

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

**MOTION FOR PROTECTIVE ORDER
AND REQUEST FOR EXPEDITED TREATMENT**

Comes now the City of Rolla, Missouri (Rolla), by and through Rolla Municipal Utilities (RMU), and, for its Motion for Protective Order and Request for Expedited Treatment pursuant to Missouri Public Service Commission (Commission) rules 4 CSR 240-2.085 and 4 CSR 240-2.080(16), respectfully states as follows:

SUMMARY

1. A situation has developed where there is risk that highly confidential (HC) material will be released by a party to this case to someone who is clearly not a permitted recipient under the rules of the Commission. Time is of the essence in this matter due to the expedited procedural schedule adopted by the Commission on Friday, July 30, 2010, which compels parties to respond to data requests within ten calendar days. Once the HC information is released, the damage is done. It cannot be “undone” thereafter. The issue presented is whether a *pro se* litigant is entitled to view material that has been designated both as a “closed record” by a governmental entity under state statute and “highly confidential” under a Commission rule. Rolla asks that the Commission take the immediate step of issuing an order to preserve the status quo and thereby give the Commission time to deliberate the question of whether its rule actually permits Ms. Hawley, the *pro se* litigant, to view that HC material. If Ms. Hawley ultimately is allowed by the Commission to view this material in

accordance with 4 CSR 240-2.135 over the objection of Rolla, Rolla asks that a protective order with specific conditions be issued.

2. This issue has just surfaced due to a communication between counsel for Rolla and the Staff last week and the action of the Commission on Friday, July 30, 2010, in approving an expedited schedule and discovery rules for this particular proceeding. This matter is being brought to the attention of the Commission at the earliest practical time under the circumstances.

**TREATMENT OF HC PORTIONS OF THE
2007 POWER DELIVERY MASTER PLAN
AND REQUEST FOR EXPEDITED PROTECTIVE RELIEF**

3. Ms. Donna D. Hawley (Ms. Hawley) has claimed, both in pleadings before the Commission in this case and in data requests, of a need to receive complete access to the 2007 Power Delivery Master Plan, an electrical engineering analysis and recommendations prepared for Rolla by R.W. Beck & Associates (hereinafter “the Study”). A redacted copy of it has been provided to Ms. Hawley in this case. Essentially, Ms. Hawley now has access to everything in the Study *except* information that either identifies specific potential vulnerabilities in the power supply to Rolla and St. James, Missouri, or can be used to do so. Those portions remain a closed record in accordance with a determination by a governmental body under Section 610.021(19), RSMo (“disclosure would impair the public governmental body’s ability to protect the security or safety of persons or real property, and shall in the same writing state that the public interest in nondisclosure outweighs the public interest in disclosure of the records.”).

4. At the outset, Rolla does not believe the Study is relevant to the case before the Commission and the issue to be decided by the Commission. The issue is whether AmerenUE’s sale of the Phelps substation and associated 34.5 kV transmission lines to the municipally-owned system of Rolla is “not detrimental to the public interest.” ***State ex rel. Fee Fee Trunk Sewer, Inc.***

v. Litz, 596 S.W.2d 466, 468 (Mo.App. E.D. 1980). “Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain approval of the Commission. § 393.190 RSMo. (1969). *The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility.* The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest. ***State ex rel. City of St. Louis v. Public Service Commission of Missouri***, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934).” *Id.* (emphasis added). In this situation, it is difficult to see how the sale of a substation and transmission lines that have never been used by any retail customers of AmerenUE could be detrimental to the public interest that is protected by the Commission.

5. Nevertheless, in the interest of providing the Staff of the Commission (Staff) and the Office of the Public Counsel (Public Counsel) the opportunity to assess the import of the Study in the context of this proceeding, and in response to Staff data requests, Rolla provided the Study to those parties as an HC document in accordance with 4 CSR 240-2.135(1)(B)7 (“Information relating to the security of a company’s facilities.”). Rolla did this with the understanding and expectation that Staff and Public Counsel are bound by Section 386.480 RSMo to protect confidential information, and both have a long track record of doing that. Rolla also provided the material with the expectation that the Commission’s rule governing distribution of HC material would be followed in accordance with its plain and unambiguous language; that the only permitted recipients are “attorneys ... [and] outside experts” 4 CSR 240-135(4).

6. What has triggered this immediate situation is that on July 27, 2010, Ms. Hawley sent two data requests to all parties in this case (i.e., Staff, Public Counsel, AmerenUE, St. James and Rolla). The first one said “I am requesting copies of all data, document (sic) or communications that

each of the parties has that pertains to this case from the beginning to today's date." The second specifically requested "an unredacted copy of the 2007 Power Delivery Master Plan." Rolla's counsel has recently been informed by Staff counsel that the Staff interprets 4 CSR 240-2.135(4) to allow a *pro se* litigant who is neither an "attorney of record ...or ... outside expert" to view HC material, and that Staff will provide the HC version of the Master Plan in its possession to Ms. Hawley in response to her data request of July 27, 2010, under the theory that Ms. Hawley is an "attorney" within the meaning of the Commission's rule. Counsel for Rolla is unaware of any precedent that supports this Staff interpretation of the Commission's rule. Under the procedural schedule adopted by the Commission, the Staff would be obligated to provide material in response to these data requests by no later than Friday, August 6, 2010. Rolla has no information on the position of the Public Counsel on this topic. Thus, the announced position of the Staff presents the immediate threat of HC material being given to someone who is not a permitted recipient of HC material, unless the Commission takes timely action to prevent that from occurring. The Commission's decision on this issue obviously may also set a precedent for future Commission cases in which there are *pro se* parties seeking HC material.

7. Rolla's position is that the text of 4 CSR 240-2.135 clearly does not contemplate a *pro se* litigant having access to HC material. It says "highly 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." 4 CSR 240-2.135(4) (emphasis supplied). The rule does not include the category of "individuals acting as their own attorney." Ms. Hawley has described herself in previous pleadings in the context of seeking intervention. She has never asserted that she is a licensed attorney. For that matter, she also has no qualifications that would allow any party to reasonably conclude she is an "outside expert." Again, the issue in this case is whether AmerenUE's sale of a substation and

transmission lines to the entities that have been using them for decades is somehow detrimental to the public interest. The present and possible future design of Rolla's own system, which is the subject matter of the Study, is not an issue in this case, and not even something over which the Commission has subject matter jurisdiction.

8. Rolla believes 4 CSR 240-2.135(4) provides for the viewing of HC material by attorneys because attorneys have taken an oath, have a duty to the courts to uphold the law, are bound by the ethics rules of The Missouri Bar, and are subject to disciplinary action including disbarment. Attorneys have a need to view such material (and at the same time protect against its disclosure to other parties) as an inherent part of the role of counsel. Attorneys also need to supervise and advise the "outside experts" on the correct procedures to be followed. Retained outside experts also have a need to view HC material because of their specialized training and education in the particular subject matter so as to provide advice to a client and they are bound by an executed non-disclosure agreement. They would also presumably be motivated not to disclose any of the HC material by a desire to maintain their professional reputation for integrity. In contrast, Ms. Hawley has not held herself out as either an attorney or a consulting electrical engineer. Rolla has brought prior public acts of Ms. Hawley to the attention of the Commission in pleadings filed in this case. One aspect not previously mentioned is that she is a participant in an on-line website, on-line discussions, and postings on the internet in which she routinely posts her personal views on the municipal government of Rolla and, in particular, RMU. This has been occurring since long before the initiation of this case. One example of her personal views of this topic and the role of the Commission can be found in her comments following a Rolla Daily News article on Rolla's proposed FY2011 budget. See: <http://www.therolladailynews.com/news/x1237302101/-Cautious-budget-plan>

9. Her assertions and views (accurate or not) expressed there, and broadcast to the world thereby, are certainly not complimentary to the city government. But she has a First Amendment right to air them. In Rolla's view, though, these activities present the potential of Ms. Hawley posting HC material on one of many on-line venues. Such a posting, perhaps deemed by her to be harmless and in pursuit of her goals, nevertheless would be disseminated to the entire world and could then be used by others to the detriment of the security of the electric distribution system and the people served by RMU.

10. In summary, Rolla asks the Commission to at least issue an order before Friday, August 6, 2010, that blocks any party to this case from releasing HC material to Ms. Hawley. Friday, August 6, 2010, is the tenth day since the parties were served with her data requests, and thus the due date for a response under the expedited procedure ordered in this case. Such an order will preserve the status quo and allow the Commission time to study and decide the question with due deliberation. Failure of the Commission to act in a timely manner, however, leaves the Staff with its obligation under the Commission's rules to provide a timely response to a data request. If the Commission either concludes in that order (or a successive order after further deliberations) that the plain language of 4 CSR 240-2.135 prohibits the release of the HC portions of the 2007 Power Delivery Master Plan to Ms. Hawley, no further relief is sought by this motion.

ALTERNATIVE MOTION FOR PROTECTIVE ORDER

11. Rolla has set out herein its interpretation of 4 CSR 240-2.135 and the reasons why it believes Ms. Hawley does not qualify for access to HC material. Rolla believes the language of the rule is unambiguous and that it does not support the interpretation offered by Staff counsel. If the Commission instead concurs with Staff's interpretation of 4 CSR 240-2.135, or that Ms. Hawley should be provided access to those portions of the Study that have deemed to be a "closed record"

by a governmental entity in accordance with Section 610.021(19) RSMo on some other rationale, then pleading in the alternative and without conceding the validity of such an interpretation, Rolla asks that the Commission issue a protective order containing provisions to address the treatment of all HC material in this case that may come into the possession of Ms. Hawley. By suggesting this protective order, the Commission should not assume Rolla is comfortable with Ms. Hawley obtaining this information. Her prior public conduct provides no assurance to Rolla that she will follow such an order and demonstrates she has nothing but contempt for RMU. If she were to violate the protective order, the damage would be done and the remedies that might be afforded for such violation are little consolation.

12. At a minimum, in this circumstance, the Commission should order that the HC portions the Study be treated by Ms. Hawley in the same manner as the provisions of 4 CSR 240-2.135.

That is,

a) 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. In other words, the information shall not be distributed, described or access provided, to anyone other than the Staff, Public Counsel or attorneys associated with this case;

b) The party disclosing highly confidential information, may, at its option, make such information available only on the furnishing party's premises, unless the discovering party can show good cause for the disclosure of the information off-premises;

c) The person reviewing highly confidential information may not make copies of the documents containing the information and may make only limited notes about the information. Any such notes must also be treated as highly confidential;

d) If prefiled testimony includes information that has previously been designated as highly confidential or proprietary in another witness's prefiled testimony, that information must again be designated as highly confidential or proprietary;

e) All live testimony, including cross-examination and oral argument, that reveals information that is designated as proprietary or highly confidential, may be offered only after the hearing room is cleared of all persons except those persons to whom the highly confidential or proprietary information is available under this rule. The transcript of such live testimony or oral argument will be kept under seal and copies will be provided only to the commission and the attorneys of record. The contents of such transcripts may not be disclosed to anyone other than those permitted access to the designated information under this rule;

f) Proprietary or highly confidential information may not be quoted in briefs or other pleadings unless those portions of the briefs or other pleading are also treated as proprietary or highly confidential; and

g) After the conclusion of the proceedings, all HC material must be returned to the party claiming a confidential interest.

13. In addition to those provisions, because Ms. Hawley is probably not familiar with the Commission's confidentiality rule and its requirements in regard to disclosure, treatment of HC material in testimony or pleadings, Rolla requests that since the Staff is the party that believes she is entitled to view this material, the Commission order that a member of the Staff general counsel's office who is not otherwise associated with this case be directed to act as special counsel for Ms. Hawley to explain the Commission's rules and requirements and what is expected and required of

her in the handling of the HC material, and ensure the requirements of the rule/protective order and treatment of the HC material and associated information as this case progresses.

14. Lastly, Rolla requests that under these circumstances, Ms. Hawley should be required to file a non-disclosure certificate similar to that which the Commission's rule would require of other non-attorneys seeking to view confidential materials (4 CSR 240-2.135(4)(D) and (6)).

15. None of the information for which a claim of confidentiality is made by Rolla in this case can be found in any format in any other public document.

WHEREFORE, Rolla prays that the Commission act in an expedited manner to prevent the disclosure of HC material in this case and thereby provide itself with time to consider the underlying issue of the scope of 4 CSR 240-2.135 as it pertains to a pro se litigant, and that it ultimately conclude that the HC material can not be provided to Ms. Hawley in accordance with that rule or, in the alternative, issue a protective order containing at least the terms and conditions discussed herein in order to give Rolla the full extent of protection to which it is entitled for HC material.

Respectfully submitted,

//s// Gary W. Duffy

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on August 2, 2010, to the following:

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