

**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  
MIDWEST ENERGY CONSUMERS GROUPS' REPLY**

The Office of the Public Counsel (OPC) responds to the Midwest Energy Consumers Group's (MECG) Reply to the OPC's Response to MECG's Motion to Strike as follows:

1. The MECG filed a motion to strike portions of OPC witness Dr. Geoff Marke's testimony on April 10, 2020, and filed a subsequent reply to the OPC's response to the aforementioned motion on April 15, 2020.

2. Public Service Commission (Commission) Rule requires surrebuttal testimony to be responsive to the rebuttal testimony of other parties.<sup>1</sup> The OPC's first response demonstrated that Dr. Marke's surrebuttal recommendation as to how the Commission should apply any rate decrease responded to rebuttal testimony *and* external events surrounding the ongoing COVID-19.<sup>2</sup> Dr. Geoff's Marke's surrebuttal recommendation is thus formalistically compliant with Commission Rule and should not be struck.

3. The MECG's latest reply does not address the OPC's defense that Dr. Marke's surrebuttal testimony does indeed respond to rebuttal, but rather claims "contrary to Commission rule, OPC changed its position in its surrebuttal testimony."<sup>3</sup> The MECG provides no citation to any

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<sup>1</sup> 20 CSR 4240-2.130(7)(D).

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

<sup>3</sup> *MECG Reply to OPC's Response to MECG Motion to Strike*, ER-2019-0374 (Apr. 15, 2020).

Rule that it understands to compel witnesses to hold any viewpoint, and of course there is no Commission Rule on point.

4. The absence of any Rule that would compel speech from a witness reveals that the MECG's motion to strike is not rooted in a proper foundation to strike testimony.

5. If witness testimony is to be struck it must be for a failing of evidentiary law, not for mere disagreement. Yet disagreement is the actual basis the MECG's Motion and Reply stands on. Dr. Marke's surrebuttal testimony recommends that the Commission should apply any rate decrease to residential customers. MECG's Reply questions the appropriateness of Dr. Marke's recommendation because of its view of the industrial customers' burdens and "all studies showing that there is already a large residential subsidy." The MECG's protests are not the proper basis to strike testimony, but simply disagreement the MECG can raise in briefing.

6. The MECG could have also disputed Dr. Marke's testimony by questioning him, but was apparently fine with not cross examining anyone. The Commission Staff (Staff) filed a progress report on April 3, 2020, on behalf of all parties including the MECG, noting that the parties all agreed to waive cross examination. Staff filed this progress report one week after Dr. Marke's surrebuttal testimony was prefiled on March 27, 2020. If the MECG had a reason to disagree and contest Dr. Marke's recommendation, it did not seem to believe that cross examination was necessary.

7. In fact, the MECG has witnesses to proffer this supposed "residential subsidy." The MECG's further arguments in its Reply as to COVID-19's impacts on business could have been substantiated by them rather than offered as disguised hearsay through an attorney's motion to strike. The MECG's Reply, both in the main text and footnotes, makes assertions as to how residential customers can adapt to a pandemic versus industrial customers. These points of contention are simply that; contention, and not the proper basis to strike witness testimony.

8. It appears that to the OPC that the MECG's strategy is to simply cajole a witness into a particular position and narrow the scope of briefing, rather than simply making its arguments in the appropriate venue. A motion to strike is not an appropriate substitute for a disagreement on recommendations.

9. Although not pertinent to the Commission at this time, it should also note that the MECG's disagreement with Dr. Marke that industrial customers should enjoy the spoils of any rate decrease is particularly odd given it was amenable to signing a stipulation and agreement that provides no rate decrease.

**Wherefore**, the OPC replies to the MECG's Response, and reaffirms its request for the Commission to deny the MECG's Motion to Strike.

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 16<sup>th</sup> Day of April, 2020, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall