

**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	)	

**OPC REPLY TO APPLICATION FOR RECONSIDERATION**

**COMES NOW** the Office of the Public Counsel (“OPC”) and for its Reply to Empire District Electric Company’s (“Empire”) Application for Reconsideration of the Commission’s Order Regarding Motion to Compel Discovery, states as follows:

1. OPC urges the Commission to deny Empire’s application for reconsideration because: (1) Empire has not shown that answering Data Request (“DR”) 1318(4) would be unduly burdensome; (2) the Commission already concluded the data requested by DR 1318(4) is reasonably calculated to lead to the discovery of relevant information; (3) Empire’s gas hedging for the period in question occurred *throughout* the years of data requested by OPC since Empire hedges up to four years in advance of the audit period, and the requested analyses and forecasts are from this same period; and (4) the Commission’s *Order Regarding Motion to Compel Discovery* (“Order”) clearly invited Empire to respond on the issue of whether the request is unduly burdensome, and did not invite Empire to reargue the relevance of the requested data.

2. Empire requests Commission reconsideration of its Order directing Empire to answer OPC’s DR 1318, subpart 4, which states “*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.*” Empire’s answer was due April 5, 2017.

3. OPC explained in its motion to compel that this data request seeks information that “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.” Data from 2014 would provide forecasting analyses that occurred during the period of time in which Empire acquired gas for the audit period. Empire’s hedging strategy is to acquire gas up to four years in advance of the audit period, and the requested analyses and forecasts are from this same period. The Commission’s Order concluded correctly the data requested is reasonably calculated to lead to the discovery of relevant information.

4. In its initial response, Empire argued this request “is grossly overbroad in scope and timeframe, and requiring a response to this request would place an undue burden on Empire.” Empire did not explain why it was overbroad, nor did Empire explain its objection that the requested material was not relevant.

5. On April 26, 2017, the Commission issued its Order Regarding Motion to Compel Discovery (“Order”). The Commission concluded, “Public Counsel’s data request 1318(4) appears to be reasonably calculated to lead to the discovery of relevant information in that the information it seeks would enable Public Counsel to better evaluate the reasonableness of ABB’s forecasts and the reasonableness of Empire’s reliance on those forecasts.” The Commission also concluded, “Empire has not shown that the burden of producing information covering a longer time-period is unduly burdensome.” Since Empire had not explained *why* answering DR 1318(4) would be unduly burdensome, the Commission further held, “if Empire wishes to submit additional

argument on this point for the Commission’s reconsideration, it may do so no later than April 28.” The Commission did not invite Empire to submit additional argument on whether the data sought in DR 1318(4) was *relevant*.

6. On April 28, 2017, Empire filed its application for reconsideration. Empire’s application begins by arguing as to the relevance of the requested data. Empire argues costs related to Empire’s fuel adjustment clause (“FAC”) incurred prior to the audit period were already reviewed, and the subsequent audit period will also be reviewed. Empire’s argument overlooks the fact that OPC is not seeking to challenge any costs from a prior or subsequent audit period. OPC’s data request 1318(4) seeks only analyses and other communication between Empire and ABB that, as the Commission states in its Order, “would enable Public Counsel to better evaluate reasonableness of ABB’s forecasts and the reasonableness of Empire’s reliance on those forecasts.” Moreover, it’s quite possible ABB’s forecasts and other communication could support a decision by Empire to *change* its strict percentage-based hedging strategy, yet Empire chose to ignore those forecasts. Either way, the requested data is very relevant to Empire’s hedging decisions for gas acquired for use during the audit period.

7. Empire argues there are no reports, analyses, memos or similar communication between ABB and Empire “pertaining to the costs” for the audit period under review. This is a subjective determination that should not be left to Empire to choose whether a particular communication or analysis “pertains” to this audit period. Even if a forecast states that it is intended for a different audit period, yet provides forecasts for a number of years that include the audit period of this case, that information

would be relevant to this proceeding. Again, as the Commission already concluded, DR 1318(4) is reasonably calculated to lead to the discovery of admissible evidence.

8. Empire states ABB also performs modeling for Empire's Integrated Resource Plans ("IRP") that it argues "do not, in any way, determine hedging or FAC requirements." Empire's argument overlooks the fact that this prudence review is just as much an analysis of what data Empire relied upon when it hedged as it is a review of what Empire *should have* relied upon when it made its hedging decisions. Just because Empire did not rely upon a particular natural gas price forecast or projection does not make that forecast irrelevant if, had Empire relied upon it, the prudent response would have been to alter its hedging practice. Empire's practice is to follow a strict percentage to be hedged between one and four years ahead, so it is no surprise that Empire does not consult its IRP modeling when it makes its hedging decisions. A review of those forecasts is necessary because they could show Empire should have relied upon such forecasts when it hedged. Empire repeatedly states the information is irrelevant because Empire did not rely upon it, but that information is very relevant if it indicates Empire should have altered its hedging policies in response.

9. OPC's request for this data is to show what Empire knew at the time it hedged, and the only way to show what Empire knew is to review all the forecasts and related analyses that Empire was reviewing at the time. Empire argues that since they use ABB for various consulting functions, the information requested is irrelevant, but Empire's application shows that all of the services provided by ABB are related to price forecasts for fuel and markets.

10. Nowhere in Empire's application for reconsideration does Empire truly explain *why* the data requested in DR 1318(4) would be overly burdensome. Importantly, this was the only issue upon which the Commission invited Empire to respond, yet Empire's response mostly argues relevance. Empire fails to refer to the volume of documents that would be responsive to the data request. Simply referring to a period of time, and the variety of issues involved, does not give OPC or the Commission any indication of how voluminous, or just how much of a burden it would be to provide the requested data. Since this prudence review is the only opportunity for OPC to challenge the prudence of costs Empire flowed through its FAC, and since fuel costs represent the majority of the rates paid by customers, even if there were an amount of "burden" associated with responding, such burden does not make the data undiscoverable because the standard is the data sought must not be "unduly" burdensome. Empire has not shown that answering OPC's DR 1318(4) would rise to the level of being unduly burdensome, especially in light of the importance of ensuring the fuel costs paid by ratepayers were based upon prudent decisions. Empire has provided no indication of whether the data requested would constitute 100 pages of data, or 1,000 pages of data. Empire has failed to properly establish that the data requested is either unduly burdensome or irrelevant to what Empire knew at the time it made its hedging decisions for the audit period.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission deny Empire's application for reconsideration.

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 2<sup>nd</sup> day of May 2017.

/s/ Marc Poston