

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 3rd day of April, 2024.

In the Matter of the Petition of Union)
Electric Company d/b/a Ameren Missouri)
for a Financing Order Authorizing the)
Issue of Securitized Utility Tariff Bonds for)
Energy Transition Costs related to Rush)
Island Energy Center)

File No. EF-2024-0021

**ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL**

Issue Date: April 3, 2024

Effective Date: April 3, 2024

This Commission order resolves a discovery dispute between the Office of the Public Counsel (Public Counsel) and the Commission’s Staff (Staff) both granting and denying portions of a Public Counsel motion asking the Commission to order Staff to provide answers to data requests.

On March 20, 2024, an attorney for Public Counsel contacted the Regulatory Law Judge overseeing this matter pursuant to Commission Rule 20 CSR 4240-2.090(8) about a discovery dispute with Staff. A WebEx discovery conference failed to resolve the dispute, and the Regulatory Law Judge authorized Public Counsel to file a motion to compel, finding that Complainants had fulfilled the requirements of Commission Rule 20 CSR 4240-2.090(8)(A) and (B). Public Counsel filed its *Motion to Overrule Staff's Objections and to Direct Staff to Answer Public Counsel's Data Requests* on March 22, 2024. The Commission shortened the time for Staff and other parties to respond and Staff

timely filed a response to Public Counsel's motion on March 28, 2024. The Commission received no other responses to Public Counsel's motion.

Commission Rule 20 CSR 4240-2.090(1) states that discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Missouri Rule of Civil Procedure 56.01(b) states that parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. Parties may inquire into any matter that is reasonably calculated to lead to admissible evidence.¹ However, this rule is not without limitation. The Commission can consider whether the requested discovery is proportional to the needs of the case given the totality of the circumstances. The totality of the circumstances includes the importance of the issues, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit.²

The Commission will evaluate whether the information sought is relevant to the subject matter at issue in this case, is reasonably calculated to lead to the discovery of admissible evidence, is subject to any case law restrictions, and/or is subject to Public Counsel's records access provision, Section 386.480, RSMo.

The Data Requests

Public Counsel seeks responses to the following data requests:

- **Data request 44** – Asks that Staff provide copies of each prospective vendor's responses to Staff's Request for Information or Request for Proposal for financial advisor(s) in this case. If additional follow-up information was requested from prospective vendors, Public Counsel asks that Staff provide such follow-up

¹ *State ex. rel. Martel v. Gallagher*, 797 S.W.2d 730 (Mo. App. E.D. 1990).

² Missouri Rules of Civil Procedure Rule 56.01(b)(1).

information.

- **Data request 45** – Asks that Staff provide copies of each prospective vendor’s responses to Staff’s Request for Information or Request for Proposal for bond counsel in this case.
- **Data request 46** – Asks Staff to explain its decision-making process in determining to award Ducera Partners LLC the financial advisor contract for this case. Public Counsel offers the following examples: were specific evaluation criteria used, such as experience in a minimum number of utility securitization transactions, estimated customer savings achieved by the financial advisor(s)’ participation, specific areas of capital market/financial experience, etc?
- **Data request 47** – Asks that Staff provide Ducera Partners LLC’s invoices for services provided to date in context of this case.
- **Data request 48** – Asks that Staff provide its outside bond counsel’s invoices for services provided to date in context of this case.
- **Data request 49** – Asks that Staff provide Ducera Partners LLC’s timesheets for each month in which it billed for services provided in this case.
- **Data request 50** – Asks that Staff provide its outside bond counsel’s timesheets for each month in which it billed for services provided in this case.
- **Data request 51** – Asks that Staff provide copies of each prospective vendor’s responses to Staff’s Request for Information No. 37530822000349 in File Nos. EO-2022-0040 and EO-2022-0193 and any other Request for Information or Request for Proposal issued in these cases by Staff. If additional follow-up information was requested from prospective vendors, Public Counsel asks that Staff provide such follow-up information.
- **Data request 52** – Asks that Staff provide copies of each prospective vendor’s responses to Staff’s Request for Information or Request for Proposal for bond counsel in File Nos. EO-2022-0040 and EO-2022-0193. If additional follow-up information was requested from prospective vendors, Public Counsel asks that Staff provide such follow-up information.
- **Data request 53** – Asks that Staff explain its decision-making process in determining to award Ducera Partners LLC the financial advisor contract for File Nos. EO-2022-0040 and EO-2022-0193. Public Counsel offers the following examples: were specific evaluation criteria used, such as experience in a minimum number of utility securitization transactions, estimated customer savings achieved by financial advisor participation, specific areas of capital market/financial experience, etc?

- **Data request 54** – Asks that Staff provide Ducera Partners LLC’s invoices for services provided in File Nos. EO-2022-0040 and EO-2022-0193.
- **Data request 55** – Asks that Staff provide its outside bond counsel’s invoices for services provided to date in context of File Nos. EO-2022-0040 and EO-2022-0193.
- **Data request 56** – Asks that Staff provide Ducera Partners LLC’s timesheets for each month in which it billed for services provided in File Nos. EO-2022-0040 and EO-2022-0193.
- **Data request 57** – Asks that Staff provide its outside bond counsel’s timesheets for each month in which it billed for services provided in File Nos. EO-2022-0040 and EO-2022-0193.
- **Data request 58** – Asks that Staff provide copies of each prospective vendor’s responses to the Missouri Public Service Commission’ Staff’s Request for Information or Request for Proposal for financial advisor(s) in File No. EF-2022-0155. If additional follow-up information was requested from prospective vendors, Public Counsel asks that Staff provide such follow-up information.
- **Data request 59** – Asks that Staff provide copies of each prospective vendor’s responses to the Staff’s Request for Information or Request for Proposal for bond counsel in File No. EF-2022-0155. If additional follow-up information was requested from prospective vendors, Public Counsel asks that Staff provide such follow-up information.
- **Data request 60** – Asks that Staff explain the its decision-making process in determining to award Ducera Partners LLC the financial advisor contract for File No. EF-2022-0155. Public Counsel offers the following examples: were specific evaluation criteria used, such as advisement for a minimum number of utility securitization transactions, estimated customer savings achieved by the financial advisor(s)’ participation, specific areas of capital market/financial experience, etc?
- **Data request 61** – Asks that Staff provide Ducera Partners LLC’s invoices for services provided in File No. EF-2022-0155.
- **Data request 62** – Asks that Staff provide its outside bond counsel’s invoices for services provided to date in context of File No. EF-2022-0155.
- **Data request 63** – Asks that Staff provide Ducera Partners LLC’s timesheets for each month in which it billed for services provided in File No. EF-2022-0155.
- **Data request 64** – Ask that Staff provide its outside bond counsel’s timesheets for each month in which it billed for services provided in File No. EF-2022-0155.

It is worth noting that Public Counsel issued its data requests prior to the filing of surrebuttal testimony, but answers to Public Counsel's data requests would not have been due until after the deadline for parties to file surrebuttal testimony.

Public Counsel's Motion to Compel

Public Counsel argues that it has "virtually unfettered access to Commission files and records" under Section 386.480, RSMo. Public Counsel also argues that pursuant to the Missouri Sunshine Law, Section 610.011.1, RSMo, it is Missouri public policy that public governmental bodies' records, actions and deliberations are open to the public unless otherwise provided by law.

Public Counsel states that Missouri's securitization statute, Section 393.1700, RSMo (Securitization Statute), authorizes the Commission to retain financial advisors, consultants, and counsel to assist the Commission and its Staff in securitization cases. The Securitization Statute also permits those costs to be recovered through securitization charges. Accordingly, Public Counsel argues that the reasonableness of Staff's financial advisor and bond counsel fees is relevant to the amount included in securitization financing costs. Public Counsel argues that "the quantity and quality of the services provided, the qualifications of the provider, the amounts charged for those services, and at what cost might other providers have provided similar services of comparable or better quality" are both relevant and likely to lead to admissible evidence.

Public Counsel also states that Staff's responses about any Request for Information or Request for Proposal would necessarily disclose "who would have provided financial advisor services and who would have provided bond counsel services to Staff for securitization proceedings, and on what terms they would have provided those

services”. Public Counsel argues that information would also be relevant to the reasonableness of services provided to Staff.

Public Counsel notes that publicly available information shows that Staff’s financial advisor, Ducera, has a not-to-exceed cost that is substantially higher than prior securitization cases.³

Staff Response to Public Counsel

Staff generally objects to data requests 44-64 as not relevant, not reasonably calculated to lead to the discovery of admissible evidence, and as violating attorney/client privilege. Staff objected to data requests 51 through 64 because the information sought was in regards to other cases that did not involve Ameren Missouri.

Data requests 44, 45, 51, 52, 58 and 59 ask for any prospective vendors responses to Staff’s request for bids seeking bond counsel and a financial consultant. Staff argues that Public Counsel seeks to substitute its judgement for Staff’s judgment in selecting bond counsel and a financial consultant. Staff states “The selection of expert witnesses is an authority reserved by the parties to Commission cases and never before has the Commission found it proper to interfere with the right to a party’s trial strategy.” Staff asks that the Commission find it improper for an opposing party to interfere with the selection of witnesses or outside counsel.

Staff’s initial objections did not include an objection that Public Counsel’s data requests were unduly burdensome. However, Staff’s response to Public Counsel’s motion states that the information requested is not in its control because the contract and related

³ The Commission has overseen three prior securitization cases: File Nos. EO-2022-0040 and EO-2022-0193 address Liberty Utilities’ request to securitize costs for Winter Storm Uri and the retirement of its Asbury generation plant, and File No. EF-2022-0155 addresses Evergy Missouri West’s request to securitize costs for Winter Storm Uri.

documents are not retained by Staff but are handled by the Commission's administrative division in conjunction with the state Office of Administration. Staff argues that it is unsure of how complicated it would be to compile answers to these data requests while preparing for the upcoming evidentiary hearing (April 15-19).⁴

Discussion

Public Counsel seeks to discover information concerning the hiring of Staff's bond counsel and financial consultant in this case and all prior securitization cases. To date, there have been only three securitization cases before the Commission, and only two evidentiary hearings as Liberty's request to securitize costs related to Winter Storm Uri and the retirement of its Asbury generation facility were addressed in a single evidentiary hearing resulting in a single Commission Report and Order and a single bond issuance. None of the prior securitizations involved Ameren Missouri.

Public Counsel cites the Missouri Sunshine Law, Section 610.011.1, RSMo, for the state public policy that records of governmental bodies be open to the public. However, Public Counsel is not requesting the information from Staff through a sunshine request but is requesting information during the course of a contested proceeding. Public Counsel cites Section 386.480, RSMo, for the proposition that it has access to the Commission's files and records. Section 386.480, RSMo, grants Public Counsel access to Commission files and records, but the primary purpose of the statute is to safeguard information provided to the Commission from disclosure to the public without a Commission order. Public Counsel mentions these provisions of law, but is not making its request under

⁴ Union Electric Company d/b/a Ameren Missouri filed a motion to present a witness on April 12, 2024.

either provision. Public Counsel is requesting the information from Staff, as a party, through the discovery process, and not from the Commission.

The Commission agrees with Public Counsel that some of the cost information for Staff's financial advisor and bond counsel is relevant to this case because those amounts may be recovered through securitization charges. Information concerning the costs of Staff's financial advisor and bond counsel in File Nos. EO-2022-0040, EO-2022-0193, and EF-2022-0155 would certainly have been relevant to those proceedings. However, the Commission finds that the costs of Staff's financial advisor and bond counsel in File Nos. EO-2022-0040, EO-2022-0193, and EF-2022-0155 have limited relevance in this case. As previously discussed, there have been three securitization cases before the Commission. None of those cases involved Ameren Missouri and only one involved an early plant retirement and Energy Transition Costs. Both the Winter Storm Uri costs and the Asbury plant retirement costs in File Nos. EO-2022-0040 and EO-2022-0193 were addressed together in a single proceeding, Commission order, and a single bond issuance. Three Commission securitization proceedings is not sufficient to establish a pattern for costs of financial advisors and bond counsel when those proceedings are so diverse in nature. The Commission finds that financial information about the costs of Staff's financial advisors in File Nos. EO-2022-0040, EO-2022-0193, and EF-2022-0155 is not proportional to the needs of the case considering the totality of the circumstances. The costs of financial advisors and bond counsel in those prior Commission securitization cases are not costs being examined and securitized in this proceeding.

Public Counsel's request for financial advisor and bond counsel costs in this securitization, while relevant to the subject matter and reasonably calculated to lead to

the discovery of admissible evidence, seeks (according to Staff) information not in the possession of Staff. Staff states that the contract and related documents are not in its control, but are handled by the Commission's Administrative Division and the state Office of Administration. Staff argues that Public Counsel's request is overly burdensome given that Staff does not retain that information and that the evidentiary hearing Staff is preparing for is scheduled to start on April 15, 2024.

Staff's response states that "the information requested is not in its control as the contract and related documents are not retained by Staff but are handled by the Commission's administrative division in conjunction with the state Office of Administration." *Hancock v. Shook*, 100 S.W.3d 786 (Mo. banc. 2003) addresses discovery information in the custody of third parties, "[t]he basic test of the rule is "control" rather than custody or possession" and "[d]ocuments are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a nonparty to the action." Staff has asserted that the information Public Counsel seeks is not in its control and is overly burdensome to obtain. Public Counsel all but acknowledges that the information it seeks is outside of Staff's possession when it argues that the information would be subject to Section 610.011.1, and Section 386.480, RSMo. The Commission finds that under the totality of the circumstances, given that the costs of Staff's financial advisor and bond counsel has not been put forth in testimony as being a significant issue in this case, given that the information could not be used in surrebuttal testimony at this point, and given that Staff does not know how difficult it would be to obtain the information this close to the evidentiary hearing, it is not appropriate to compel Staff to provide documents or information not in their possession, custody, or control.

Accordingly, the Commission will order Staff to provide any cost information concerning its financial advisor and bond counsel that is in its possession specific to this case. Staff shall also provide any material in its possession responsive to Public Counsel data requests 44-50. Staff may redact as necessary any information that would be privileged, work product, or otherwise protected, but must provide information sufficient to assess if the privilege is applicable.

The Commission will partially grant and partially deny Public Counsel's motion to compel.

THE COMMISSION ORDERS THAT:

1. Public Counsel's request that Staff be ordered to provide information responsive to Public Counsel's data requests 51-64 is denied.

2. Public Counsel's request that Staff be ordered to provide information responsive to Public Counsel's data requests 44-50 is denied as to information not in the possession of Staff.

3. Public Counsel's request that Staff be ordered to provide information responsive to Public Counsel's data requests 44-50 is granted for material in the possession of Staff. Staff shall provide this information to Public Counsel no later than April 5, 2024.

4. If Staff claims privilege or work product as to any of the information in its possession it shall provide sufficient information to assess whether the privilege is applicable.

5. This order is effective when issued.



BY THE COMMISSION

Nancy Dippell

Nancy Dippell
Secretary

Hahn, Ch., Rupp, Coleman, Holsman
and Kolkmeyer CC., concur.

Clark, Senior Regulatory Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 3rd day of April 2024.



Nancy Dippell

Nancy Dippell
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

April 3, 2024

File/Case No. EF-2024-0021

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,

A handwritten signature in black ink that reads "Nancy Dippell". The signature is written in a cursive style with a large, prominent "N" and "D".

**Nancy Dippell
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.