

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

In the Matter of the Sixth Prudence)	
Review of Costs Subject to the)	
Commission-Approved Fuel Adjustment)	Case No. EO-2017-0065
Clause of The Empire District Electric)	
Company)	

Objection and Motion to Strike

COMES NOW the Office of the Public Counsel (“OPC”), by and through counsel, and for its Objection and Motion to Strike, and respectfully states:

1. On October 26, 2017, counsel for The Empire District Electric Company (“Empire”) filed its *Post-Hearing Reply Brief* in the above captioned casefile.
2. On page 12 of said brief appears a graph entitled “Gas Market Review Prices” (“Chart”).
3. The Chart purports to identify “Gas Price in RMO Meeting Minutes” over a timeframe of 1/12/2010 to 7/12/2016.
4. Superimposed over this chart is a dashed line purportedly indicating the “Avg 2016 Price Hedged - \$3.38*”. The chart identifies this price as the average hedge price reported in the Empire’s December 4, 2016 gas position statement as an asterisk below the graph.
5. OPC objects to the chart for the following reasons:
 - i. The Chart is not in the record of this case. 4 CSR 240-2.150(1) states that the “The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument.” The Chart at issue was never proffered by Empire at hearing or recorded in the company’s nine sets of testimonies. The Chart does not appear on the Commission’s *List of Exhibits* from the hearing. EO-2017-0065, EFIS 51 (Aug. 25, 2017). While Empire may argue to have based the Chart on information in the record, its presentation is prejudicial in that it suggests an inaccurate average

hedging price for the duration of the period involving this case. The Commission provides parties the opportunity to present evidence at a public hearing, or upon special request on a *Motion to Reopen the Record for the Taking of Additional Evidence*. 4 CSR 240-2.110(8). Empire made no such motion. Instead, Empire seeks to insert extra-record material as new evidence through its *Reply Brief*. § 536.070(2) RSMo (2016) states, “Each party shall have the right to... rebut the evidence against him or her.” The Chart is prejudicial in that OPC was not given an opportunity to rebut the Chart in the proceeding.

- ii. The chart is inadmissible because it was not proffered under the supervision of a witness, and OPC had no opportunity to cross-examination said witness submitting the study. § 536.070(11) states:

The results of statistical examinations or studies, or of audits, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, **shall be admissible as evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination,** and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it. (Emphasis added)

The Chart at issue has been prepared and submitted by opposing counsel. This Chart purports to show “the range of prices” identified in meeting minutes, and then identifies an “average 2016 price hedged” superimposed across six years. This Chart depicts a compilation of figures. This Chart was not offered during the hearing with the support of a witness. As such, Empire has infringed on OPC’s due process, because their actions have foreclosed OPC’s opportunity to conduct cross-examination to challenge the truthfulness and veracity of the content alleged.

Empire's extra-record material does not meet the evidentiary standards for compilations as admissible evidence under the statute.

- iii. Setting aside the violations of Commission Rules and § 536.070(11), the Chart misrepresents information pertinent to this case.¹ Empire's represents that for the duration of the period in which Empire entered into hedging contracts which closed within the audit period of this case the average hedging price was \$3.38. This representation is false for two reasons; (1) the average was calculated by including hedging contracts entered in to outside the audit period, (2) extending the visual representation backwards from December 2015 to January 2010 misleads the reader into assuming the \$3.38 2016 average is in fact the average for the periods identified in the *x*-axis, or a cumulative average for the duration of the time period depicted.
 - a. The Chart depicts an average price reported from Jan – Dec of 2016 from a gas position report dated December 4, 2015. The audit period in this case is March 1, 2015 through August 31, 2016. The figure asserted by Empire includes figures beyond the audit period, and is therefore unreliable. There is insufficient information in the record to determine what impact the inclusion of extra-record material had on the calculation.
 - b. The superimposed line makes it appear as if \$3.38 is the average on the dates identified on the *x*-axis, or alternatively that \$3.38 is a cumulative average for the duration of the chart. In either event, the figure presented grossly misrepresents the average net prices for the periods involved in this case.

¹ "We encourage charts, chronologies, diagrams and similar items **as long as they accurately reflect the evidence in the case.**" Berlin v. Pickett, 221 S.W.3d 406, 412, (2006 Mo. App. 2006) (Emphasis added).

Date	Current/Upcoming Year Hedged Price for the approx. x-axis dates	12/5/2015 Avg 2016 Hedged Price as represented on the Chart	Difference
1/8/2010 for May-Dec 2010 ²	\$6.39	\$3.38	-\$3.01
4/2/2010 for Aug-Dec 2010 ³	\$6.38	\$3.38	-\$3.00
7/2/2010 for Nov-Dec 2010 ⁴	\$6.58	\$3.38	-\$3.20
10/8/2010 for Jan 2011 ⁵	\$6.25	\$3.38	-\$2.87
1/7/2011 for May-Dec 2011 ⁶	\$5.65	\$3.38	-\$2.27
4/1/2011 for Aug-Dec 2011 ⁷	\$5.91	\$3.38	-\$2.53
7/8/2011 for Nov-Dec 2011 ⁸	\$7.09	\$3.38	-\$3.71
10/7/2011 for Jan 2012 ⁹	\$7.17	\$3.38	-\$3.79
1/6/2012 for May-Dec 2012 ¹⁰	\$6.33	\$3.38	-\$2.95
4/6/2012 for Aug-Dec 2012 ¹¹	\$6.59	\$3.38	-\$3.57
7/6/2012 for Nov-Dec 2012 ¹²	\$7.16	\$3.38	-\$3.78
10/5/2012 for Nov-Dec 2012 ¹³	\$7.16	\$3.38	-\$3.78
1/4/2013 for May-Dec 2013 ¹⁴	\$5.09	\$3.38	-\$1.71
4/5/2013 for Aug-Dec 2013 ¹⁵	\$5.13	\$3.38	-\$1.75
7/5/2013 for Nov-Dec 2013 ¹⁶	\$5.52	\$3.38	-\$2.14
10/4/2013 for Nov-Dec 2013 ¹⁷	\$5.52	\$3.38	-\$2.14
1/10/2014 for May-Dec 2014 ¹⁸	\$4.53	\$3.38	-\$1.15
4/4/2014 for Aug-Dec 2014 ¹⁹	\$4.42	\$3.38	-\$1.04
7/3/2014 for Nov-Dec 2014 ²⁰	\$4.26	\$3.38	-\$.88
10/10/2014 for Nov-Dec 2014 ²¹	\$4.17	\$3.38	-\$.79
1/9/2015 for May-Dec 2015 ²²	\$4.43	\$3.38	-\$1.05
4/10/2015 for Aug-Dec 2015 ²³	\$4.49	\$3.38	-\$1.11
7/10/2015 for Nov-Dec 2015 ²⁴	\$4.49	\$3.38	-\$1.11

² Ex. 16, p. 14

³ *Id.* at p. 17

⁴ *Id.* at p. 20

⁵ *Id.* at p. 23

⁶ *Id.* at p. 26

⁷ *Id.* at p. 29

⁸ *Id.* at p. 32

⁹ *Id.* at p. 35

¹⁰ *Id.* at p. 38

¹¹ *Id.* at p. 41

¹² *Id.* at p. 44

¹³ *Id.* at p. 47

¹⁴ *Id.* at p. 50 Revised.

¹⁵ *Id.* at p. 53

¹⁶ *Id.* at p. 56

¹⁷ *Id.* at p. 59

¹⁸ *Id.* at p. 62

¹⁹ *Id.* at p. 65

²⁰ *Id.* at p. 68

²¹ *Id.* at p. 71

²² *Id.* at p. 74

²³ *Id.* at p. 77

²⁴ *Id.* at p. 80

10/9/2015 for Nov-Dec 2015 ²⁵	\$4.49	\$3.38	-\$1.11
1/8/2016 for May-Dec 2015 ²⁶	\$3.52	\$3.38	-\$0.14
4/8/2016 for Aug-Dec 2016 ²⁷	\$3.48	\$3.38	-\$0.10
7/22/2016 for Aug 2016 ²⁸	\$3.69	\$3.38	-\$0.31

As clearly illustrated by figures from Exhibit 16, the \$3.38 figure is not representative of hedging averages for the dates it purports to represent. OPC observes that Empire's chosen data point conspicuously understates the average price of the hedging contracts Empire actually executed. The Chart has a prejudicial effect which greatly outweighs any other evidentiary interest.

6. For the foregoing reasons, OPC moves to strike the offending chart from Empire's *Post-Hearing Reply Brief*. Courts have found this relief appropriate in similar situations. *Meiners Company v. Clayton Greens Nursing Center*, 645 S.W.2d 722, 724 (Mo App 1983); *McGee v. City of Pine Lawn*, 405 S.W.3d 582, f.n. 1 (Mo App 2013); *Daly v. Kansas City*, 317 S.W.2d 360, 364 (Mo 1958); *In re J. M.*, 328 S.W.3d 466, 469 (Mo App 2010 (extra-record materials "cannot be introduced into the record on appeal")); *Cooper v. Murphy*, 276 W.W.3d 380, 382-83 (court struck extra-record material on the ground that it was never properly submitted or received as evidence); and *In re Adoption of C. A. H.*, 901 S.W.2d 285, 288 (Mo App 1995 (court did not consider extra-record materials because they were not offered into evidence); *Woodward v. Research Med. Ctr.*, 2005 Mo. App. LEXIS 1248, *31.

7. The Commission has ordered such motions in similar circumstance in the past, albeit with some reluctance.²⁹ However, given that OPC will have no opportunity in a Sur-Reply to object to the admission of extra-record material and correct the representations of opposing counsel, OPC

²⁵ *Id.* at p. 83

²⁶ *Id.* at p. 86

²⁷ *Id.* at p. 89

²⁸ *Id.* at p. 92. August 2016 is the final month of the audit period.

²⁹ "The Commission is reluctant to encourage the filing of motions to strike portions of an opponent's brief. The Commission is capable of determining for itself whether competent and substantial evidence exists to support a particular proposition. The Commission is also aware that facts alleged for the first time in a party's brief are not competent and substantial evidence. If a party believes an opponent has offered improper argument, usually its best remedy is to address that argument in its own reply brief." ER-2012-0166, *In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service*, Order Granting Ameren Missouri's Motion to Strike Portions of NRDC's Brief (Nov. 14 2012).

believes the appropriate remediation is to remove the offending material.

Wherefore, the Office of the Public Counsel respectfully asks the Commission to strike the offending Chart from page 12 of Empire's *Post-Hearing Reply Brief*.

Respectfully submitted,

/s/ Hampton Williams

Hampton Williams
Acting Director, Office of Public Counsel
Missouri Bar No. 65633

Office of the Public Counsel
Post Office Box 2230
Jefferson City, MO 65102
(573) 751-5318 (Voice)
(573) 751-5562 (FAX)
Hampton.Williams@ded.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 27th day of October 2017.

/s/ Hampton Williams