

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 23rd day
of December, 2009.

In the matter of The Empire District Gas Company of)	
Joplin, Missouri for Authority to File Tariffs Increasing)	<u>File No. GR-2009-0434</u>
Rates for Gas Service Provided to Customers in the)	Tariff No. YG-2009-0855
Missouri Service Area of the Company.)	

**ORDER DENYING MOTION TO STRIKE
PORTIONS OF THE EMPIRE DISTRICT GAS COMPANY
REBUTTAL TESTIMONY ON TRANSPORTATION ISSUES**

Issue Date: December 23, 2009

Effective Date: December 23, 2009

On June 5, 2009, The Empire District Gas Company submitted to the Missouri Public Service Commission certain proposed tariff sheets to implement a general rate increase for retail natural gas service. Empire also filed written direct testimony on behalf of twelve witnesses. The Commission published notice of the filing, suspended the effective date of the tariffs, and set procedural dates, including a date for all parties except Empire to file direct testimony on rate design, and for all parties to file rebuttal and surrebuttal testimony.

In compliance with the procedural schedule, on November 3, 2009, Constellation NewEnergy-Gas Division, LLC, filed direct testimony of Richard Haubensak regarding gas transportation tariffs proposed in the case by Empire. Constellation filed rebuttal testimony of Richard Haubensak and Wendi P. Brown regarding the transportation issues on December 9, 2009.

Also on December 9, 2009, Empire filed testimony entitled "Rebuttal Testimony" of W. Scott Keith and H. Edwin Overcast regarding the transportation issues. On December 18, 2009, Constellation filed a motion to strike portions of the Rebuttal Testimony of Scott Keith and all of the Rebuttal Testimony of H. Edwin Overcast.

Partial non-unanimous stipulations and agreements were filed on December 18, 2009, that if approved, will settle all issues in this matter other than the transportation issues. Surrebuttal testimony is due on December 29, 2009. The hearing in this matter is set to begin on January 7, 2010.

The time for filing a response to the motion to strike was shortened to December 22, 2009. Empire filed a response to the motion.

Constellation requests to strike the testimony on the theory that it is "direct" testimony rather than "rebuttal" testimony and thus should have been filed with the original filing under 4 CSR 240-130(7). That section states in part:

(A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case in chief.

Constellation argues that Empire failed to support its transportation proposals in its direct testimony and should not be allowed to supplement its direct testimony under the pretense of filing rebuttal. Constellation specifically states that Empire failed to explain its proposal to require small-volume transportation customers to use telemetry equipment. According to Constellation, Empire also "failed to support its proposed 333% increase in the fees for balancing service, or its proposed daily balancing charge for large-volume transportation customers" and that the cost studies and data compilations attached to its "rebuttal" testimony should have been included in the direct testimony.

Constellation claims that if Empire's testimony is allowed to stand, that Constellation will be disadvantaged because it will not have had sufficient time to conduct discovery on the information and schedules attached to the "rebuttal" testimony.

As pointed out in Empire's response, while Constellation accurately quotes the definition of "direct testimony" it is the definition of "rebuttal testimony" found at 4 CSR 240-2.130(7)(B) which must be examined to determine if the testimony is appropriate. That definition is:

Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case.

Each of the items which Constellation requests be stricken from the testimony of both Mr. Keith and Mr. Overcast is specifically responsive to the direct testimony filed on behalf of Constellation or the Staff of the Missouri Public Service Commission and is, therefore, proper rebuttal testimony.

The real basis for Constellation's motion is that Empire should have anticipated the issue and filed the rebuttal testimony as direct testimony. Empire and Constellation each filed direct testimony regarding the telemetry and service balancing transportation issues and each of the other parties was given an opportunity to do so. The extent of information provided by Empire in its direct testimony on these issues was not ideal, however, given that the majority of its direct testimony on these issues was in the form of the tariff itself. And, failing to file a red-lined version of the tariff pages may have made it difficult for the other parties to review the proposed changes. Much of the testimony that Constellation requests be stricken, however, is the same information which Empire provided to Constellation during discovery. Thus, Constellation cannot claim surprise by

this information. Empire's failure to file this testimony as direct testimony does not justify the drastic remedy of striking that testimony. The motion is denied.

THE COMMISSION ORDERS THAT:

1. The Motion to Strike Portions of Empire District Rebuttal Testimony on Transportation Issues filed on December 18, 2009, is denied.
2. This order shall become effective upon issuance.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. Reed', is written over a faint, larger signature.

Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Davis, Jarrett,
Gunn, and Kenney, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge