

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 14th day of April, 2010.

In The Matter Of The Construction Audit and)
Prudence Review of Environmental Upgrades))
To Iatan 1 Generating Plant, and Iatan)
Common Plant, and the Iatan 2 Generating)
Plant, Including All Additions Necessary For)
These Facilities to Operate)

File No. EO-2010-0259

ORDER OF CLARIFICATION

Issue Date: April 14, 2010

Effective Date: April 14, 2010

Syllabus: The Commission is clarifying its investigatory authority. Outside of a contested case, the formal discovery devices available in circuit court (“discovery”) are not available to any person, including the Commission’s Staff. Data requests, which are informal requests for information, may be used, but Staff need not conduct an investigation through data requests alone. The Commission has authority to request documents, inspect things, and question persons without data requests, and has a variety of procedures available to enforce such authority.

Background

On December 9, 2009, the Commission issued an order that denied a motion by its Staff to compel discovery. The Commission’s order delineated the appropriate enforcement mechanisms when seeking information by use of informal data requests during an investigation. The order contrasted the differences between enforcement of the data requests served pursuant to the Commission’s investigatory authority with the enforcement of formal discovery tools in a contested case.

On March 12, 2010, Staff filed a motion requesting the Commission order Kansas City Power and Light Company and KCP&L Greater Missouri Operations Company to follow Commission Rule 4 CSR 240-2.090 as it relates to data requests. The Commission subsequently denied that request believing Staff was asking the Commission to authorize discovery enforcement in this investigation by use of contested case procedures. Staff now seeks clarification regarding the use of data requests.

Clarification

A. Investigation

As described in the order dated December 9, 2009, statute, rule, and case law limit discovery's availability before the Commission to contested cases. Unlike discovery, informal data requests are available outside the context of a contested case. Enforcement of a data requests during an investigation is by subpoena as outlined in the December 9, 2009 order. But data requests are merely one method for exercising the investigatory powers that the General Assembly has granted the Commission for executing the Commission's duties.

The General Assembly has charged the Commission with the duty to investigate electrical corporations for the promotion of the public interest:

The commission shall:

* * *

(2) . . . examine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying . . . electricity . . . , and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such . . . electricity . . . , and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable

devices, apparatus and property . . . electrical corporations, water corporations, and sewer corporations.¹

To execute that duty, the statutes give the Commission specific investigatory powers.

The Commission has power to inspect any electrical corporation's properties:

The commission shall:

* * *

(7) Have power, either through its members or inspectors or employees duly authorized by it, to enter in or upon and to inspect the property, buildings, plants, factories, powerhouses, ducts, conduits and offices of any such corporations or persons[.]²

The Commission has power to examine any electrical corporation's documents:

The commission shall:

* * *

(8) Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation or person, and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited[.]³

(9) [T]he commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it [.]⁴

The Commission has power to question any electrical corporation's personnel and require reporting:

The commission shall:

* * *

¹ Section 393.140, RSMo 2000.

² *Id.*

³ *Id.*

⁴ *Id.*

(5) Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business.

* * *

(9) . . . The commission may require of all such corporations or persons specific answers to questions upon which the commission may need information, and may also require such corporations or persons to file periodic reports in the form, covering the period and filed at the time prescribed by the commission [.]

* * *

(10) Have power in all parts of the state, either as a commission or through its members, to . . . take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285.⁵

The Commission is not limited to exercising any of these powers solely through data requests. And, the Commission considers these powers so central to its statutory duty that it has set them forth on the back of its employees' identification cards.

B. Enforcement

The General Assembly has provided enforcement for the Commission's investigatory power with mechanisms ranging from persuasive to criminal. Enforcement for non-compliance with a Commission demand or direction can be by penalty:

1. Any corporation, person or public utility . . . which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

⁵ *Id.*

2. Every violation of the provisions . . . of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

3. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such corporation, person or public utility.⁶

Specifically as to the answers and reports the Commission may require, the General Assembly also provides enforcement by penalty:

(9) . . . If such corporation or person shall fail to make specific answer to any question or shall fail to make a periodic report when required by the commission as herein provided within the time and in the form prescribed by the commission for the making and filing of any such report or answer, such corporation or person shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer.⁷

The General Assembly has also given the Commission express power to compel compliance with its investigations by subpoena:

The commission shall:

* * *

(9) Have power to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers. [T]he commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it [.]⁸

⁶ Section 386.570, RSMo 2000.

⁷ Section 393.140, RSMo 2000.

⁸ *Id.*

(10) Have power in all parts of the state, either as a commission or through its members, to subpoena witnesses . . . in any proceeding or examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285.⁹

Violation of such subpoena is subject to criminal prosecution:

If a person subpoenaed to appear before the commission or a commissioner fails to obey the command of such subpoena, without reasonable cause, or if a person in attendance upon the commission or a commissioner shall, without a reasonable cause, refuse to be sworn or to be examined, or answer a question, or to produce a book or paper when ordered to do so by the commission or a commissioner, or to subscribe or swear to his deposition after it has been correctly produced in writing, he shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail not to exceed one year, or by both such fine and imprisonment, and may be prosecuted therefor in any court of competent jurisdiction; and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.¹⁰

The Commission has delegated to Staff these broad Commission powers of investigation.

The Commission expects its Staff to exercise those powers.

C. Limitation

Of course, these powers are solely for gathering information. Information gathered, and conclusions reached, in the course of an investigation may support further action, like rulemaking, or adjudication by non-contested case or contested case. Investigations, like in this matter, may produce an audit that will come into play during the companies' next general rate case. The audit report, or any other information obtained during the audit, if offered into evidence in another matter will be subject to the appropriate evidentiary

⁹ *Id.*

¹⁰ Section 386.460, RSMo 2000.

competency tests that apply in those formats, because such investigation does not, alone, determine the legal rights or duties of any person.¹¹

THE COMMISSION ORDERS THAT:

1. The Staff of the Missouri Public Service Commission request for clarification is granted.
2. The Commission's March 31, 2010 Order Regarding Pending Motions is clarified in the body of this order.
3. This order shall become effective immediately upon issuance.

BY THE COMMISSION

(S E A L)



Steven C. Reed
Secretary

Clayton, Chm., Davis, Jarrett, Gunn,
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

¹¹ Indeed, a contested case operates under the fundamental laws of evidence. See *Director of Ins., Fin. Inst., and Prof. Regis'n v. Rothermich*, Case No. 06-1608 DI (Mo. Admin. Hearing Com'n, Nov. 29, 2007), 2007 WL 4618606, 4.