

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
November 2, 2000**

CASE NO: TT-2001-117

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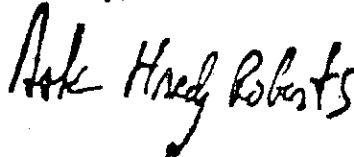
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Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,

A handwritten signature in black ink, appearing to read "Dale Hardy Roberts". The signature is written in a cursive, slightly stylized font.

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office
in Jefferson City on the 2nd
day of November, 2000.

In the Matter of the Access Tariff Filing)	<u>Case No. TT-2001-117</u>
of Ozark Telephone Company.)	<u>Tariff No. 200100203</u>

**ORDER GRANTING RECONSIDERATION,
VACATING ORDER REGARDING MOTION TO COMPEL
AND RESOLVING DISCOVERY DISPUTE**

Introduction:

On October 25, 2000, the Staff of the Commission (Staff) filed a motion to compel Ozark Telephone Company (Ozark) to answer certain data requests (DRs). On October 30, 2000, without having yet heard from Ozark, the Commission issued its Order Regarding Motion to Compel, granting Staff's motion. Thereafter, on October 31, 2000, Ozark filed its Response to Staff's Motion to Compel and Request for Reconsideration of Order Regarding Motion to Compel.

Ozark's Request for Reconsideration:

Ozark states that the Commission granted Staff's motion on an *ex parte* basis, without hearing from Ozark, in violation of its own Rule 4 CSR 240-2.080(16). That rule provides that a party shall have ten days to respond to any pleading unless the Commission orders otherwise. Ozark asserts that the Commission never ordered otherwise in this case and that the Commission, consequently, was required to allow it ten days within which to respond. Ozark does not argue that it has been deprived of procedural due process.

There is no question here of any *ex parte* action by the Commission. Staff's motion was properly served on Ozark and was accompanied by a copy of Ozark's objection letter. Thus, Ozark was properly put on notice of Staff's motion and the Commission acted only after due consideration of Ozark's objections as set out in its letter. Nonetheless, the Commission is an administrative agency of the state of Missouri and is required to comply with its own rules. Missouri National Education Association v. Missouri State Board of Mediation, 695 S.W.2d 894, 897 (Mo. banc 1985). Therefore, the Commission will grant Ozark's request for reconsideration and will vacate its order of October 30, 2000.

Staff's Motion to Compel and Ozark's Response:

On September 28, 2000, Staff served 52 DRs on Ozark. These DRs were evidently "form" DRs, used by Staff in the initial phases of all general rate cases. Ozark timely objected, by letter of October 6, 2000, to DRs 22, 26, 34, 35, 36, 39, 42, and 48 as overbroad, burdensome, irrelevant, and not likely to lead to the discovery of relevant information. With respect to the latter seven of these DRs, Ozark stated that it would provide the requested information for the current year and 1999, but not for requested prior years. Ozark also advised Staff generally that, in view of its limited resources, it would not be able to provide all of the requested and nondisputed information within 20 days, but that it would do so within 40 days. In its motion, Staff noted that answers had not yet been received to DRs 1 through 50, 3801 or 3802. Finally, Ozark asserted its position that this proceeding is not a general rate case.

As required by the Commission's rules, the parties conferred by telephone on October 13, 2000. This conference resulted in the resolution of Ozark's objection to DR 26. A further telephone conference with the presiding officer on October 18, 2000, failed to resolve any of the

remaining issues. As stated, Staff filed its motion to compel on October 25. Therein, Staff reviewed each of the disputed DRs and explained its need for the information. In the case of each of these DRs, Ozark had agreed to furnish the requested information for the current year and the most recent past year, but not for the past five years as requested. Staff explained that the historical data is necessary to determine whether or not any trends are present so that the test year level for each item may be normalized. Staff also stated that Ozark had failed to show good cause for an extension of the time within which to answer the DRs and that a 40-day interval was unreasonable, and prejudicial to Staff, in view of the 150-day time limit for trying and deciding this case.

In its response to Staff's motion, Ozark again asserts that the retrieval of four and five years of historical data, "most of which is not readily available," is unduly burdensome for a small company like Ozark, which is able to assign only one individual to the task of responding to Staff's DRs. Ozark states that it can make additional information available on an as-needed basis. Ozark also states that, inasmuch as the nature of its business has changed materially since the elimination of the Primary Toll Carrier Plan in 1999, that the relevancy of the requested historical data is small. As to its need for additional time to answer, Ozark points out that it had answered all but four of the DRs by October 31 and that it is diligently working to answer the others. Ozark further asserts that Staff's concern for the 150-day deadline is belied by Staff's own conduct in waiting over a month after Ozark filed this case to serve its boilerplate DRs.

The Commission is specifically authorized by statute to "adopt and prescribe" rules of procedure. Section 386.410.1, RSMo Supp. 1999. Pursuant to this authority, the Commission has promulgated its Rule 4 CSR 240-2.090(1), relating to discovery:

Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure.

The Commission's rules also include a discovery device unknown to the circuit courts: Commission Rule 4 CSR 240-2.090(2) provides for "data requests" (DRs). A DR is "an informal written request for documents or information[.]" The party receiving a DR must provide the requested information or documents within 20 days; objections to DRs must be served on the requesting party within ten days. In Commission practice, objections to DRs are conveyed by a letter, generally brief, rather than by a lengthy pleading as is common in civil practice.

We turn first to Ozark's relevancy objection. The scope of discovery is set by Rule 56.01(b)(1), which provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

"Relevant" evidence, in turn, is that which tends to prove or disprove a fact of consequence to the pending matter. W. Schroeder, 22 Missouri Practice-Missouri Evidence, § 401.1(a) (1992). Relevance must be determined in the first instance by reference to the pleadings. See St. ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 327-28 (Mo. App., E.D. 1985). However, that step is not necessary here. Ozark has conceded the relevancy of the requested information by agreeing to provide it for the current year and for 1999. In the face of this concession, Ozark's claim that its business

has changed, thus reducing the relevance of historical data, is of little consequence.

Ozark has also objected that the DRs in question are overbroad and burdensome. In considering these objections, the Commission is mindful of the proper purposes of discovery, which are "(1) to eliminate concealment and surprise, (2) to aid the litigants in determining the facts prior to trial, and (3) to provide the litigants with access to proper information with which to develop their respective contentions and to present their respective sides of the issues framed by the pleadings." State ex rel. Martel v. Gallagher, 797 S.W.2d 730, 732 (Mo. App., E.D. 1990); State ex rel. Anheuser v. Nolan, *supra*, at 328 (parenthetical numbering supplied).

The objections of overbreadth and undue burden, often paired as in this case, are not synonymous. There is no single definition of overbreadth as applied to discovery. However, the cases show that a discovery request is not overbroad if its purpose is a proper one as listed above. Martel, *supra*, at 732-33. By contrast, a discovery request is overbroad if it includes privileged items, or is not reasonably particular, or seeks items merely tangential to the matters at issue in the case, or is not limited to a particular time period. State ex rel. Upjohn Company v. Dalton, 829 S.W.2d 83, 85 (Mo. App., E.D. 1992). In the present case, it is only the time period to which Ozark objects. A discovery request may be temporally overbroad if it extends to irrelevant periods; thus, the discovery of trust amendments antedating the requesting party's interest in the trust was overbroad. State ex rel. LaBarge v. Clifford, 979 S.W.2d 206, 209 (Mo. App., E.D. 1998). However, in a physician's suit against a hospital, a request for peer review information covering a ten-year span was not overbroad. State ex rel. Health Midwest Development Group v. Daugherty, 965 S.W.2d 841, 844 (Mo. banc 1998). In the present case, the

Commission cannot say that a request for information covering five years is overbroad, particularly in view of Staff's explanation that historical data is necessary to permit recognition of trends so that the test year may be properly normalized.

The objection of undue burden, unlike overbreadth, looks to the effort required of the responding party to produce responses to otherwise proper discovery requests. It is a cost-benefit analysis. Missouri courts have recognized an affirmative duty to prevent the "[s]ubversion of pre-trial discovery into a 'war of paper,' whether to force an adversary to capitulate under economic pressure or to inflate billable hours[.]" State ex rel. Anheuser v. Nolan, *supra*, at 328. To that end,

in ruling upon objections to discovery requests, trial judges must consider not only questions of privilege, work product, relevance and tendency to lead to the discovery of admissible evidence, but they should also balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it. * * * Thus, even though the information sought is properly discoverable, upon objection the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome or less expensive than that designated by the requesting party.

Ozark has suggested no alternative discovery method other than to provide two years of data, with additional data to be made available upon request. This suggestion is evidently unacceptable to Staff, doubtless because it will hinder Staff in its entirely reasonable effort to analyze the data for trends. The Commission will deny the objection because to grant it will prohibit Staff from carrying out its intended analysis; however, Ozark is free to propose an alternative discovery method under Rule 56.01(c).

Having considered all of Ozark's objections, the Commission has determined that Ozark must provide the requested information.

Ozark's Request for an Extension of Time:

This point does not require extended discussion. In view of Ozark's small size and limited resources, plus its diligent efforts to respond promptly despite these handicaps, it is reasonable to allow it 40 days within which to respond to Staff's discovery requests. The fortieth day after September 28 is Tuesday, November 7, 2000. Ozark shall serve its responses upon Staff by Tuesday, November 7, 2000.

IT IS THEREFORE ORDERED:

1. That request for reconsideration filed by Ozark Telephone Company on October 31, 2000, with respect to the Commission's Order Regarding Motion to Compel, issued on October 30, 2000, is granted.

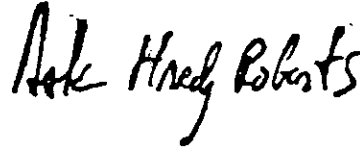
2. That the Order Regarding Motion to Compel, issued on October 30, 2000, is hereby vacated.

3. That Ozark Telephone Company shall serve upon the Staff of the Missouri Public Service Commission full and complete responses to Data Requests 22, 34, 35, 36, 39, 42, and 48 on or before November 7, 2000.

4. That Ozark Telephone Company's request for an extension of time within which to respond to discovery is granted; Ozark Telephone Company shall serve upon the Staff of the Missouri Public Service Commission full and complete responses to the Data Requests issued on September 28, 2000, on or before November 7, 2000.

5. That this order shall become effective on November 7, 2000.

BY THE COMMISSION

A handwritten signature in black ink, reading "Dale Hardy Roberts". The signature is written in a cursive style with a large initial "D".

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

(S E A L)

Lumpe, Ch., Drainer, Murray, and
Schemenauer, CC., concur.
Simmons, C., absent.

Thompson, Deputy Chief Regulatory Law Judge

ALJ/Sec'y: Thompson / Payne
11-1
Date Circulated 11-1 CASE NO. TT-2001-117
AK p2
Lumpke, Chair
ad 17
Draier, Vice Chair
CM
Murray, Commissioner
DA 08
Schenenauer, Commissioner
alset
Simmons, Commissioner
11-2
Agenda Date
4-04A
Action taken:
Must Vote Not Later Than

OK

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,

Missouri, this 2nd day of Nov. 2000.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

