

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

Roman Dzhurinskiy and Zinaida Dzurinskaya,)	
)	
Complainants,)	
)	
vs.)	File No. EC-2016-0001
)	
Union Electric Company d/b/a Ameren Missouri,)	
)	
Respondent.)	

ORDER GRANTING MOTION TO COMPEL

Issue Date: November 16, 2015

Effective Date: November 16, 2015

This action is a complaint arguing that Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”) violated Ameren Missouri’s tariff (“tariff”). The argued violation consists of Ameren Missouri failing to remove a certain charge (“charge”) from the electric bill of Roman Dzhurinskiy and Zinaida Dzurinskaya (“the Dzurinskiys”) based on receipt of assistance that did not go toward the Dzurinskiys’ Ameren Missouri bill.

The Office of the Public Counsel (“OPC”) objects to the discovery¹ of Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”). For that reason, the Commission suspended the date for filing any response to OPC’s pending motion for summary determination.² As explained below, OPC’s objections have no merit.

Therefore, the Commission is granting Ameren Missouri’s motion to compel, and re-setting the date for the response to OPC’s pending motion for summary determination.

¹ Electronic Filing Information System (“EFIS”) No. 49 (November 12, 2015) *Order Suspending Date for Response to Motion for Summary Determination*.

² Set forth at length in the appendix to this order.

A. Filings and Procedure

The Dzurinskiys filed the complaint.³ OPC filed a motion for summary determination⁴ against Ameren Missouri, to which Ameren Missouri's response is due on November 16, 2015.⁵ Ameren Missouri served data requests⁶ on OPC and OPC served Ameren Missouri with objections.⁷ Ameren Missouri filed a motion to compel compliance with discovery⁸ ("motion")⁹ and OPC filed a response to the motion ("response").¹⁰

The complaint initiated a contested case.¹¹ In every case before the Commission, the parties include OPC.¹² This action is subject to the Commission's regulation governing a small formal complaint,¹³ which provides that the regulatory law judge assigned to the case has authority to determine the motion.¹⁴

The motion seeks enforcement of data requests, which are a hybrid of other discovery devices provided by the rules, as shown by the Commission's definition:

Data request means an informal written request for **documents or information** that may be transmitted directly

³ EFIS No. 1 (July 1, 2015) *Complaint*.

⁴ EFIS No. 19 (September 14, 2015) *Motion for Summary Determination*.

⁵ EFIS No. 35 (October 13, 2015) *Order Setting Procedural Schedule*.

⁶ EFIS No. 44 (October 30, 2015) *Motion to Compel* Exhibit A.

⁷ EFIS No. 44 (October 30, 2015) *Motion to Compel* Exhibit B.

⁸ EFIS No. 44 (October 30, 2015) *Motion to Compel*.

⁹ After conferring with OPC and the regulatory law judge assigned to this action, as required under regulation 4 CSR 240-2.090(8)(A) and (B), respectively.

¹⁰ EFIS No. 47 (November 9, 2015) *Public Counsel's Response to Motion to Compel Discovery*.

¹¹ EFIS No. 2 (July 1, 2015) *Notice of Contested Case and Orders for Small Formal Complaint*.

¹² 4 CSR 240-2.010(10).

¹³ 4 CSR 240-2.070(15).

¹⁴ 4 CSR 240-2.070(15)(C).

between attorneys, agents, or employees of the commission, public counsel, or other parties [. ¹⁵]

The Commission's regulations provide enforcement of data request by the same means as other discovery.¹⁶ The Commission's regulations refer to the Missouri Supreme Court's rules of discovery for civil actions in circuit court ("rules")¹⁷ including enforcement through a motion to compel.¹⁸

B. Analysis

One of Ameren Missouri's data requests is not the subject of the motion. That data request is Ameren Missouri-OPC-007 ("DR 7"). Ameren Missouri seeks compliance with the remaining six data requests, to which OPC's objects as follows.

i. Admissibility

OPC made the following objections.

- Each data request lacks foundation,
- Each data request, other than DR 1, is argumentative,
- DR 2, 5, and 6 call for speculation, and
- Parts of DR 4 are compound.

In support of the objections, OPC does not cite any law. In the motion, Ameren Missouri argues that OPC's grounds do not constitute objections to discovery. On the contrary, these grounds relate to admissibility at hearing. Such grounds expressly do not support an objection to discovery under the plain language of the rules:

¹⁵ 4 CSR 240-2.090(2).

¹⁶ 4 CSR 240-2.090(2)(I).

¹⁷ 4 CSR 240-2.090(1), as authorized at Section 386.490, RSMo 2000.

¹⁸ Mo. Rule 61.01(g).

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. [¹⁹]

The Commission will overrule each of those objections because each of the data requests is reasonably calculated to lead to the discovery of admissible evidence, as described by the tariff's plain language, as follows.

ii. Reasonable Calculation

OPC objected to each data request for seeking information not reasonably calculated to lead to the discovery of admissible evidence. In support of the objections, OPC does not cite any law. The rules provide:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action [.]

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. [²⁰]

OPC and Ameren Missouri agree that admissible evidence is described in the tariff provision that governs the charge and the exemption.

As approved in File No. ER-2014-0258, customers eligible under this definition will be exempt from [the] charges for 12 billing months following assistance received from [five specified sources²¹].

OPC argues that the tariff unambiguously provides that the exemption starts with "assistance received [.]" Ameren Missouri argues that the tariff is ambiguous as to whether an Ameren Missouri customer who receives assistance toward a bill unrelated to Ameren

¹⁹ Mo. Rule 56.01(b)(1).

²⁰ Mo. Rule 56.01(b)(1).

²¹ Mo. P.S.C. Schedule No. 6, Original Sheet No. 90.1. Emphasis added.

Missouri (“non-Ameren Missouri beneficiary”) is exempt from the charge on an Ameren Missouri bill.

Ameren Missouri has the burden of proving relevance.²² Ameren argues that whether the tariff is ambiguous is not an abstract point of law. It determines the operation of the tariff, which determines whether Ameren committed a violation, which is the issue before the Commission on the complaint. The tariff determines the facts relevant to the exemption because it defines the exemption, but it does so by reference to matters outside the tariff: specifically File No. ER-2014-0258²³ (“earlier case”) and the five specified sources (“sources”). Therefore, in addition to the date of “assistance received [,]” the tariff makes evidence related to the earlier case and the sources relevant and admissible to determine the start of the exemption.

For example, the operation of any of the sources, including by whom “assistance [is] received”—the Dzurinskiys, or Ameren Missouri, or some third party—from the sources is necessary to determine whether and when the Dzurinskiys’ exemption started, which determines whether or when Ameren Missouri committed a violation. Nothing could be more probative on this complaint. OPC’s choice to offer no evidence on that matter, or on the earlier case, does not bar Ameren Missouri from exploring the matter.

Each data request addresses matters made relevant by the tariff’s plain language—assistance received, the earlier case, or the sources—as follows.

- Whether a non-Ameren Missouri beneficiary is exempt from the charge on an Ameren Missouri bill (DR 1).

²² Rule 56.01(b)(1).

²³ *In the Matter of Union Electric Company d/b/a Ameren Missouri’s Tariff to Increase Its Revenues for Electric Service*. The Commission’s decision on the merits of that action is at File No. ER-2014-0258, EFIS No. 742 (April 29, 2015) *Report and Order*. OPC argues that the tariff refers only to a stipulation and agreement in that action but the tariff’s plain language includes no such restriction.

- How Ameren Missouri identifies non-Ameren Missouri beneficiary (DR 2.a), or a customer proves an exemption (DR 2.b); and how Ameren Missouri verifies an exemption (DR 2.c).
- A specific source's contracts with assistance administrators and home energy suppliers (DR 4).
- Whether OPC verified a specified document attached to the motion for summary determination (DR 3).
- How much identification or reporting, verification, and changing the billing process, cost (DR 5).
- Whether those costs were part of Ameren Missouri's analysis in the earlier case. (DR6).

That information, and therefore each data request, is at least reasonably calculated to lead to the discovery of admissible evidence.

Ameren Missouri has carried its burden of proof so the Commission will overrule each of those objections.

iii. Work Product Privilege and Overbreadth

OPC objected to DR 4 and DR 6 on the basis of attorney work product privilege and to DR 4 for overbreadth. In support of those objections, OPC cites no law.

As to privilege, the rules provide:

Parties may obtain discovery regarding any matter, not privileged [. ²⁴]

Ameren cites case law discussing the burden of proof on an assertion of work product privilege, which is on OPC.²⁵

²⁴ Rule 56.01.

DR 6 asks for the following.

Please state whether OPC believes Ameren Missouri's estimation, in [the earlier case], of costs of implementing [the] exemption included costs a) to Ameren Missouri and potentially other entities necessary to develop and maintain a self-reporting (or other) process for customers to report qualifying exemptions and for Ameren Missouri to validate and incorporate into its billing process and b) the increase in the . . . charge to other [exempt] customers to recover the costs not paid [non-Ameren beneficiaries]. If so, identify OPC's basis for this belief.

The work product privilege consists of two protections, one set forth by rule for tangible work product, and the other independent of the rules for intangible work product.²⁶ Each of those protections has a different reach and is subject to a different standard.²⁷

For those reasons:

Blanket assertions of work product are insufficient to invoke protection. In order to invoke work product protection, the party opposing discovery "must establish, via competent evidence, that the materials sought to be protected (1) are documents or tangible things, (2) were prepared in anticipation of litigation or for trial, and (3) were prepared by or for a party or a representative of that party." [²⁸]

This is a problem because OPC's entire argument on this point consists entirely of the following conclusory assertion:

If Public Counsel had developed its own estimates during the pendency of Ameren's rate case, those estimates, along with Public Counsel's impressions of Ameren's estimates, would be privileged work-product.

²⁵ *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2004).

²⁶ *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2004).

²⁷ *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 368 (Mo. banc 2004).

²⁸ *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2004).

The term “impressions” suggests that OPC may be referring to intangible work product. But, because OPC cites no authority describing either protected matter, or explaining how any information sought is within either description, the Commission cannot know whether the term’s presence is intended to have legal significance. The Commission cannot conjecture on which of the protections is at issue—either or both—and what facts OPC assigns to either. That conduct would substitute the Commission’s advocacy for OPC’s obligation to make and support an objection to discovery. The Commission will not do so.

In any event, the purpose of data requests is the same as circuit court discovery: developing contentions, preventing concealment or unjust surprise, formulating issues for trial, and aiding the Commission.²⁹ DR 6 simply asks whether Ameren Missouri’s cost estimates for the earlier case included the tasks that OPC’s reading of the tariff implies. That information is subject to discovery through the various discovery devices that the Commission regulations blend into data requests. OPC has not carried its burden of proof as to this blanket objection.

DR 4 seeks the identity of persons having knowledge:

Please identify whether any staff of OPC, and if so who, are knowledgeable about the following:

a. Missouri Department of Social Services Family Support Division (DSS/FSD) contracts with community action agencies to determine LIHEAP applicants’ eligibility and to administer ECIP funds; and

b. DSS/FSD contracts with home energy suppliers.

OPC raised the objections of work product privilege and overbreadth, citing no authority in support. The rules expressly provide for discovery of persons having knowledge:

²⁹ J.B.C. v. S.H.C., 719 S.W.2d 866 (Mo. App., E.D. 1986).

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and **the identity and location of persons having knowledge** of any discoverable matter. [³⁰]

The rule's plain language permits what Ameren Missouri seeks.

Therefore, the Commission will overrule those objections.

iv. Undue Burden

In response to DR 1, OPC argues that compliance is unduly burdensome. OPC cites no law in support of its objection. The rules provide:

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:

(1) that the discovery not be had [³¹]

DR 1 asks:

Please identify the exact testimony, data response requests, or other communications, in [the earlier case], by which OPC communicated . . . that, under [the tariff, non-Ameren beneficiaries were] exempt from [the charge].

OPC argues that those matters already in the Commission's electronic filing information system ("EFIS") are equally available to, or already in the possession of, Ameren Missouri.

Ameren Missouri responds that it seeks nothing entered in EFIS. OPC replies that Ameren Missouri must serve another data request modified to specify the non-EFIS subset of the

³⁰ Rule 56.01 (emphasis added).

³¹ Rule 56.01(c).

matter already requested. Nothing requires Ameren Missouri to repeat its data request. The Commission will overrule the objection.

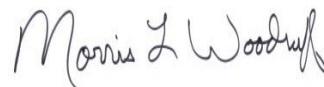
C. Summary

OPC cites no authority for its objections, while the plain language of the tariff and the rules refutes OPC's objections. OPC's objections have no merit. Therefore, the Commission will overrule the objections, grant the motion, and set the time for filing a response to the motion for summary determination.

THE COMMISSION ORDERS THAT:

1. The *Motion to Compel* is granted, and the Office of the Public Counsel ("OPC") shall immediately comply with the discovery described in the body of this order.
2. The Response of Ameren Missouri to the motion for summary determination shall be filed no later than two weeks after OPC has completed its compliance with ordered paragraph 1 of this order.
3. This order shall be effective when issued.

BY THE COMMISSION



Morris L. Woodruff
Secretary



Daniel Jordan, Senior Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 16th day of November, 2015.

Appendix

DR1

Please identify the exact testimony, data response requests, or other communications, in ER-2014-0258, by which OPC communicated to the Commission or to any party an understanding or belief that, under then-proposed tariff JE-2015-0290, Ameren Missouri's Energy Efficiency Investment Charge tariff (now MO P.S.C. Schedule No. 6, 1st Revised Sheet No. 90.1), Ameren Missouri customers who received LIHEAP Energy Assistance or ECIP funds towards a non-Ameren Missouri utility bill were "low-income" customers exempt from Rider EEIC.

DR2

a. Please identify the means or process that OPC believes Ameren Missouri may use to identify customers who are eligible for exemption from Rider EEIC, where the customers are eligible for the exemption based on receipt of LIHEAP Energy Assistance or ECIP funds to pay a non-Ameren Missouri utility bill. Please identify the exact testimony, data response requests, or other communications by which OPC communicated this proposed means or process to the Commission or any party.

b. If OPC proposes that Ameren Missouri accept documentation from customers, such as copies of Missouri Department of Social Services Family Support Division (DSS/FSD) payment notices, please identify the means or process that OPC believes a customer may use to submit such documentation. Please identify the exact testimony, data response requests, or other communications by which OPC communicated this proposed means or process to the Commission or any party.

c. If OPC proposes that Ameren Missouri accept documentation from customers, please identify the means or process that OPC believes Ameren Missouri may use to verify that such documentation is authentic. Please identify the exact testimony, data response requests, or other communications by which OPC communicated this proposed means or process to the Commission or any party.

DR3

Please state whether OPC, and if so who, verified through a representative of the Missouri Department of Social Services Family Support Division (DSS/FSD) the authenticity of the Energy Assistance Payment Notice attached as page 2 of Attachment C to OPC's Motion for Summary Determination in EC-2016-0001. If not, why not?

DR4

Please identify whether any staff of OPC, and if so who, are knowledgeable about the following:

- a. Missouri Department of Social Services Family Support Division (DSS/FSD) contracts with community action agencies to determine LIHEAP applicants' eligibility and to administer ECIP funds; and
- b. DSS/FSD contracts with home energy suppliers.

DR5

Please state whether OPC or any person on its behalf has analyzed or estimated the costs Ameren Missouri would incur in verifying whether customers have received LIHEAP Energy Assistance or ECIP funds towards a non-Ameren Missouri utility bill. If yes, please provide a) the estimated cost to Ameren Missouri and potentially other entities necessary to develop and maintain a self-reporting (or other) process for customers to report qualifying exemptions and for Ameren Missouri to validate and incorporate into its billing process and b) the increase in the MEEIA Rider charge to other non-qualifying customers to recover the costs not paid by qualifying low-income customers who received qualifying payments on non-Ameren Missouri utility bills. If yes, please also provide the analysis or estimation, with all supporting documentation. If yes, please also identify the exact testimony, data response requests, or other communications, if any, by which OPC communicated its analysis or estimations to the Commission or to any party.

DR6

Please state whether OPC believes Ameren Missouri's estimation, in ER-2014-0258, of costs of implementing a MEEIA low-income exemption included costs a) to Ameren Missouri and potentially other entities necessary to develop and maintain a self-reporting (or other) process for customers to report qualifying exemptions and for Ameren Missouri to validate and incorporate into its billing process and b) the increase in the MEEIA Rider charge to other non-qualifying customers to recover the costs not paid by qualifying low-income customers who received qualifying payments on non-Ameren Missouri utility bills. If so, identify OPC's basis for this belief.