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October 29, 1999

Mr. Dale Hardy Roberts  
Executive Secretary  
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P. O. Box 360  
Jefferson City, MO 65102

**FILED<sup>3</sup>**

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Missouri Public  
Service Commission

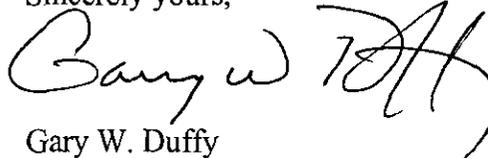
**RE: Case No. AX-2000-118**

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and fourteen copies of the initial comments of Brydon, Swearngen & England, P.C.

If you have any questions, please give me a call.

Sincerely yours,

  
Gary W. Duffy

Enclosures  
cc w/encl: Office of Public Counsel

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

In the matter of Proposed Rule       )  
4 CSR 240-2.090 Discovery and       )  
Prehearings                               )

Case No. AX-2000-118

**COMMENTS OF BRYDON, SWEARENGEN & ENGLAND, P.C.**

Comes now the law firm of Brydon, Swearngen & England P.C. and for its comments in this matter respectfully states as follows:

1.       These comments are in response to the numerous notices of proposed rulemaking published in the *Missouri Register* on October 1, 1999 (24 Mo.Reg. 2318 through 2340). The law firm of Brydon, Swearngen & England P.C. ("BSE") routinely represents numerous utilities who are regulated by the Commission. Therefore, the firm is required to utilize and abide by the rules of practice and procedure of the Commission, and thus members of the firm and their clients will be affected by changes in those rules. Several members of the firm have experience with the existing rules of practice and procedure of the Commission since their inception in 1975.

2.       The Commission proposes to add a new requirement to the data request provisions. The added requirement in section (2) of 4 CSR 240-2.090 is that a data request "shall be signed by a person who could attest to the truthfulness and correctness of the answers." This proposal goes too far and should be rejected. There is no explanation given in the PURPOSE section of this rule as to why the Commission needs to make this change, so we must necessarily guess at the Commission's motivation in seeking to identify someone "who could attest to the truthfulness and correctness of the answers."

A.       Parties to Commission proceedings already have at least three general

ways of obtaining discovery. First, they can use written interrogatories under Civil Rule 57.01, which requires that answers be under oath. Therefore, if a party is particularly concerned about “the truthfulness and correctness of the answers” they can utilize interrogatories. Second, they can use depositions under Civil Rule 57.02. These also produce answers given under oath. Third, they can use a somewhat informal and expedited process of data requests, which have not been required to be under oath or in any particular format. This informal approach can usually speed up the delivery of information.

B. The Commission’s proposal here will slow down that process. Instead of simply providing the information, a new process will have to be instituted by someone responding to a data request. The process will be to identify someone “who could attest to the truthfulness and correctness of the answers.” This will not necessarily be a quick and easy process in all instances. It is one thing to possess a particular information, and a completely different thing to be able to swear under oath about the accuracy of the underlying information. For example, a data request might ask for the total amount of investment in an overhead electric line that is fifteen miles long. The components of that number involved probably dozens of people making specific entries of information. Is there one person who would truthfully swear that all of that information is “truthful and correct”? Who is that person? What if that line was erected ten years ago and that person has retired?

C. The point of this discussion is that if the interrogating party demands some high assurance of the “truthfulness” of an answer to a data request, they should not be using data requests in the first place. They should be using depositions or interrogatories. There has been no demonstration that answers to data requests are generally untruthful, so there is no demonstrated need for this additional level. Further, this additional requirement is not going to

produce a greater assurance that answers to data requests are correct. It is simply going to add time to the process to track down someone who can presumably qualify to make that representation.

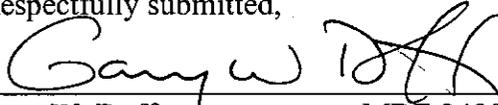
D. This proposal is not necessary because there already exist multiple incentives for a utility responding to a data request to provide information that is as accurate as possible. First and foremost, a utility should not knowingly attempt to jeopardize its reputation for truthfulness. Second, there is a statute which makes it a felony to “falsely make any statement required to be made to the public service commission ... . See §386.560 RSMo.

3. There is also a new proposal in section (2) that “The responding party shall promptly notify the requesting party of any changes to the answers previously given to a data request.” This is a highly problematic and complex requirement. For example, a data request might ask for a rate base or expense figure. The requested information may change on a daily basis. This proposal appears to require the responding party to notify the questioning party every day there is a change in the original answer, even though the answer to the original question remains correct as given. The burden should be put on the interrogating party to properly word the question in the first place. Further, there are no limits put on the amount of data requests which can be served in a case. In recent cases, there have been thousands of data requests. It is unduly burdensome on the responding party to have to keep track of all of the responses and determine if there have been “any changes” to them on a daily basis. Further, even if a “change” has occurred, there is no indication that it will automatically be of significant consequence. The Commission’s process of using prepared testimony is designed to bring to the attention of the parties situations where a change could be important. For example, if the Staff relies on a data request response for a position it takes in its direct or rebuttal testimony, the utility can respond

in rebuttal or surrebuttal that the situation has changed and the response previously given is no longer representative, and it can explain why. In that fashion, responses which have some significance can be addressed while the hundreds of others can be ignored.

4. Section (7) should specify that settlement offers are also privileged.

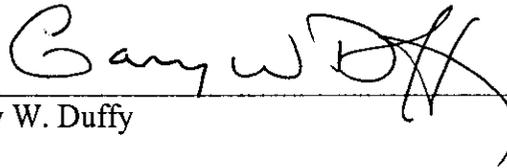
Respectfully submitted,



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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was served by hand delivery on the Office of the Public Counsel and the Office of the General Counsel of the Commission this 29<sup>th</sup> day of October, 1999.



Gary W. Duffy