

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of KCP&L Greater Missouri Operations) File No. ER-2016-0156
Company's Request for Authority to Implement a) Tracking Nos. YE-2016-0223
General Rate Increase for Electric Service) and JE-2017-0007

ORDER GRANTING MOTION TO STRIKE

Issue Date: July 26, 2016

Effective Date: July 26, 2016

The Missouri Public Service Commission is ordering that rebuttal testimony, prematurely filed as direct testimony, may be addressed in surrebuttal testimony.

Filings

KCP&L Greater Missouri Operations Company ("GMO") initiated this general rate case by filing proposed tariffs and an application for a rate increase.¹ The Office of the Public Counsel ("OPC") is a party to this case by regulation.² The Commission ordered a procedural schedule.³ OPC filed direct testimony including that of Michael P. Gorman ("Gorman Direct").⁴ GMO filed a motion to strike ("motion").⁵ OPC filed a response.⁶ GMO filed a reply.⁷

¹ Electronic Filing and Information System ("EFIS") No. 7 (July 23). All dates are in 2016.

² 4 CSR 240-2.010(10).

³ EFIS No. 85 (April 6, 2016) *Amended Notice of Hearing, and Order Establishing Procedural Schedule and Governing Procedure*.

⁴ EFIS No. 151 (July 15) *Direct Testimony of Michael P. Gorman*.

⁵ EFIS No. 156 (July 20) *Motion to Strike Portions of Direct Testimony of Public Counsel Witness Michael P. Gorman*.

⁶ EFIS No. 157 (July 25) *Office of the Public Counsel's Response to Motion to Strike Portion of Direct Testimony of Witness Michael P. Gorman*.

⁷ EFIS No. 158 (July 25) *Reply to Public Counsel's Response to Motion to Strike Portion of Direct Testimony of Witness Michael P. Gorman*.

Disputed Testimony

GMO cites certain portions of the Gorman Direct (“disputed testimony”) that address direct testimony of GMO witnesses.⁸ GMO argues that the disputed testimony constitutes prematurely filed rebuttal testimony. The disputed testimony’s characterization is governed by Commission regulations.

Both GMO and OPC cite the definition of direct testimony:

Direct testimony shall include all testimony and exhibits asserting and explaining that party’s entire case-in-chief [.]⁹

That regulation and the due process of law, OPC argues, entitle OPC to prepare its “entire” case-in-chief on direct by including testimony that responds to GMO’s direct case.

But that is the definition of rebuttal: testimony that responds to GMO’s direct case. The regulation provides:

. . . rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party’s direct case. [¹⁰]

“Shall” signifies a mandate and means “must” in the present tense.¹¹ Therefore, the Commission concludes that the disputed testimony is rebuttal.

⁸ The disputed testimony consists of Gorman Direct:

- a. Page 2, lines 8–9 (rebuttal to Mr. Hevert).
- b. Page 5, lines 5–15 (rebuttal to Mr. Hevert).
- c. Page 6, line 4 through page 8, line 10 (rebuttal to Mr. Hevert).
- d. Page 21, line 1 through page 25, line 16 (rebuttal to Mr. Bryant).
- e. Section V, page 66, line 7 through page 91, line 2 (rebuttal to Mr. Hevert).

⁹ 4 CSR 240-2.130(7)(A).

¹⁰ 4 CSR 240-2.130(7)(B).

¹¹ State ex rel. Scott v. Kirkpatrick, 484 S.W.2d 161, 164 (Mo. banc 1972).

Prejudice

GMO argues that OPC's premature filing of rebuttal has prejudiced GMO because it distorts the sequence of prepared testimony as prescribed in the Commission's regulations.

Those regulations allow any party sponsoring a witness to file prepared testimony in the following sequence: direct, which sets forth the witness' evidence; rebuttal from other parties, which sets addresses the direct; and surrebuttal from the sponsoring party, which addresses the rebuttal.¹² That sequence gives any witness the last word on their own evidence. But, if the disputed testimony stands as direct, GMO must address the disputed testimony in rebuttal and OPC has the last word on the evidence of GMO's witnesses in surrebuttal.

GMO argues that the integrity of that sequence is especially important here, because GMO has the burden of proving that its proposed tariffs are just and reasonable,¹³ on an accelerated schedule of ten months¹⁴ instead of the eleven months allowed by statute.¹⁵ Rebuttal testimony is due on August 15.¹⁶ Surrebuttal testimony is due on September 2.¹⁷ The evidentiary hearing begins on September 15.¹⁸

¹² 4 CSR 240-2.130(7).

¹³ Section 393.150.2, RSMo 2000.

¹⁴ EFIS No. 33 (March 2, 2016), *Order Suspending Tariff, Notice of Contested Case, and Order Delegating Authority*.

¹⁵ Section 393.150.1 and 2, RSMo 2000.

¹⁶ EFIS No. 85 (April 6, 2016) *Amended Notice of Hearing, and Order Establishing Procedural Schedule and Governing Procedure*, page 2.

¹⁷ EFIS No. 85 (April 6, 2016) *Amended Notice of Hearing, and Order Establishing Procedural Schedule and Governing Procedure*, page 2.

¹⁸ EFIS No. 85 (April 6, 2016) *Amended Notice of Hearing, and Order Establishing Procedural Schedule and Governing Procedure*, page 2.

OPC argues that GMO has the option to treat the disputed testimony as direct or rebuttal, and address the disputed testimony in rebuttal or surrebuttal, all along. That argument is disingenuous. For GMO to assume that surrebuttal, due September 2, could address evidence offered on direct would invite a motion to strike for failure to file rebuttal on time. And there would be less time to resolve the arguments before the hearing on September 15. The risk would have been imprudent.

Therefore, the Commission concludes that OPC's premature filing of rebuttal requires a remedy.

Remedy

GMO suggests that GMO's witnesses can address the disputed testimony in surrebuttal as the regulations intend if the disputed testimony is treated as the rebuttal that it is. To that end, GMO proposes two remedies in the alternative. First, GMO asks the Commission to strike the disputed testimony and order it re-filed as rebuttal testimony. Second, GMO asks to address the disputed testimony in GMO's surrebuttal, not rebuttal. OPC does not dispute the second alternative.¹⁹ Therefore, the Commission will order that GMO may address the disputed testimony in surrebuttal testimony.

THE COMMISSION ORDERS THAT:

1. The *Motion to Strike Portions of Direct Testimony of Public Counsel Witness Michael P. Gorman* is granted.
2. The disputed testimony, as described in the body of this order, may be addressed in surrebuttal testimony.

¹⁹ EFIS No. 157 (July 25) *Office of the Public Counsel's Response to Motion to Strike Portion of Direct Testimony of Witness Michael P. Gorman*, page 2, paragraph 4.

3. This order shall be effective when issued.

BY THE COMMISSION



A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Daniel Jordan, Senior Regulatory Law Judge,
by delegation of authority pursuant to
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 26th day of July, 2016.