

**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)	

**MOTION TO COMPEL DISCOVERY
and MOTION FOR EXPEDITED TREATMENT**

COMES NOW the Office of the Public Counsel (“OPC”) and for its Motion to Compel Discovery and Motion for Expedited Treatment, states as follows:

1. On February 28, 2017, the Commission’s Staff filed its sixth prudence audit of Empire District Electric Company’s fuel adjustment clause (“FAC”) for the period March 1, 2015 through August 31, 2016.

2. On March 10, 2017 OPC requested an evidentiary hearing to address: (1) the prudence of Empire’s hedging decisions for natural gas acquired for the audit period; (2) the lack of an analysis of Empire’s generation unit heat rates to determine if Empire maintained its generation plants’ efficiencies; and (3) the lack of any review of Empire’s true purchased power and off-system sales as defined in the Commission’s *Report and Order* in the Empire rate case ER-2014-0351 and FERC Order 668.

The Data Requested and OPC’s Reasons for Requesting It

3. OPC seeks a Commission order compelling Empire to answer nine (9) data requests (DRs) that cover the three issues identified above: *hedging* (DRs 1316, 1317, 1318 and 1319), *purchased power and off-system sales* (DRs 8000 and 8001), and *heat-rate testing* (DRs 8500, 8501 and 8502). OPC seeks this relief because Empire has

objected to and has not provided data from outside of the audit period of March 1, 2015 through August 31, 2016 for all nine DRs in question.

4. Empire objects to providing information from outside the audit period of March 1, 2015 through August 31, 2016 because it claims a data request is overbroad and irrelevant if the document sought was produced before or after the audit period. Empire's objection assumes the only information relevant to Empire's fuel costs are those documents *dated* March 1, 2015 through August 31, 2016. However, Empire's hedging, purchased power, off-system sales, and heat rate testing decisions that impacted fuel costs incurred during the audit period began well before the audit period. Much of Empire's natural gas hedging, for example, would have occurred before the audit period for future gas deliveries during the audit period. All reports and analysis that Empire had available to it at the time would also have been from before the audit period. Before the audit period Empire prepared hedging reports that involved the audit period, Empire entered into futures contracts that impacted the audit period, Empire received reports from outside analysts that involved the audit period, and Empire implemented internal practices and procedures that impacted the audit period. This is the data OPC seeks and that Empire refuses to provide under the argument such data is overbroad and irrelevant.

5. In some instances, OPC also requested documents from after the audit period. The purpose of this data is to better understand changes made due to the audit period or other data from after the audit period that is relevant to the audit period.

6. Each DR in question is provided below along with an explanation as to how the information sought is not overbroad or irrelevant for the time period requested:

Hedging Data Requests

DR 1316: *Please provide copies of the natural gas hedging reports that are provided at each Board of Director meetings. For the 2014, 2015 and 2016 meetings as well as 2017 when they become available. (Answer due April 5, 2017).*

Discovery purpose: Hedging reports are relevant to this review because natural gas hedging is a fuel cost Empire passes through its FAC. We seek the 2014 data to know what data Empire had before or at the time it made its hedging decisions for the audit period. We seek the 2017 data to see any analysis of hedging during the audit period, and to understand whether Empire has made any changes pursuant to the hedging results during the audit period. This data is not overbroad because it is limited to only the year before the audit period, and the few months since the audit period.

DR 1317: *Reference Empire's 2015 10-K where it states: "The majority of our physical natural gas supply requirements will be met by short-term forward contracts and spot market purchases." Noting that the Risk Management guidelines require 60% of the following year's expected gas requirements to be hedged by December, as well as 40% of the following year, what was the typical length (duration) of the forward contracts and swaps during the 18 month FAC timeframe? 1. As a supplement to Dr # 1314, Please provide the all analysis and workpapers that ABB used or created to substantiate their natural gas forecasts listed in the Company's most recent Integrated Resource Plan. (Answer due April 5, 2017).*

Discovery purpose: We seek two things with this DR: the typical length of forward-looking contracts during the audit period, and the analysis and workpapers that substantiate Empire's natural gas forecasts during their most recent Integrated Resource Plan (IRP). The first part seeks information to understand the terms of Empire's hedging decisions, and the second part seeks analysis, changes and forecast that occurred during the audit period, were potentially based upon data from the audit period, and would occur during or after the audit period. This information is relevant because it pertains to

Empire's hedging practices, and is not overbroad because it is limited in duration to a short time period that is potentially relevant to the time period subject to this FAC prudence review.

DR 1318: *Please arrange a meeting between Empire personnel and OPC personnel during the week of April 24-28 2017. 1) OPC would like to review the minutes of Liberty and Empire Board of Director meetings in 2014, 2015, 2016 and 2017. 2) OPC would like to meet with Empire's fuel procurement personnel do discuss fuel procurement policies and procedures. 3) OPC would like to meet with Empire's natural gas hedging personnel to discuss Empire's natural gas hedging policies and procedures, including details surrounding how and why Empire decides to purchase specific financial hedges. 4) OPC would like to review a copy of each and every report, analysis, memo or similar communication between ABB and Empire in 2014, 2015, 2016 and 2017. (Answer due April 5, 2017).*

Discovery purpose: This DR requests a meeting with Empire personnel to discuss Empire's hedging practices, and an opportunity to review board of director meeting minutes and reports and analysis provided to Empire regarding its natural gas hedging practices. As explained previously, data from before the audit period is necessary to understand what Empire knew or should have known at the time it made the hedging decisions that impacted the fuel costs during the audit period. This discovery request is not overbroad in that it is limited to one year before the audit period, and the few months after the audit period.

DR 1319: *Please list and describe each and every change to Empire's natural gas hedging policies and procedures since 2010. (Answer due April 5, 2017).*

Discovery Purpose: This data is relevant because it seeks data going back to Empire's last risk management policy from 2010. All changes made since those 2010 policies and procedures were implemented would be relevant to what shaped and lead to the policies and procedures used for the gas purchased for the audit period.

Purchased Power and Off-System Sales Data Requests

DR 8000: *Please provide in electronic format with formulas intact, costs recorded in FERC Account 555 by month for the time period March 2014 through August 2016 for: a) Energy received through bilateral contracts by contract; b) Native load energy from SPP; c) Purchased power costs as netted for each hour as described in FERC order 668; and d) Total costs recorded in FERC Account 555 by subaccount.*

DR 8001: *Please provide in electronic format with formulas intact, revenues recorded in FERC Account 447 by month for the time period March 2014 through August 2016 disaggregated as follows: a) For energy sold through bilateral contracts by contract; b) Empire generation from SPP; c) Off-system sales as netted for each hour as described in FERC order 668; and d) Total revenues recorded in FERC Account 447 by subaccount. (Answers to both DRs due April 10, 2017).*

Discovery Purpose: The data sought by these two DRs is relevant because Account 555 is the account for purchased power and Account 447 is the account for off-system sales. OPC seeks to understand the costs Empire booked to those accounts for one year prior to the audit period which coincides with the beginning of the Southwest Power Pool (“SPP”) integrated market for energy. To understand what Empire knew when it made its purchased power decisions for the period, OPC seeks to understand any changes in purchased power costs from when the SPP integrated market began so we can better understand why these costs have changed. This discovery request is not burdensome in that it is limited to monthly numbers that already have been calculated.

Heat Rate Testing Data Requests

DR 8500. *Please provide an explanation of why the monthly heat rate information provided as part of prudence audit data requests are on average higher than the efficiency test results provided in rate cases. (Answer due April 11, 2017).*

Discovery Purpose: This request seeks explanations for discrepancies between heat rate information from the monthly numbers provided to Staff in a data request in this FAC prudence case and the heat rates provided in rate cases in which Empire has

requested its FAC be continued. This data will provide a better understanding of what Empire knew or should have known about the efficiency of its generating units at the time it incurred fuel costs for the audit period. Heat rate information is relevant to the prudence of not addressing discrepancies in generation plant information that could indicate changes in generation plant maintenance. The information is not overbroad because it is specific to the issue of heat rate testing information that is relevant to the operating efficiency of Empire's generating units during the audit period.

DR 8501: *Please provide an explanation for the following outliers [lower efficiencies reported] in the historical monthly heat rates provided by Empire...*

DR 8502: *Please provide an explanation for the following outliers [higher efficiencies reported] in the historical monthly heat rates provided by Empire...* (Answers to both DRs due April 11, 2017).

Discovery Purpose: The above DR language was followed by references to specific examples where lower or higher efficiencies were reported within the last eight years. Information from before the audit period is relevant to determining what Empire knew at the time it made its fuel purchasing decisions and to observe any patterns of efficiency issues that should have raised concerns regarding Empire's generating units. This request is not overbroad because it seeks information relevant to the past efficiency of Empire's current generating units to determine what, if any, actions should or could have been taken to address impacts to Empire's fuel costs during the audit period. Significant changes in heat rates may indicate the utility's lack of maintenance which in turn would increase fuel costs, potentially for the rest of the life of the plant. This discovery request is not overbroad in that it is limited to specific months and specific power plants.

OPC's Authority to Access Empire's Books and Records

7. OPC's authority to access the books and records of a monopoly utility under Commission regulation is found in Section 386.450 RSMo, which states:

386.450. At the request of the public counsel and upon good cause shown by him the commission shall require or on its own initiative the commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the public counsel when the order is issued at his request or by the commission or under its direction.

8. Good cause exists to order Empire to immediately respond to OPC's data requests for the reasons explained above. Missouri case law has established that in a prudence review, "the Commission looks at whether the utility's conduct was reasonable at the time, under all of the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight."¹ The disputed data requests seek information to enable the Commission to properly follow the prudence standard by looking at information Empire knew or should have known at the time it made its fuel cost decisions for the audit period, and by looking at information resulting from Empire's audit period. It should also be noted that this prudency review is a consumer protection created by Section 386.266.4(4) RSMo, indicating the Legislature's intent that the decisions leading to the fuel costs recovered through the FAC must be reviewed for prudency, which is precisely what OPC's data requests would accomplish.

¹ *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n*, 116 S.W.3d 680, 694 (Mo. App. 2003); *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 954 S.W.2d 520, 528 -529 (Mo. App. 1997).

9. Empire's objections to the data requested have been preserved, and Empire will still have an opportunity to object to the relevance of the requested data should OPC attempt to introduce such data into the record.

10. OPC complied with the procedural requirements of 4 CSR 240-2.090(8) in that OPC's counsel in good faith conferred with opposing counsel by phone to try to reach agreement on the data requests. OPC also arranged for a discovery conference with the presiding officer and opposing counsel, which was held on April 10, 2017.

Motion for Expedited Consideration

11. OPC also requests expedited consideration of this Motion to Compel. Empire's answers are overdue pursuant to Commission rule 4 CSR 240-2.090(2). OPC has patiently attempted to resolve this issue with Empire directly without filing a motion to compel. OPC would have filed this motion to compel earlier, but at Empire's request, OPC instead provided DR explanations directly to Empire. On April 10, 2017, the same day as the discovery conference, OPC sent Empire a lengthy and detailed explanation of each data request and the reasons the data requested is relevant and not overbroad. It was OPC's hope the explanations, which are the same explanations contained above, would resolve the issue. Over a week later, Empire has not responded to those explanations.

12. Direct testimony in this case is due to be filed on May 19, 2017. The longer Empire goes without providing the requested documents, the harder it is for OPC to prepare its direct case. Allowing Empire to further delay this case will harm OPC's ability to understand Empire's fuel cost decisions, and will inhibit OPC's ability to seek follow-up discovery on any questionable responses received to these DRs. Moreover, Empire will not be prejudiced in any way by ordering it to answer OPC's data requests.

13. OPC asks the Commission issue an order compelling Empire to answer the DRs no later than April 26, 2017. This will still allow OPC a day or two to process the information and issue follow-up data requests in time to receive responses to those follow-up requests before the May 19, 2017 direct testimony due date.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission compel Empire to promptly answer OPC's data requests.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 18th day of April 2017.

/s/ Marc Poston