

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

In the Matter of The Empire District	)	
Electric Company’s Request for	)	
Authority to File Tariffs Increasing	)	Case No. ER-2019-0374
Rates for Electric Service Provided	)	
To Customers in its Missouri	)	
Service Area	)	

**PUBLIC COUNSEL’S RESPONSE TO MOTIONS TO STRIKE**

The Office of the Public Counsel (OPC) responds to Renew Missouri and the Midwest Energy Consumers Group’s (MECG) Motions to Strike as follows:

1. Both MECG and Renew Missouri objected to certain portions of OPC witness Dr. Geoff Marke’s testimony, and asked the Commission strike those portions with two separate filings on April 10, 2020.

2. The Public Service Commission (Commission) ordered the OPC to respond to both parties motions by April 13, 2020. However, Renew Missouri also rescinded its motion to strike Dr. Marke’s testimony on April 13, 2020. Therefore, the OPC only responds to the MECG’s motion.

3. The MECG objects to Dr. Marke altering his previous positions in testimony regarding rate design. In fact the MECG demands that Dr. Marke be bound to his previous “tentative align[ment]” with recommendations from the Commission Staff.<sup>1</sup> These complaints express a desired security that MECG never had.

4. No party may force a witness to uphold testimony he does not believe, and witnesses routinely alter their prefiled testimony on the stand before their counsel moves for admission.

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<sup>1</sup> MECG Motion to Strike Portions of OPC Surrebuttal Testimony, ER-2019-0374 (Apr. 10, 2020).

5. The OPC could have waited till the moment of offering Dr. Marke's testimony to have him alter his direct and rebuttal testimony, instead of employing the courtesy of expressing those changes beforehand in surrebuttal.

6. MECG's motion is thus a battle over form rather than substance, and is rooted in its improper goal of binding a witness to positions he no longer holds.

7. The MECG also claims that Dr. Marke's recommendation that any rate reduction be applied solely to residential customers does not respond to any previously prefiled rebuttal testimony, and that Dr. Marke effectively withheld his direct position until surrebuttal.

8. Dr. Marke begins his recommendation by discussing party positions made in rebuttal, and noting that no party has changed its position since direct.<sup>2</sup> Based on these non-changing positions, and the very apparent new reality of economic hardship in light of COVID-19, Dr. Marke recommends that the Commission reduce Empire's rates for residential customers. This recommendation is plainly in response to rebuttal testimony, and permissibly in response to external events that the Commission may take into official notice.

9. Missouri law provides that the Commission "shall take official notice of all matters of which the courts take official notice," and that the Commission may also take "official notice of technical or scientific facts, not judicially cognizable, within their competence."<sup>3</sup>

10. MECG complains that Dr. Marke's testimony sets a "horrible precedent" for future cases whereby parties may withhold positions until surrebuttal testimony.<sup>4</sup> The OPC offers that not permitting parties to respond to sudden and extreme events, in conjunction with responses to rebuttal testimony, sets the wrong precedent of future rate cases proceeding on outmoded positions.

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<sup>2</sup> *Surrebuttal Testimony of Dr. Geoff Marke*, ER-2019-0374 p. 12 (Mar. 27, 2020).

<sup>3</sup> Mo. Rev. Stat. § 536.070 (2011).

<sup>4</sup> *MECG Motion to Strike Portions of OPC Surrebuttal Testimony*, ER-2019-0374.

11. The MECG ignores that Dr. Marke's surrebuttal positions are in response to other parties' rebuttal positions, that it has no right to bind any witness to a position, and exigent circumstances may require testimony on point.

**Wherefore**, the OPC requests that the Commission disregard the MECG's Motion to Strike, and request that the Commission take official notice of the following:

- The World Health Organization reported clusters of a pneumonia like disease in Wuhan, Hubei Province of China on December 31, 2019;
- The World Health Organization identified the outbreak in Wuhan as a novel coronavirus, COVID-19, on January 7, 2020;
- On March 6, 2020, Missouri reported its first case of COVID-19;
- On March 13, 2020, Missouri Governor Mike Parson declared a state of emergency;
- and
- The United States Department of Labor reports that more than 16 million individuals filed unemployment claims in March in response to an unprecedented COVID-19 related economic downturn.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 13<sup>th</sup> Day of April, 2020, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall