

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

In the Matter of the Application of The Empire)
District Electric Company for Approval of) **Case No. EO-2018-0092**
Its Customer Savings Plan)

**STAFF’S RESPONSE TO OPC’S
APPLICATION FOR REHEARING**

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and hereby responds to the Public Counsel’s *Application for Rehearing* filed herein.¹ In support of its response, Staff states as follows:

It is uncommon to respond to an application for rehearing in PSC practice because such an application is generally merely a procedural formality necessary to perfect the right to seek judicial review of a Commission decision.² The statute limits an appeal to the grounds raised in the application for rehearing and so such applications are generally as comprehensive as counsel can make them.³ Typically, an application for rehearing is denied by the Commission with little comment.

However, it becomes necessary to respond when a party’s application for rehearing falsely asserts misconduct on the part of other parties. Sadly, that is exactly the case here. In paragraphs 21 and 22 of his *Application for Rehearing*, Public Counsel Hampton Williams states:

¹ *In the Matter of the Application of The Empire District Electric Company for Approval of Its Customer Savings Plan*, Case No. EO-2018-0092 (*Application for Rehearing*, filed August 9, 2018) pp. 13-15.

² “[T]he PSC statutes contain a specific judicial review provision, Section 386.510, RSMo, that supersedes the judicial review provisions within MAPA.” *A & G Commercial Trucking*, 168 S.W.3d 680, 683 (Mo. App., W.D. 2005). The essential prerequisite to judicial review is a timely application for rehearing, § 386.500.2, RSMo.

³ *Id.*

21. The signatories to the Stipulation and Agreement in this case violated the Commission's procedural order which required the presentation of workpapers two days after the filing of testimony. The Commission's order required that "Parties shall provide all workpapers, in electronic format, whenever feasible, within two business days following the date on which the related testimony is filed." On April 20, the Commission amended its procedural schedule, directing parties to file a stipulation and agreement and file affidavits in support no later than April 24. The Order also limits discovery on the Stipulation and Agreement to April 27.

As a term of the Stipulation and Agreement, the signatories colluded to withhold work papers and documentation pertaining to the Stipulation and Agreement in Paragraph 7 of the document, stating:

7. The Signatories agree that any and all discussions, suggestions, or memoranda reviewed or discussed, related to this Stipulation shall be privileged and shall not be subject to discovery, admissible in evidence, or in any way used, described or discussed.

As detailed in Lena Mantle's affidavit, the signatories did withhold spreadsheets that provided supporting information to the Stipulation and Agreement. The existence of these sheets were not known to OPC until May 1, when they were provided as a response to a data request. Ms. Mantle states:

This spreadsheet, which is not attached to this affidavit due to its voluminous nature, contains more details regarding the results of the modeling of the S&A by Empire. This spreadsheet includes the information regarding the S&A plan which was not provided in the workpapers supporting the S&A provided with the filing of the S&A. The spreadsheet attached to the data request response includes, among other analysis, a rate impact calculation, a treatment of the replacement of the current wind PPA and Empire's outputs from the modelling of the S&A, including unit information, income statements, and capital expenditures for scenarios with high and low gas prices with the 2017 ABB Fall market price forecasts.

The signatories of the Stipulation and Agreement withheld workpapers pertinent to this proceeding in contravention to the Commission's order. This concern proved material, given the Commission's Footnote 34 wherein it dismisses the testimony of an OPC witness for discrepancies in

his initial analysis, despite only having three days with the information and the inability to conduct discovery after April 27.

22. The OPC raised several objections regarding the other parties' failure to comply with discovery, or failure to produce a finalized Stipulation and Agreement by the April 24 deadline. The Commission denied both motions to seek brief accommodation to perform discovery necessary for the provision of its case, and permitted the parties to violate the ordered procedural schedule. The Commission should rehear the issues and provide all parties an equal opportunity to conduct discovery and present its case.⁴

The above allegations of the Public Counsel are simply untrue; they lack any factual foundation. The Commission's *Order Setting Procedural Schedule* of December 13, 2017, requires that workpapers be provided within two business days of the filing of the related **testimony**.⁵ It says nothing of stipulations and agreements. The Commission's *Order Amending Procedural Schedule* of April 20, 2018, provides that April 24, 2018, is the "last day for parties to file a stipulation and agreement and to file affidavits in support."⁶ It does not require any exchange of workpapers upon the filing of a stipulation and agreement. Additionally, the workpapers in question were not Staff's work product, but the Company's. The fact is, members of the Office of the Public Counsel ("OPC") participated in many of the settlement discussions that led to the *Nonunanimous Stipulation and Agreement* and were privy to much of the supporting analysis.

⁴ *Id.*

⁵ ***In the Matter of the Application of The Empire District Electric Company for Approval of Its Customer Savings Plan***, Case No. EO-2018-0092 (***Order Setting Procedural Schedule and Other Procedural Requirements***, issued December 13, 2017) p. 2.

⁶ ***In the Matter of the Application of The Empire District Electric Company for Approval of Its Customer Savings Plan***, Case No. EO-2018-0092 (***Order Amending Procedural Schedule***, issued April 20, 2018) p. 1.

The reality is that Staff did not violate either of the Commission's procedural orders, but complied scrupulously with them. Consequently, everything else that the Public Counsel says in Paragraphs 21 and 22 is unfounded.

In particular, there was no collusion. "Collusion" is an ugly word. It refers to an agreement or conspiracy to defraud another or directed to some other unlawful goal. **Black's Law Dictionary**, 259 (7th ed., 1999). The agreement at Paragraph 7 of the *Nonunanimous Stipulation and Agreement* was not directed at any unlawful goal; as has been demonstrated, the Commission's procedural orders do not require the production of workpapers upon the filing of a stipulation and agreement. Staff now includes the provision set out at Paragraph 7 in all stipulations and agreements in direct response to recent, repeated, improper attempts to adduce evidence of settlement discussions.

Staff notes that its purpose is to support the Commission in its statutory mission by providing expert factual, legal and policy analyses to assist the Commission in making decisions that are lawful, reasonable, and in the public interest. Like the Commission itself, the Staff is neutral in every case, supporting neither the utility nor the ratepayers, but dedicated to the public interest, which demands healthy and efficient utilities that provide safe and adequate service at just and reasonable rates. The Commission Staff Division serves as a neutral, independent party in all cases before the Commission, presenting Staff's recommended resolution as well as viable alternatives with supporting analyses and documentation, as applicable. That is exactly what Staff has done in this case.

WHEREFORE, Staff prays that the Commission accepts Staff's response to Public Counsel's *Application for Rehearing* filed herein; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

/s/ Kevin A. Thompson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, on this 17th Day of August, 2018, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission.

/s/ Kevin A. Thompson