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 Transfer of Certain Assets of AmerenUE to St. James Municipal Utilities and Rolla Municipal Utilities.	))))))	Case No. EO-2010-0263

RESPONSE TO ORDER DIRECTING FILING

Comes now the City of Rolla, Missouri (Rolla), by and through Rolla Municipal Utilities (RMU), and for its Response to Order Directing Filing issued by the Commission on August 4, 2010, respectfully states as follows:

SUMMARY

1. The August 4 Order (as applicable to Rolla[1]) requires the parties to state in a filing no later than August 9, 2010: (a) what legal authority, if any, supports their position that a *pro se* litigant is, or is not, entitled to Highly Confidential (HC) information per 4 CSR 240-2.135, and what protective order, if any, Rolla may be entitled to per 4 CSR 240-2.085 or 2.135; and (b) what objection, if any, they would have to such a special counsel.

2. In summary, Rolla stated in its Motion for Protective Order on August 2 that it was aware of no legal authority to support the Staff's position that Ms. Hawley is entitled as a *pro se* litigant to view HC material under 4 CSR 240-2.135, and that the Staff

1 The Order requires Staff to make a statement regarding "what counsel would be available to assist Ms. Hawley with" following the HC procedures, assuming the Commission so ordered. While that portion of the order was not directed at Rolla, Rolla wishes to make clear its position that appointment of such special counsel is only suggested as an alternative, if Ms. Hawley is provided access to the HC information/closed record material in spite of the language of 4 CSR 240-2.135.

position that she qualified as an “attorney” was contrary to the plain language of the rule. In this filing, Rolla will expand on that to cover additional relevant points. A summary listing of the reasons why a *pro se* litigant is not entitled to view HC material (or a “closed record” under Chapter 610 RSMo) pursuant to 4 CSR 240-2.135, includes the following topics:

a) Not permitted by the rule: Disclosure to a *pro se* litigant violates the plain language and the overall purpose of 4 CSR 240-2.135 and any *ad hoc* interpretation allowing it in this case would be an arbitrary and capricious action and contrary to the rulemaking provisions in Chapter 536 RSMo.

b) In this situation, the HC material is a “closed record” that the Commission has no jurisdiction to disclose. The HC material at issue is also a “closed record” pursuant to Chapter 610.021(19), RSMo and the statutorily required vote of the Rolla Board of Public Works. There is no authority in either Chapters 386, 393 or 610 RSMo for the Commission, acting as one “public governmental body,” to veto or override the lawful and proper “closure” of a record as determined by another public governmental body.

c) Ms. Hawley is leading the Commission on a meaningless quest; the Commission lacks subject matter jurisdiction to grant the relief requested by her, so it is a waste of public resources to further enable her quest by granting her access to HC material.

d) Ms. Hawley has admitted violating disclosure provisions and therefore put the Commission on notice that she cannot be trusted to maintain confidentiality even if it is offered to her.

DISCUSSION

A. Disclosure is not permitted by the plain language of the rule.

3. 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 separate categories of "individuals acting as their own attorney" or "attorneys in fact." 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."

4. ***Black's Law Dictionary*** at p. 128 (6th edition, 1990), defines the word "attorney" as follows: "In the most general sense the term denotes an agent or substitute, or one who is appointed and authorized to act in the place or stead of another. An agent, or one acting on behalf of another. [citation omitted] In its most common usage, however, *unless a contrary meaning is clearly intended, this term means 'attorney at law,' 'lawyer,' or 'counselor at law.'"* (emphasis added)

5. ***Black's*** also has a definition for "attorney in fact:" "*Attorney in fact*. A private attorney authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general, *not of a legal character*. The authority is conferred by an instrument in writing, called a "letter of attorney," or more commonly a "power of attorney." (emphasis added).

Black's, supra, at 129. Ms. Hawley does not meet the definition of either "attorney" or "attorney in fact."

6. 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.

7. When the Commission created the text of 4 CSR 240-2.135, it was certainly aware that *pro se* litigants appear before it from time to time. The Commission therefore could have included provisions in the rule to deal with the situation. The rule does not address a procedure for *pro se* litigants. Clearly, no such special procedure was contemplated. The text of the rule is not ambiguous and is thus not subject to interpretation. It says "attorneys of record." It does not say just "attorneys" which would allow all the attorneys for a party to have access to HC material as opposed to just the "attorneys of record." There is no precedent at the Commission of which Rolla is aware where a pro se litigant has been provided such material.

8. Because the provision of HC material to a *pro se* litigant is clearly beyond the scope of the rule as written, it would be prohibited by the rule's plain language. Because the rule is not ambiguous, it is not open to interpretation by the Commission on an *ad hoc* basis to allow it to apply in situations beyond the scope of the rule. This would be an arbitrary and capricious action by the Commission. The proper procedure

for the Commission to follow to consider the merits of expanding the scope of the rule is the rulemaking process in Chapter 536 RSMo. Any determination in this case that the term "attorney" means a "pro se" litigant is a substantive change in the rule significantly and impermissibly broadening its scope.

B. The HC portion of the R.W. Beck Study is a "closed record;" the Commission has no jurisdiction to alter that status by ordering it disclosed to a member of the public.

9. The HC material at issue is a "closed record" pursuant to Chapter 610 RSMo. It was designated as such originally by the Rolla Board of Public Works in accordance with Section 610.021(19), RSMo. The Rolla Board of Public Works is a "public governmental body." See, e.g., ***State ex rel. Board of Public Utilities of the City of Springfield, et al. v. Crow,*** 592 S.W.2d 285, 288 (Mo.App.S.D. 1979).

10. The effect of any Commission order permitting Ms. Hawley to view the HC material is to alter the status of the "closed record" and make it available to persons that would not have access to it as a "closed record." A review of Chapter 610 RSMo contains no provision that either contemplates or allows one "public governmental body" to veto or override the determination of a "closed record" made by another public governmental body. The Commission is an administrative agency of limited jurisdiction. There is no such grant of authority in the enabling legislation for the Commission, Chapters 386 or 393 RSMo.

11. Therefore, the only conclusion is that the Commission does not have the statutory authority to take actions that would alter the "closed record" status of the

material at issue here. Conversely, if this were *only* HC material where a claim of confidentiality is made by an entity under the subject matter jurisdiction of the Commission, the result might be different. But just as the Commission has no authority to override a determination by the Division of Workers Compensation that might somehow come before it in the context of some utility rate case, it has no authority to modify the closed record status of material determined to be such by the Rolla Board of Public Works. That board, after having carefully considered the sensitive nature of the records at issue, acted properly and lawfully in closing the records pursuant to the provisions of Chapter 610, RSMo. It has taken no subsequent action to waive the "closed" status, and therefore the Commission has no legal authority to supplant that board's decision.

C. Ms. Hawley is leading the Commission on a meaningless quest.

12. Ms. Hawley has made public statements of her goal with regard to the municipally-owned electric system in Rolla. She is clearly devoted to a ***political*** campaign to eliminate Rolla Municipal Utilities. The following excerpt from a posting she made on the Rolla Daily News website demonstrates her passionate but misinformed views. See: http://www.therolladailynews.com/news/x1237302101/-Cautious-budget-plan

> If a petition campaign [to sell the municipal electric system] doesn't influence the Council into placing it on the ballot, I do believe that we could go around the Council and petition the Missouri PSC and the Attorney General to force the city Council to do so.
>
> A complaint before the PSC only takes 25 rate payers for it to require a hearing. Since this is not simply a rate case, but a matter of mismanagement along with a Council that has abdicated its regulatory power, it would qualify for PSC

> jurisdiction. All we would have to show is how RMU is overbuilding the system for unknown reasons, has signed contracts without Council approval, and add in all the types of corruption that the State Auditor reported such as nepotism and secret pay raises and free cars, etc.. These combinged (sic) could be enough issues that the PSC or Attorney General would intervene.

13. The case presently before the Commission is not about Rolla "overbuilding the system" but is a filing by AmerenUE seeking permission to sell one substation and associated 34.5 kV transmission lines. The Commission's decision to allow Ms. Hawley status as a party has simply given her another forum to pursue her political agenda as outlined above. This is an agenda that she could not push through the Rolla City Council (who also publicly censured her for her conduct) even when she was a member for a few years. The excerpt further demonstrates the hazards of Ms. Hawley acting in a *pro se* status. It shows she can read a statute but that she does not *understand* it. It shows she has a tendency to interpret statutes to serve her means rather than as they are written. To anyone familiar with Chapters 386 and 393, the interpretation she gives above is baseless. She obviously does not understand the jurisdiction of the Commission or the laws of the state pertaining to municipal electric systems.

14. The excerpt indicates she believes that the Commission will join her quest and order the City of Rolla to sell its municipal electric system to someone else. Similarly, she believes that the Commission has jurisdiction to perform a management audit or prudence review of a municipal system and then order the system sold as a remedy.

15. As the Commission is well aware, nothing in Chapters 386 or 393 RSMo gives the Commission the power to order the sale of a municipal system or to engage in long-range planning for a municipal electric system. Given that, what possible reason is

there for the Commission to facilitate, encourage or entertain Ms. Hawley's impractical quest by allowing her access to sensitive information that a public governmental body has determined does not belong in her hands or that of the general public?

16. 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."). In truth, she can develop whatever plan for the future of the distribution system in Rolla she wants either with or without the Study and provide that to the Commission. Rolla can object to its relevance because nothing in such a plan would either prove or disprove whether AmerenUE's proposed sale of the substation and transmission lines is detrimental to the public interest. This case is not a prudence review by the Commission of Rolla's planning process.

17. The public interest that the Commission is obliged to protect is that which is served by the entities regulated by the Commission. The entity that determines the public interest for the electric system in Rolla is the City of Rolla, acting through the Board of Public Works. Rolla has completely rejected the political agenda of Ms. Hawley just as the voters in Ms. Hawley's former ward have rejected her representation of them. There is simply no point in the Commission giving her a "bully pulpit" in this case to pursue her agenda. Her agenda has been and continues to be a colossal waste

of time and public resources. If she wants to pursue it, there are more appropriate forums than the Commission. The Commission should refrain from facilitating her fantasy that she is going to get the Commission to force a sale of the Rolla Municipal system over the objections of the Rolla city government.

18. Rolla believes the evidence will show that AmerenUE's Missouri ratepayers will not be harmed if title to the substation and transmission lines changes as this plant will continue to serve the same purpose it has for decades. What Rolla does or does not do with additions or deletions to the rest of its distribution and transmission systems in planning for the future is not before the Commission, is not the province of the Commission, and should not be the concern of the Commission. It is, however, the province of the Rolla Board of Public Works, and the Commission should give due deference to the governmental agency charged with that particular purpose.

D. Ms. Hawley has admitted violating disclosure provisions and therefore proven that she cannot be trusted to maintain confidentiality even if it is offered to her.

19. Rolla conducted an electronic search in an attempt to determine if there was any precedent for a *pro se* litigant being provided confidential information. There do not seem to be any Missouri cases that address the issue of *pro se* litigants seeking confidential material. The search did turn up three non-Missouri cases, none of which appear to be dispositive or even informative in this particular situation because, while they deal with confidential information and *pro se* litigants, they do not deal with "closed

records" established by a public governmental body. One case involved The United States Court of International Trade. Two cases involved state utility commissions.

Cases Discussing Pro Se Litigants and Confidential Material

20. ***In re: Application for Certificate to Provide Wastewater Service in Charlotte County by Island Environmental Utility, Inc.*, 2003 Fla. PUC LEXIS 848 (2003).** In this order issued by the Florida Public Service Commission, a *pro se* litigant was granted access to financial statements of a utility's principal shareholders. However, the issue was very different than our case, because the financial statements were required by a specific provision of the Florida Administrative Code. *Id*. at 5-6. Furthermore, the utility had not requested that the financial statements receive "confidential information" status. *Id.* The circumstances are much different in the case at bar where the *pro se* litigant seeks access to a small portion of a single study that identifies potential vulnerabilities—information that has little to do with the ultimate issue before the Commission as to whether AmerenUE's sale of the Phelps substation and transmission lines is not "detrimental to the public interest."

21. ***In the Matter of the Consideration of the Revenue Requirement of the Alaska Exchange Carriers Association, Inc.*, 1998 Alas. PUC LEXIS 160.** In this case, the Regulatory Commission of Alaska declared that "[a] party's representatives include attorneys as well as individuals who are appearing *pro se*." *Id.* at 29-30. However, this declaration appears to be a clarification of a previous order rather than a legal analysis of *pro se* litigants. *Id.* at 28-29. Furthermore, the discovery order issued by the Regulatory Commission of Alaska was adopted to govern 21 different proceedings concerning various companies' access charges, and the order applies to material that was not necessarily deemed confidential. *Id*. 34-35. This is very different

than the case at bar, involving very specific "highly confidential" information—the disclosure of which is limited to "the attorneys of record" by the express language of 4 CSR 240-2.135.

22. In short, the two commission decisions regarding *pro se* litigants discussed above were made under very different rules, contexts and circumstances than those involved in this proceeding.

23. ***Katunich, et al. v. Donovan*, 576 F. Supp. 636 (U.S. Ct. Intl. Trade, 1983).** This case involves plaintiffs challenging the Secretary of Labor's denial of benefits under the Trade Act of 1974. A key issue for the plaintiffs involved the number of employees, layoffs, recalls and terminations at their former employer, U.S. Steel, as well as the tonnage produced by various U.S. Steel facilities. *Id*. at 637. The court conducted a balancing test, weighing the relevance and necessity of the disclosure against the potential harm. *Id.* at 638. "Of course," the court concluded, "it is basic that each case turns on its own particular facts and circumstances." *Id.* In the end, the court granted the plaintiffs' motion for disclosure as to approximately eight pages of material.

24. The ***Katunich*** case differs from the issue presently before the Commission because the balancing test was performed by a court in a challenge to an administrative proceeding, rather than by a commission in the administrative proceeding itself. Furthermore, the court's balancing test and ensuing decision went to the heart of the issue at hand—that is, to the issue of whether the plaintiffs' separation from employment was caused by a reduced need for their services directly related to a product impacted by imports. *Id*. at 637. In contrast, Ms. Hawley's interest in the

confidential portions of the Study have nothing to do with the issue presently before the Commission.

25. ***Katunich*** dealt with a "balancing of the interests" in granting partial access to information. This is to be expected of a court of law because it has the jurisdiction to do that. Indeed, section 610.030 RSMo states that "the circuit courts of this state shall have the jurisdiction to issue injunctions to enforce the provisions of sections 610.010 to 610.115." And while a regulatory law judge of the Commission may certainly act *in camera* to resolve disputes about highly confidential or proprietary information under the Commission's rules in cases involving Commission-regulated entities, this case is different. As explained above, we are dealing with a "closed record" that also happens to contain HC material, classified as such solely for purposes of this case. The Commission does not have jurisdiction to alter the status of a "closed record" from another governmental agency. That jurisdiction is lodged only in the classifying public governmental body itself and the courts.

26. Nevertheless, if the Commission is inclined to do its own *de facto* balancing of interests analysis in this proceeding, the fact that Ms. Hawley admitted in a pleading filed last week that she has disclosed "closed records" on one prior occasion should give the Commission pause in considering whether they seriously want to give her another opportunity to do that again with information that, in the right hands, identifies potential weaknesses in an electric distribution system. Her prior public conduct in bursting into private meetings, the censure of her by the Rolla City Council, her admitted violation of the public trust by disclosing closed records, and the utter irrelevance of any plan she can produce for the future of the distribution system in Rolla,

all tip any scale the Commission would be balancing in determining if there is a clear public interest to be fostered by allowing her access to the "closed record" in this case.

27. Furthermore, her signature on any non-disclosure certificate or "confidentiality agreement" is valueless in the view of Rolla. She has admitted she disclosed closed records when she felt it was justified. What is at stake here is sensitive information. If Ms. Hawley were to disclose the information, whatever sanctions might be imposed by the Commission or damages Rolla might be able to collect from Ms. Hawley for breach of a confidentiality agreement (and based on her self-description in previous pleadings, that is apparently little or nothing) will not even begin to compensate either Rolla or its citizens for the damage that could be done.

E. Other topics raised by the Commission in the August 4 Order:

28. The August 4 Order also requires the parties to state what protective order, if any, Rolla may be entitled to per 4 CSR 240-2.085 or 2.135. Rolla believes that it covered that topic in its Motion filed on August 2, 2010. Again, though, Rolla does not believe that Ms. Hawley should be afforded any access to the portions of the Study that she does not already have.

29. The August 4 Order requires the parties to state "what objection, if any, they would have to such a special counsel." Rolla suggested a special counsel to guide Ms. Hawley only if she were ultimately permitted access to the "closed record" over its objection. Its recommendation in that regard should not be taken as an admission by Rolla that she is entitled to access to the material. A special counsel for Ms. Hawley might aid the proceedings somewhat if HC material is offered in evidence in the sense that special counsel would be there to offer her advice on how to deal with it. However,

in this instance, there can be no assurance she would follow the advice.

WHEREFORE, Rolla submits the foregoing as its response as ordered by the Commission.

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 9, 2010, to the following:

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