

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

In the Matter of The Empire District Electric)
Company's 2019 Triennial Compliance Filing)
Pursuant to 4 CSR 240-22.)

Case No. EO-2019-0049

MOTION TO DISMISS INTERVENOR

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and hereby moves the Commission to dismiss from this proceeding the Midwest Energy Consumers Group ("MECG"); in support of which *Motion*, Staff states:

Statement of the Case:

1. This matter arose on August 18, 2018, when Empire District Electric Company ("Empire") filed its *Notice of Stakeholder Meeting*, followed on September 20, 2018, by its *Application for Variances*.

2. On September 20, the Commission issued its *Order Providing Notice, Establishing Intervene Deadline, and Directing Response*.

3. Not until July 3, 2019, did MECG file its *Application to Intervene*, stating that it "is an incorporated association representing the interests of large users of electricity including customers taking service from Empire District Electric Company." MECG further asserted, "[t]he matters to be considered in this case and the Commission's determinations therein, could have a direct and significant impact on Applicant's cost of energy service and the manner in which it is supplied" and "[t]he Applicant has a direct and immediate interest in this proceeding that is different from that of the general public."

4. On July 17, 2019, in reliance upon MECG's *Application to Intervene*, the Commission granted intervention to MECG, stating: "[a]fter considering the unopposed

applications to intervene, the Commission finds that allowing MJMEUC and MCEG to intervene will serve the public interest.”

Who is MCEG?

5. Midwest Energy Consumers Group (“MCEG”) is a Missouri nonprofit corporation in good standing with its principal place of business located at 308 E High St, Jefferson City, Missouri 65101, and its registered agent is David Woodsmall, 807 Winston Ct., Jefferson City, MO 65101. MCEG was incorporated on July 15, 2016, by David Woodsmall.¹ Its registered agent is, and has always been, David Woodsmall; Mr. Woodsmall is also MCEG’s President, its Secretary, and one of its three directors.² Staff believes that MCEG is simply the *alter ego* of David Woodsmall.

6. MCEG is not now, and has never been, a customer of Empire, although its assertions in its *Application to Intervene* were intended to imply that it was.

7. According to its *Articles of Incorporation*, MCEG was formed to “[r]epresent commercial and industrial customers regarding energy matters.”³ MCEG is not a customer of Empire. It is not a large commercial or industrial user of electricity or natural gas. Indeed, its charter does not authorize it to engage in those activities. According to its *Articles of Incorporation*, it has no members;⁴ nonetheless, it lists fifty-two “participating members” on its website,⁵ some of which are customers of Empire.

¹ Ex. A.

² Ex. B, MCEG’s *Annual Report* for 2018; Ex. C, MCEG’s *Annual Report* for 2017.

³ Ex. A, Question 8.

⁴ Ex. A, Question 6.

⁵ Ex. D.

Intervention in PSC Proceedings:

8. The Commission's rule on intervention at 20 CSR 4240-2.075 provides:

(3) The commission may grant a motion to intervene or add new member(s) if—

(A) The proposed intervenor or new member(s) has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or

(B) Granting the proposed intervention would serve the public interest.

9. The Commission's rule makes clear that intervention may be granted on either of two bases: Either an interest on the part of the applicant that is different from that of the general public and that may be adversely affected by the outcome of the case; or because granting intervention would serve the public interest. The rule is intended to limit intervention to (A) stakeholders and (B) non-stakeholders that, nonetheless, bring something useful to the table. A stakeholder is an entity with a demonstrable legally-protectable interest in the subject matter of the dispute; generally an economic interest.

MECG Does Not Qualify for Intervention in this Proceeding:

10. MECG is not a stakeholder; it has no legally-protectable interest in this matter. In the language of the courts, MECG lacks *standing*.⁶ It is not itself a customer of Empire and it is not susceptible to an adverse economic impact by the Commission's decision in this case. "Standing requires that a party have a personal stake arising from a threatened or actual injury." **Schweich v. Nixon**, 408 S.W.3d 769, 774 (Mo. banc 2013). "When considering standing, there is 'no litmus test for determining whether a

⁶ "Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right." **Black's Law Dictionary** p. 1413 (7th ed., 1999).

legally protectable interest exists.’ The issue is whether plaintiff has ‘a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief.’ A party establishes standing, therefore, by showing that it has ‘some legally protectable interest in the litigation so as to be directly and adversely affected by its outcome.’” *Id.*, at 775. When considering the standing of an incorporated association, the association’s standing is dependent on the standing of its members:

In order for appellants to have standing in a representative capacity, “(1) the members must have standing to bring suit in their own right; (2) the interests the association seeks to protect must be germane to its purpose; and (3) neither the claim asserted nor the relief requested must require the participation of individual members in the lawsuit.”

Querry v. State Highway & Transp. Comm’n, 60 S.W.3d 630, 634 (Mo. App., W.D. 2001). But, as already noted, MEGC’s *Articles of Incorporation* state that it has no members. Likewise, standing to challenge an administrative agency action is dependent upon a demonstrable adverse impact:

For a party to have standing for review under § 536.150, the agency action must directly affect the private rights of the person seeking judicial review. **Mo. Nat. Educ. Ass’n v. Mo. State Bd. of Educ.**, 34 S.W.3d 266, 275 (Mo. App., W.D. 2000).

Querry, *supra*, 60 S.W.3d at 636. But, MEGC is not itself a customer of Empire; thus, it cannot be adversely effected by the final decision in this matter.

11. The public interest does not support MEGC’s participation in this matter. In Case No. EO-2019-0244, in which MEGC had asserted in its *Application to Intervene* that it “is an incorporated association representing the interests of large commercial and industrial users of electricity” and “[a]s a group of large commercial and industrial customers of KCPL-GMO, MEGC’s interest in this case is different than that of the general

public,” the Commission concluded that MEEG did not actually represent any interest but its own.

MEEG Should Be Dismissed From This Action:

12. Because MEEG does not qualify for intervention in this matter, its *Application* was improvidently granted and its intervention should now be revoked and MEEG dismissed from this proceeding. If Staff is mistaken, and MEEG in fact represents the interests of actual, specific commercial and industrial customers of Empire, then Staff urges the Commission to require Mr. Woodsmall and MEEG to identify those customers, so that the real parties in interest to this matter are known and Staff and the other parties can pursue discovery from them.

13. To allow the real parties in interest to meddle in this case anonymously, hidden behind the screen of this incorporated association, works a very real denial of the Due Process rights of every other party to this case. If Mr. Woodsmall and MEEG are truly representing the interests of commercial and industrial customers of Empire, then the other parties litigant have a manifest right to discover those interests and, where adverse, to contest them.

WHEREFORE, Staff prays that the Commission will dismiss MEEG as a party in this matter, or alternatively, will require MEEG to disclose the identities of the “large commercial and industrial users of electricity” whose interests it purports to represent; and grant such other and further relief as is just in the premises.

Respectfully submitted.

/s/ Kevin A. Thompson

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Certificate of Service

The undersigned certifies that the foregoing was served electronically upon all parties of record or their representatives pursuant to the Service List maintained for this case by the Commission's Data Center **on this 4th day of October, 2019.**

/s/ Kevin A. Thompson