

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

In the Matter of the Application of Union)
Electric Company for Authority to Continue)
The Transfer of Functional Control of Its)
Transmission System to the Midwest)
Independent Transmission System Operator, Inc.)
File No. EO-2011-0128

**STAFF MOTION FOR ORDER COMPELLING RESPONSES TO
STAFF DATA REQUEST NOS. 57 AND 58**

COMES NOW, the Staff of the Missouri Public Service Commission (“Staff”), by and through the undersigned counsel of the Staff Counsel’s Office, and prays for an order of the Missouri Public Service Commission (“Commission”) directing the Midwest Independent Transmission System Operator, Inc. (“Midwest ISO”) to answer Staff Data Requests No. 57 and 58. In support thereof, the Staff states:

1. Undersigned Staff counsel has complied with 4 CSR 240-2.090(8). Staff counsel has conferred with Counsel for the Midwest ISO. Undersigned Staff counsel and Counsel for the Midwest ISO were unable to resolve the Midwest ISO’s objection to the Staff Data Request Nos. 57 and 58 and the Staff still desires responses. Counsel for the Midwest ISO authorized counsel for the Staff to contact Chief Regulatory Law Judge Morris L. Woodruff. Judge Woodruff directed undersigned Staff counsel to proceed directly by filing a Motion To Compel.

2. On August 23, 2011, the Commission issued an *Order Directing The Commission’s Staff To Respond To Questions From The Commission In Its Prefiled Testimony* (“August 23 Order”). Said *August 23 Order* directed the Staff to provide testimony in response to questions set out in the *August 23 Order*. Question 15 therein provided in part:

15. Please investigate and report to this Commission the total amount spent by MISO on consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining MISO. Please provide a list of all external employees, agents or affiliates compensated by MISO for these purposes. . . .

3. The Staff submitted Staff Data Request Nos. 56, 57, and 58 to the Midwest ISO

which asked the following questions.

Staff Data Request No. 56:

Please identify any and all consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining the MISO system.

Staff Data Request No. 57:

Please report the total amount spent by MISO on consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining the MISO system.

Staff Data Request No. 58:

For each of the consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining the MISO system, please state the amount paid by MISO.

4. On September 14, 2011, the Midwest ISO submitted to the Staff written objections to these three data requests, as well as various other Staff data requests, within the shortened time period to which the parties had agreed and for which the Commission directed by Order. On September 21, 2011, within the shortened time period to which the parties had agreed and for which the Commission directed by Order, the Midwest ISO responded to all data requests submitted to it, except Staff Data Request Nos. 57 and 58.

5. Thus, the Midwest ISO answered Staff Data Request No. 56, providing the names of ten (10) firms that it identified as having been retained regarding Entergy's proposal to join

the Midwest ISO in response to the Staff's request that the Midwest ISO identify any and all consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining the MISO system,

Public Strategies, Inc.
The Registry, Inc.
That's Good HR
Wilson Engstrom Corum & Coulter
The Sullivan Group LLC
The First Group
Roberts Law Firm
The Long Law Firm LLP
Brunini, Grantham, Grower & Hewes PLLC
Jackson Walker LLP

but the Midwest ISO objected to providing the total amount spent by the Midwest ISO on, or the amount spent by the Midwest ISO on any and all consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining the MISO system

6. For Staff Data Request Nos. 57 and 58, the Midwest ISO responded as follows on September 21, 2011:

MISO incorporates its objection asserted on September 14, 2011 that this data request calls for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this proceeding. The relevant question in this case is whether Ameren Missouri's continued participation in MISO is not detrimental to the public interest.¹

The Staff notes that the Midwest ISO's objection is not that the information sought is protected by some privilege or immunity.

¹ Attachment 1 is a copy of Staff Data Request No. 57 and the Midwest ISO's response/objection, a copy of Staff Data Request No. 58 and the Midwest ISO's response/objection, and a copy of a September 14, 2011 letter from Counsel for the Midwest ISO objecting to Staff Data Request Nos. 57 and 58.

7. As the Commissioners are aware, on April 25, 2011, Entergy Corporation (“Entergy”) announced that its operating companies would submit formal proposals to their regulators this year to join the Midwest ISO with a target implementation date of December 2013. The Southwest Power Pool (“SPP”) has served as independent coordinator of transmission (“ICT”) for Entergy. The Entergy operating companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, L.L.C., Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc.

8. The Midwest ISO’s activities and costs incurred relating to Entergy joining the Midwest ISO are relevant to the Staff’s and the Commission’s consideration of whether Ameren Missouri’s continued participation in MISO is not detrimental to the public interest:

- (a) There is no indication that the Midwest ISO will not seek the recovery of the costs that it has expended on consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining the MISO system;
- (b) Entergy joining the Midwest ISO means the Organization of MISO States (OMS) would likely increase to include the Arkansas, Texas, Mississippi, Louisiana, and City of New Orleans public utility regulatory agencies, probably decreasing the voting strength of the Missouri Commission, but likely increasing its costs and activities respecting the Midwest ISO; and
- (c) Midwest ISO recently sought in Federal Energy Regulatory Commission (“FERC”) Docket No. ER11-3728-000 waiver of its Open Access Transmission, Energy, and Operating Reserve Markets Tariff regarding the planning and cost allocation of network upgrades in order to establish a transition for the integration of Entergy and its operating companies into the Midwest ISO. The Missouri Commission filed a Notice Of Intervention And Protest. On September 27, 2011, the FERC issued an Order Denying Request For Tariff Waiver in Docket No. ER11-3728-000, 136 FERC ¶61,212. Further activity by the Missouri Commission in FERC dockets regarding the integration of Entergy into the Midwest ISO will likely be required.

9. The Staff thought that the Midwest ISO’s Form 990 (Return Of Organization Exempt From Federal Income Tax) might provide some of the information Staff sought by Staff Data Request Nos. 57 and 58. Form 990 requires the name, business address,

description of services and compensation of the five (5) highest compensated independent contractors that received more than \$100,000 of compensation from the reporting organization. None of the five (5) contractors on the Midwest ISO's 2009 Form 990 matched any of the ten (10) firm names the Midwest ISO identified in its response to Staff Data Request No. 56. The Midwest ISO reported on its 2009 Form 990 that the total number of independent contractors (including but not limited to those listed) who received more than \$100,000 in compensation from the organization totaled 83. The most current Form 990 that the Staff has for the Midwest ISO is 2009 Form 990. The date of the signature of the Midwest ISO officer on the Midwest ISO's 2009 Form 990 is September 7, 2010. The Staff has requested a copy of the Midwest ISO's 2010 Form 990.

10. Commission rule 4 CSR 240-2.090(1) states in part that “[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court.” Mo. Rule of Civ. Pro. 56.01(b)(1) provides in relevant part that “[p]arties 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.”

11. In a 1982 Southwestern Bell Telephone Company (“Southwestern Bell”) rate increase case, Southwestern Bell objected to data requests of the Office of the Public Counsel (“Public Counsel”) that primarily concerned Southwestern Bell’s anticipated implementation of the “Computer Inquiry II” decision of the Federal Communications Commission (“FCC”) as of January 1, 1983 and Southwestern Bell’s plans for the implementation of the proposed modification of the final judgment (“MFJ”) from

United States v. Western Electric, et al., Civil Action 17-49, (U.S.D.C.N.J. 1956).
Re Southwestern Bell Telephone Co., Case No. TR-82-199, *Order Concerning Data Requests, And Directing Staff To Secure Testimony Of A Witness*, p. 1 (July 16, 1982; unreported).

The Commission stated as follows in its *Third Order Concerning Data Requests*, respecting the Public Counsel's Motion To Compel², and in its *Order Denying Rehearing*, respecting Southwestern Bell's Motion For Rehearing:

Re Southwestern Bell Telephone Co., Case No. TR-82-199, *Third Order Concerning Data Requests*, pp. 1-2 (August 4, 1982; unreported):

Having given careful consideration to the arguments presented on July 23, 1982, the Commission concludes that Public Counsel's Motion to Compel Answers should be granted. The Data Requests in question, concerning the Computer Inquiry II and the Proposed Modified Final Judgment (MFJ) to the 1956 Consent Decree appear reasonably calculated to lead to the discovery of admissible evidence. That is the standard established by the Missouri Rules of Civil Procedure, and therefore by the rules of this Commission, for discoverability. Supreme Court Rule 56.01(b)(1); 4 CSR 240-2.090(1).

The Commission notes that its decision in this Order goes only to the question of whether Computer Inquiry II and MFJ are proper subjects for discovery at this stage of the proceedings. The Commission makes no decision at this time as to the ultimate admissibility of evidence concerning those subjects or Bell's plans in regard to those subjects.

Re Southwestern Bell Telephone Co., Case No. TR-82-199, *Order Denying Rehearing*, p. 1 (August 19, 1982; unreported):

The Commission concludes that Southwestern Bell's Motion For Rehearing should be denied.

The Company should also be aware that the Commission itself has a high degree of interest in the line of inquiry being pursued by Public Counsel in the data requests under consideration and, further, that the Commission has a broad view of its own investigative powers with respect to documents and information of the

² Southwestern Bell's objections to Public Counsel's data requests were generally that the matters inquired into were irrelevant and immaterial since the data sought was not known and measurable at the time and probably would not be known until after January 1, 1983, so that answers would be speculative. Southwestern Bell also objected on the basis that some of the data requests sought the production of documents prepared in the course of and in contemplation of pending litigation and were, therefore, privileged attorney work product. Southwestern Bell further asserted that all of the documents sought were proprietary business records and therefore privileged, and that certain of the requests were unreasonably burdensome. *Id.* at 1-2.

Company. The Commission would like to take this opportunity to indicate the preference that the documents and information sought by Public Counsel be produced in the context of Public Counsel's data requests, and not after some further action of this Commission made necessary by the Company's continuing delay in response, despite the clear orders from this Commission.

12. The Commission has cited *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546-47 (Mo.App. W.D. 2008) ("*Ratcliff*") in at least two Commission cases respecting Rule 56.01(b) governing the scope of discovery in civil actions in circuit court: *Re Union Electric Company, d/b/a AmerenUE*, File No. ER-2010-0036, *Order Regarding The Office Of The Public Counsel's Motion To Compel*, p. 2 n.1 (March 16, 2010) and *Re Kansas City Power & Light Co.*, Case No. ER-2009-0089, *Order Regarding Staff's Motion To Compel*, p. 8 n.12 (December 9, 2009). The Western District Court of Appeals addressed the trial court's administration of the rules of discovery in *Ratcliff* at 546-47:

The trial court has broad discretion in administering the rules of discovery, and its ruling will be reviewed for abuse of discretion. *Igoe v. Dep't of Labor & Indus. Relations*, 210 S.W.3d 264, 267 (Mo.App. W.D.2006); *Hertz Corp. v. Raks Hospitality, Inc.*, 196 S.W.3d 536, 544 (Mo.App. E.D.2006). In reviewing the trial court's actions related to a response to a pre-trial discovery, the appellate court considers whether the challenged act, under the totality of the circumstances, has resulted in prejudice or unfair surprise. *Igoe*, 210 S.W.3d at 267; *Hertz*, 196 S.W.3d at 545.

WHEREFORE the Staff prays the Commission to issue an order directing the Midwest ISO to answer Staff Data Request Nos. 57 and 58.

Respectfully submitted,

/s/ Steven Dottheim

Steven Dottheim, Mo. Bar #29149

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Attorneys for the Staff of the Missouri Public
Service Commission

CERTIFICATE OF SERVICE

I hereby certify compliance with 4 CSR 240-2.090(8) and also that the foregoing filing of *Staff Motion For Commission Order Compelling Responses To Staff Data Request Nos. 57 And 58* was served via e-mail on counsel for all parties of record on this 27th day of October, 2011.

/s/ Steven Dottheim

Midwest Independent Transmission System Operator, Inc.

Case No. EO-2011-0128

In re Application of Union Electric Co. for
Authority to Continue the Transfer of Functional Control of its
Transmission System to Midwest Independent Transmission System Operator, Inc.

Missouri Public Service Commission

Response to Data Request

Data Request: 0057

Requesting Party: Staff

Date of Request: 9/7/11

Date of Response: 9/21/11

Request:

Please report the total amount spent by MISO on consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining the MISO system.

Response: MISO incorporates its objection asserted on September 14, 2011 that this data request calls for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this proceeding. The relevant question in this case is whether Ameren Missouri's continued participation in MISO is not detrimental to the public interest.

Midwest Independent Transmission System Operator, Inc.

Case No. EO-2011-0128

In re Application of Union Electric Co. for
Authority to Continue the Transfer of Functional Control of its
Transmission System to Midwest Independent Transmission System Operator, Inc.

Missouri Public Service Commission

Response to Data Request

Data Request: 0058

Requesting Party: Staff

Date of Request: 9/7/11

Date of Response: 9/21/11

Request:

For each of the consultants, contractors, outside legal counsel, media consultants, public relations firms, agents and anyone else hired for the purpose of gaining regulatory approval of Entergy joining the MISO system, please state the amount paid by MISO.

Response:

MISO incorporates its objection asserted on September 14, 2011 that this data request calls for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this proceeding. The relevant question in this case is whether Ameren Missouri's continued participation in MISO is not detrimental to the public interest.

September 14, 2011

Mr. Steve Dottheim
Ms. Meghan McCloyry
Office of the General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Application of Union Electric Co. to Continue MISO Membership
Case No. EO-2011-0128

Dear Steve and Meghan:

In response to Staff's Data Requests 54 through 60, I provide the following objections on behalf of Midwest Independent Transmission System Operator, Inc. ("MISO").

DR No. 0054: MISO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. MISO also objects to this data request as its reference to "compensation package" is vague and ambiguous.

DR No. 0055: MISO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. MISO also objects to this data request as its reference to "compensation package" is vague and ambiguous.

DR No. 0056: MISO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The relevant question in this case whether Ameren Missouri's continued participation in MISO is not detrimental to the public interest.

DR No. 0057: MISO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The relevant question in this case whether Ameren Missouri's continued participation in MISO is not detrimental to the public interest.

DR No. 0058: MISO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The relevant question in this case whether Ameren Missouri's continued participation in MISO is not detrimental to the public interest.

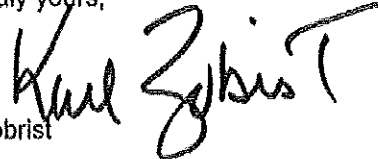
DR No. 0059: MISO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The relevant question in this case whether Ameren Missouri's continued participation in MISO is not detrimental to the public interest.

DR No. 0060: MISO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The relevant question in this case whether Ameren Missouri's continued participation in MISO is not detrimental to the public interest.

Please let me know if you have any questions regarding this matter.

Very truly yours,

Karl Zobrist



KZ/cjn