LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-3847
E-MAIL: DCOOPER@BRYDONLAW.COM

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

April 3, 2003

FILED[2]
APR 04 DS
APR 03 2003
Missouri Public Service Commission

HAND DELIVERED AND SENT BY E-MAIL

Mr. Dale Hardy Roberts
Executive Secretary
Missouri Public Service Commission
Governor State Office Building, 9th Floor
Jefferson City, Missouri 65102
daleroberts@psc.state.mo.us

Re: Protective Order Rule – Proposed Rulemaking

Dear Mr. Roberts:

Thank you for the opportunity to comment concerning the Proposed Rulemaking for Protective Order that has been posted on the Missouri Public Service Commission's web site.

I have been asked by The Empire District Electric Company and Aquila, Inc. to provide the following comments concerning the three variations of the protective order that have been posted.

It probably would be good to state as an initial matter our thoughts of what might be accomplished by this proposed rulemaking. One worthy objective for adopting a Commission rule for the protective order process would be to make the process more efficient without sacrificing necessary protections. If the new rule instead creates multiple filing requirements that make the process less efficient and slow down the litigation and discovery process, the Commission's rulemaking will not serve this objective. This reasoning will be evident in several of the following comments.

I. GENERAL COMMENTS

Initially, we will provide the Commission with comments concerning issues/provisions that are found in all three draft rules. We ask that these comments be considered by the Commission no matter which of the proposed rules is chosen.

A. Additional Pleading With Testimony

A large burden associated with the filing of testimony is created by a provision that is common to each of the proposed rules.[1] This provision states in important part as follows:

> Not later than five days after testimony is filed that contains information designated as highly confidential or proprietary, the party asserting that the information is highly confidential or proprietary - even if the asserting party did not file the testimony - must file a pleading establishing the specific nature of the information that it seeks to protect and establishing the harm that may occur if that information is disclosed to the public. If the asserting party fails to file the pleading required by this section, the commission may order that the designated information be treated as public information. Any party that objects to the asserting party's pleading regarding the designation of information within the testimony as highly confidential or proprietary may file a reply to that pleading within five days. If no party replies, the commission will assume that there is no disagreement with the designation of the testimony and will permit the testimony to remain as designated. If a reply is filed, the commission will issue an order to resolve the disagreement.

This section adds a pleading requirement that does not exist today, without changing the fundamental burden. Currently, if any party objects to the designation of information as highly confidential or proprietary, it may file a pleading so indicating and asking the Commission to disallow the designation. In the proposed rules, the burden remains on the same party to object. The rule states that "If no party replies [to the initial pleading], the commission will assume that there is no disagreement with the designation of the testimony and will permit the testimony to remain as designated." Thus, all that is done by this provision is create an additional pleading requirement for the party asserting the highly confidential or proprietary designation.

The five day time frame for such pleadings is also problematic. While a party using confidential information in its own testimony would presumably have notice of this fact and be able to file its initial pleading within five days, the rule also places this burden on a party to file an initial pleading when some other party uses confidential information in testimony. In this instance, the party with the responsibility for filing the initial pleading would not have notice until after it had received and reviewed the other party's testimony. Any delay in actual receipt, transportation or review would make a response impossible to provide within the five days allotted.

---

[1] One Tier System - Section 9; Current Two Tier System Slightly Modified - Section 10; and, More Restrictive Two Tier System - Section 11.

B. Third Party Issue

Each of the protective orders also contain the following new language[2]:

> If information that must be disclosed in response to a data request is information concerning a third party who has indicated that the information is confidential, the disclosing party must notify the third party of its intent to disclose the information. If the third party informs the disclosing party that it wishes to protect the material or information, the disclosing party must designate the material or information as highly confidential or proprietary under the provisions of this rule.

The providing party's conduct in these situations is generally governed by contractual terms with the "third party." It is those terms which govern the providing party's course of action. Thus, in those situations where the providing party is contractually obligated to notify the third party, it already will. In those situations where the providing party is not so required to notify the third party, the Commission should not create an additional requirement to do so through the rule. It is unclear what purpose this provision would serve.

II. RULE SPECIFIC COMMENTS

We will next comment specifically as to the three proposed rule forms. The forms are identified as they are on the Commission's web site.

A. "A One Tier System" -

Combining the highly confidential and proprietary categories into a single category, as does the "One Tier System," has some appeal for simplifying the protective order process. However, the benefits of such a simplification do not offset the concerns raised by the increased access that would be allowed to party employees under this proposed rule.

Currently, employees of a party cannot have access to highly confidential information. These parties can have access to proprietary information after signing a nondisclosure agreement. In this draft rule, employees of a party are given access to all confidential information, to include that information that formerly would have fit into the highly confidential category. In many cases, this would defeat the purpose of having confidential information. "Information relating directly to specific customers"; "marketing analysis or other market-specific information relating to services offered in competition with others"; "reports, work papers, or other documentation related to work produced by internal or external auditors or consultants"; and, "strategies in contract negotiations" are all items that are currently described as highly confidential. This is

---

[2] One Tier System - Section 6; Current Two Tier System Slightly Modified - Section 7; and, More Restrictive Two Tier System - Section 8.

because these are precisely the sort of items that should not be in the hands of competitors. Failure to keep this information out of the hands of competitors can have a damaging impact on a public utility's cost of service and thereby an impact on its customers. The Commission should not move in a direction that allows a party's employees access to these types of information.

B. "The Current Two Tier System Slightly Modified" -

Among the three variations posted, this is the version that most meets the needs of the commenting parties. This having been said, this version remains objectionable for the reasons stated above in the "General Comments" section of these comments.

C. "A More Restrictive Two Tier System" -

> The primary objection to this version is the requirement in section 3 that states: [w]hen a party seeks discovery of information that the party from whom discovery is sought believes to be highly confidential, the party from whom discovery is sought may ask the commission to designate the information as highly confidential. Before information may be designated as highly confidential, the party seeking to protect the information must file a motion with the commission specifying the nature of the information for which heightened protection is sought, and explaining the harm that would result if the heightened protection is not accorded to the information. If the party seeking discovery disagrees with the designation placed on the information, it may file a written response with the Commission challenging the proposed designation.

To require a utility to come to the Commission for approval each time it desires to identify a document as "highly confidential" would be extremely burdensome and perhaps unworkable. Within the context of a rate case, it is not uncommon for a utility to receive a thousand or more data requests. Many of the responses to those data requests contain information that fits the definition of highly confidential materials. Creating pleadings to file with the Commission could easily become a full time job.

Additionally, it is unclear how long each individual pleading process would take. Commission Rule 4 CSR 240-2.090(2) provides parties twenty (20) days to respond to data requests. This twenty day period exists for good reason. It many times takes twenty, or more, days to locate, compile and respond to data requests. If, as a result of this proposed rule, the responding party must further request the Commission to allow it to utilize the highly confidential designation for each set of documents that it believes fits this category, the discovery process will be lengthened considerably. A party would be unable to file such a pleading until it had completed the response, somewhere near the end of the twenty day period, and knew what responsive documents might be highly confidential. Other parties would then presumably have ten days to respond to the initial pleading. The Commission would need additional time to then to consider the dispute and issue a response. The could easily create a situation where a

requesting party would not receive information for forty (40) days, instead of the usual twenty.

As a result of the uncertainty in this process, another unintended consequence could develop. The prospect of not being allowed to utilize the highly confidential designation may encourage responding parties to err on the side of caution and make greater use of objections. Because as of the tenth day (the deadline for objecting to data requests), parties will not know how the Commission will rule on requests for highly confidential treatment, making a reasonable objection to a request in order to protect the confidentiality of the requested information may become attractive.

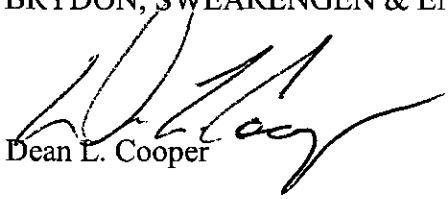
III. SUMMARY

Our primary interest in this process is that any protective order rule promulgated by the Commission stream line the process, rather than merely adding filing requirements that slow the process. We believe that by taking into account the above comments the Commission can fashion a rule which balances the goals of providing access to records, while protecting documents where it is necessary to maintain competitive balance and the security of facilities.

Thank you for the opportunity to comment concerning the draft rules being considered by the Commission. We appreciate your consideration of these comments and would be happy to discuss them further at your convenience.

Sincerely yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: 
Dean L. Cooper

DLC/tli
cc: Office of the Public Counsel