Service Commission Law authorizes the Commission to spend money from the PSC Fund for the private benefit of Ms. Hawley.

[4] Former Attorney General William Webster went to federal prison for this crime some years ago.

No statute grants private persons the right to representation at public expense in PSC proceedings.

At this time, on account of the foregoing, the undersigned is unaware of any attorney in the Staff Counsel's Office willing to undertake the representation of Ms. Hawley. As this was Rolla's suggestion, perhaps Rolla would provide counsel for Ms. Hawley. Certainly, the cities could retain counsel from some otherwise uninvolved firm to represent her.

WHEREFORE, Staff prays that the Commission will issue an order as described herein.

Respectfully submitted,

s/ Kevin A. Thompson
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **9th day of August, 2010,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson_____