

Notice of *Ex Parte* Contact

TO: All Commissioners
All Parties in Case No. ER-2004-0570
Data Center

FROM: Kevin A. Thompson

DATE: July 28, 2004

On July 28, 2004, I received the attached document from James C. Swearingen. The Commission is currently considering the issues discussed in this document in Case No. ER-2004-0570. Case No. ER-2004-0570 is a contested case. In contested cases, the Commission is bound by the same *ex parte* rule as a court of law, that is, to avoid off-the-record discussions going to the merits of the contested case.

Although communications from members of the public are always welcome, those communications relating to a contested case must be made known to all of the parties to the contested case so that those parties have an opportunity to respond. According to the Commission's rules (4 CSR 240-4), when a communication (either oral or written) concerning a contested case occurs outside the hearing process, any member of the Commission or Regulatory Law Judge who received the communication must prepare a written report concerning the communication and submit it to each member of the Commission and to the parties to the case. The report must identify the person or persons who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the Commission.

Therefore, I submit this report pursuant to the rules cited above. This will ensure that any party to this case will have notice of the attached information and a full and fair opportunity to respond.

cc: Executive Director
Secretary/Chief Regulatory Law Judge
General Counsel

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July 28, 2004

Mr. Dale Hardy Roberts
Chief Administrative Law Judge and Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

**Re: The Empire District Electric Company
Case No. ER-2004-0570**

Dear Mr. Roberts:

During the portion of the on-the-record presentation which took place in the referenced case yesterday afternoon, questions arose as to how I determined the purpose of this proceeding and how ALJ Thompson may have learned that The Empire District Electric Company ("Empire"), this firm's client, intended to have company personnel available to make a presentation during this proceeding. This letter will serve to explain what I know about these circumstances.

On June 17, 2004, the Missouri Public Service Commission ("Commission") issued its Order Setting On-the-Record Presentation in the referenced matter and scheduled said proceeding for July 26, 2004. The Order stated in part that "[t]he parties shall be prepared to be present legal and factual arguments in support of their positions on Empire's Motion to Lift the Suspension of the IEC Rider Tariff and to respond to questions from the bench." (emphasis added) I interpreted this language as a directive to be prepared to present not only legal arguments by counsel in support of the Motion, but also information from fact witnesses concerning the underlying circumstances surrounding the request. My interpretation as to the purpose of this proceeding was bolstered by and consistent with the Commission's discussion about this case at its agenda meeting on June 17, 2004, at which time interest was expressed in hearing about Empire's hedging practices. Consequently, it was decided to have the company's President and Chief Executive Officer, Bill Gipson and

its Vice President - Energy Supply, Brad Beecher available on July 26, for a factual presentation.

Empire originally had requested implementation of the IEC by June 15, 2004, the start of its summer cooling season. While appreciative of the opportunity to make a presentation, Empire had hoped that this could occur earlier than July 26. I therefore considered the possibility of filing a pleading with the Commission on behalf of Empire asking for an earlier presentation date.

To that end, on or about June 22, 2004, I telephoned ALJ Thompson to inquire if the July 26, 2004, date was the first opportunity which the Commission had for the on-the-record presentation, or if an earlier date might be available. ALJ Thompson replied that according to the Commission's calendar, July 26, 2004, was the first available date. He also indicated that if an earlier date became available, the on-the-record presentation might be moved up on the Commission's own motion. I then indicated to ALJ Thompson that if that was contemplated, could I please be advised, as Empire planned to have Mr. Gipson and Mr. Beecher make presentations on July 26, as I thought this would be helpful in laying out the factual background for Empire's request, and I wanted to make sure that they would be available on any earlier date which the Commission might establish. ALJ Thompson said that he would advise me if that occurred. Subsequently, I believe I contacted ALJ Thompson on or about July 9 to confirm there would not be an earlier presentation date. Empire made no request to change the presentation date and it was not changed.

The inquiries concerning the presentation date and expression of intention to have fact witnesses available did not in any fashion deal with the merits of the cause. No relief was requested by Empire or granted by the Commission. Furthermore, the inquiries occurred only after the Commission issued its Order establishing the on-the-record presentation which Order contained the direction to be prepared to present both legal and factual arguments.

In my view, these inquiries, dealing with purely procedural matters, were clearly not prohibited ex-parte communications. In this regard, I refer the Commission to its rule 4 CSR 240-4.020, "Conduct During Proceedings" and, specifically, subsection (2) that states, in pertinent part, that "no attorney shall communicate, or cause another to communicate, **as to the merits of the cause** with any commissioner or examiner." (emphasis added) This language clearly contemplates that discussions with an ALJ bearing on procedural matters are not prohibited, a fact confirmed yesterday by Mr. Coffman, the Public Counsel, when he stated that he also had contacted ALJ Thompson about the procedure to be employed at Monday's hearing. Further, Mr. Conrad, attorney for Praxair, in a response to a question from Commissioner Clayton, stated that procedural discussions with the ALJ assigned to a case are not communications prohibited by rule or practice.

I am of the opinion that there was no inappropriate conduct on my part or on the part of ALJ Thompson in connection with these matters. I heard nothing further from ALJ

Thompson after July 9, and do not recall having any other contact with him prior to the on-the-record presentation on July 26, 2004.

I regard it as unfortunate that Mr. Conrad's request to call me to the witness stand, to have me sworn in as a witness and to be cross-examined by opposing counsel was granted with nothing more to justify the request than vague and unsubstantiated suggestions that something inappropriate may have transpired. In my judgment, there are means available to the Commission and the parties to elicit and present the type of information contained in this letter short of having counsel taking the witness stand. For example, during his presentation Mr. Coffman, was allowed to describe his contact with ALJ Thompson through questions from the Bench. This letter is another such means. I also regard it unfortunate that my ethical obligations as a licensed attorney-at-law compelled me to refuse to take the stand as a witness in a case in which I am an attorney of record, but I had no other choice. Like any other lawyer licensed to practice law in this state, I am subject to the Missouri Supreme Court's Code of Professional Conduct (the "Code") as an officer of the Court. Rule 4-3.7 "Lawyer as Witness" states that a lawyer may not be a witness in a case in which he also is an advocate. There are three limited exceptions to this rule, none of which apply to the circumstances of this case.

These ethical obligations are not a trivial matter and are not to be taken lightly by any attorney. They are the principles of a profession that must at all times safeguard the integrity of the rule of law by, among other things, ensuring that they are principled advocates for their clients' interests and not witnesses on their behalf.

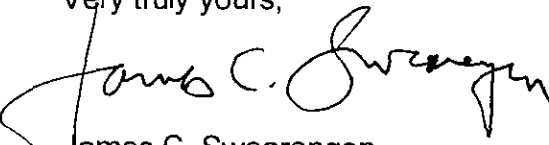
I have great respect and regard for the Commission, its members and its statutory responsibilities. I have practiced law before the Commission for over 32 years, at all times in accordance with the highest ethical standards based on the principles set forth in the Code and in the Commission's rules of practice. It was only with the utmost reluctance that I took an action I felt my ethical obligations compelled of me.

In any event, I am submitting this letter in an effort to set the record straight with respect to these matters.

Mr. Dale Hardy Roberts
July 28, 2004
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Thank you.

Very truly yours,



James C. Swearingen

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cc: Commissioners
Stuart Conrad
Shelley Woods
John Coffman
Denny Frey
Brian McCartney
Tom Byrne
ALJ Thompson