

# 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.<sup>1</sup> The Office of the Public Counsel ("OPC") is a party to this case by regulation.<sup>2</sup> The Commission ordered a procedural schedule.<sup>3</sup> OPC filed direct testimony including that of Michael P. Gorman ("Gorman Direct").<sup>4</sup> GMO filed a motion to strike ("motion").<sup>5</sup> OPC filed a response.<sup>6</sup> GMO filed a reply.<sup>7</sup>

---

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

<sup>2</sup> 4 CSR 240-2.010(10).

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

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

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

<sup>6</sup> 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*.

<sup>7</sup> 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.<sup>8</sup> 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 [.]<sup>9</sup>

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. [<sup>10</sup>]

"Shall" signifies a mandate and means "must" in the present tense.<sup>11</sup> Therefore, the Commission concludes that the disputed testimony is rebuttal.

---

<sup>8</sup> 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).

<sup>9</sup> 4 CSR 240-2.130(7)(A).

<sup>10</sup> 4 CSR 240-2.130(7)(B).

<sup>11</sup> 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.<sup>12</sup> 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,<sup>13</sup> on an accelerated schedule of ten months<sup>14</sup> instead of the eleven months allowed by statute.<sup>15</sup> Rebuttal testimony is due on August 15.<sup>16</sup> Surrebuttal testimony is due on September 2.<sup>17</sup> The evidentiary hearing begins on September 15.<sup>18</sup>

---

<sup>12</sup> 4 CSR 240-2.130(7).

<sup>13</sup> Section 393.150.2, RSMo 2000.

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

<sup>15</sup> Section 393.150.1 and 2, RSMo 2000.

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

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

<sup>18</sup> 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.<sup>19</sup> 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.

---

<sup>19</sup> 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 26<sup>th</sup> day of July, 2016.

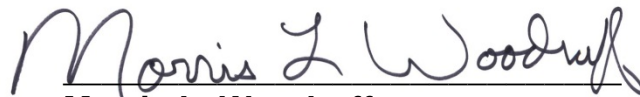
**STATE OF MISSOURI**

**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 26<sup>th</sup> day of July 2016.



  
Morris L. Woodruff  
Secretary

**MISSOURI PUBLIC SERVICE COMMISSION**

**July 26, 2016**

**File/Case No. ER-2016-0156**

**Missouri Public Service Commission**

Staff Counsel Department  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
staffcounsel@psc.mo.gov

**Office of the Public Counsel**

James Owen  
200 Madison Street, Suite 650  
P.O. Box 2230  
Jefferson City, MO 65102  
opcservice@ded.mo.gov

**Brightergy, LLC**

Andrew Zellers  
1712 Main Street, 6th Floor  
Kansas City, MO 64108  
andyzellers@brightergy.com

**City of Kansas City, Missouri**

Mark W Comley  
601 Monroe Street., Suite 301  
Jefferson City, MO 65102-0537  
comley@ncrhc.com

**City of St. Joseph, Missouri**

William D Steinmeier  
2031 Tower Drive  
P.O. Box 104595  
Jefferson City, MO 65110-4595  
wds@wdspsc.com

**Dogwood Energy, LLC**

Carl J Lumley  
130 S. Bemiston, Ste 200  
St. Louis, MO 63105  
clumley@chgolaw.com

**IBEW Local Union 1464**

Michael E Amash  
753 State Ave, Suite 475  
Kansas City, KS 66101  
jrd@blake-uhlig.com

**IBEW Local Union 1464**

Jon R Dedon  
753 State Ave, Suite 475  
Kansas City, KS 66101  
jrd@blake-uhlig.com

**IBEW Local Union 1613**

Michael E Amash  
753 State Ave, Suite 475  
Kansas City, KS 66101  
jrd@blake-uhlig.com

**IBEW Local Union 1613**

Jon R Dedon  
753 State Ave, Suite 475  
Kansas City, KS 66101  
jrd@blake-uhlig.com

**IBEW Local Union 412**

Michael E Amash  
753 State Ave, Suite 475  
Kansas City, KS 66101  
jrd@blake-uhlig.com

**IBEW Local Union 412**

Jon R Dedon  
753 State Ave, Suite 475  
Kansas City, KS 66101  
jrd@blake-uhlig.com

**KCP&L Greater Missouri Operations Company**

Larry W Dority  
101 Madison, Suite 400  
Jefferson City, MO 65101  
lwdority@sprintmail.com

**KCP&L Greater Missouri Operations Company**

James M Fischer  
101 Madison Street, Suite 400  
Jefferson City, MO 35101  
jfischerpc@aol.com

**KCP&L Greater Missouri Operations Company**

Robert Hack  
1200 Main, 19th Floor  
P.O. Box 418679  
Kansas City, MO 64141-9679  
rob.hack@kcpl.com

**KCP&L Greater Missouri Operations Company**

Joshua Harden  
4520 Main Street, Suite 1100  
Kansas City, MO 64111  
joshua.harden@dentons.com

**KCP&L Greater Missouri Operations Company**

Roger W Steiner  
1200 Main Street, 19th Floor  
P.O. Box 418679  
Kansas City, MO 64105-9679  
roger.steiner@kcpl.com

**KCP&L Greater Missouri Operations Company**

Karl Zobrist  
4520 Main Street, Suite 1100  
Kansas City, MO 64111  
karl.zobrist@dentons.com

**Midwest Energy Consumers Group**

David Woodsmall  
807 Winston Court  
Jefferson City, MO 65101  
david.woodsmall@woodsmallllaw.com

**Missouri Division of Energy**

Alexander Antal  
301 West High St.  
P.O. Box 1157  
Jefferson City, MO 65102  
Alexander.Antal@ded.mo.gov

**Missouri Industrial Energy Consumers (MIEC)**

Edward F Downey  
221 Bolivar Street, Suite 101  
Jefferson City, MO 65101  
efdowney@bryancave.com

**Missouri Industrial Energy Consumers (MIEC)**

Diana M Vuylsteke  
211 N. Broadway, Suite 3600  
St. Louis, MO 63102  
dmvuylsteke@bryancave.com

**Missouri Public Service Commission**

Nathan Williams  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
Nathan.Williams@psc.mo.gov

**Renew Missouri**

Andrew J Linhares  
910 E Broadway, Ste. 205  
Columbia, MO 65201-4829  
Andrew@renewmo.org

**Renew Missouri**

Henry B Robertson  
319 N. Fourth St., Suite 800  
St. Louis, MO 63102  
hrobertson@greatriverslaw.org

**Union Electric Company**

James B Lowery  
111 South Ninth St., Suite 200  
P.O. Box 918  
Columbia, MO 65205-0918  
lowery@smithlewis.com

**Union Electric Company**

Wendy Tatro  
1901 Chouteau Avenue  
St. Louis, MO 63103-6149  
AmerenMOService@ameren.com

**United for Missouri**

David C Linton  
314 Romaine Spring View  
Fenton, MO 63026  
Jdlinton@reagan.com

***Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).***

***Sincerely,***



**Morris L. Woodruff  
Secretary**

---

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.