

1 BEFORE THE PUBLIC SERVICE COMMISSION

2 STATE OF MISSOURI

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4

TRANSCRIPT OF PROCEEDINGS

5

HEARING

6

October 31, 2006

7

Jefferson City, Missouri

8

Volume 19

9

In the Matter of the Empire District)
10 Company of Joplin, Missouri, for)
Authority to File Tariffs Increasing) Case No.
11 Rates for Electric Service Provided) ER-2006-0315
to Customers in the Missouri Service)
12 Area of the Company)

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COLLEEN M. DALE, Presiding
CHIEF REGULATORY LAW JUDGE.

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JEFF DAVIS, Chairman
CONNIE MURRAY,
18 STEVE GAW
ROBERT M. CLAYTON, III,
19 LINWARD "LIN" APPLING,
COMMISSIONERS.

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REPORTED BY:
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1 P R O C E E D I N G S

2 JUDGE DALE: We are back on the record in Case
3 ER-2006-0315 in the matter of the tariff filing of the Empire
4 District Electric Company of Joplin, Missouri to implement a
5 general rate increase for retail electric service provided to
6 customers in the Missouri service area of the company.

7 We are here today on Tuesday, October 31st, to
8 address the issues of the corporate allocations, amortizations
9 relating to the regulatory plan and true-up testimony and any
10 other pending issues that may be hanging out there in this
11 matter. So we'll start with entries of appearance.

12 MR. COOPER: Your Honor, Dean L. Cooper and
13 L. Russell Mitten of the law firm of Brydon, Swearingen and
14 England, PC, PO Box 456, Jefferson City, Missouri 65102,
15 appearing on behalf of Empire Electric District Company.

16 JUDGE DALE: Thank you.

17 Staff?

18 MR. FREY: Representing the Staff of the
19 Missouri Public Service Commission, Dennis L. Frey, Steven
20 Dottheim and Nathan Williams, PO Box 360, Jefferson City,
21 Missouri 65102.

22 JUDGE DALE: Thank you.

23 Mr. Mills?

24 MR. MILLS: Lewis Mills appearing on behalf of
25 the Public Counsel. My address is Post Office Box 2230,

1 Jefferson City, Missouri 65102. Thank you.

2 JUDGE DALE: Praxair, Explorer.

3 MR. CONRAD: Your Honor, you didn't ask before
4 for procedural matters and because you didn't, I'm going to
5 have to interrupt the process of the appearances because we
6 are appearing specially today to object to the setting of
7 these matters at this date and time.

8 You've indicated the date and an order was
9 issued on 10/24 by purported delegation. That scheduled a
10 hearing for seven days in the future, there being seven days
11 between 10/24 and today.

12 Under Chapter 536.067.4, a reasonable time is
13 defined as at least 10 days for the scheduling of a hearing.
14 There's been no consent nor examination of the order does not
15 reveal that any of the exceptions provided by the statute for
16 shortening time have been either referenced, found or in any
17 way even referred to.

18 Accordingly, the Commission is not authorized
19 under state law to proceed to hearing on these matters at this
20 date and time. And our special appearance is for the purpose
21 of objecting to proceeding on these matters at this date and
22 time.

23 The provision I've cited reads as follows: No
24 hearing in a contested case shall be had except by consent --
25 certainly is not -- until a notice of hearing shall be given

1 as substantially provided in this section and such notice
2 shall, in every case, being given a reasonable time before the
3 hearing. Such reasonable time shall be at least 10 days
4 except in cases where the public morals, health, safety or
5 interest may make a shorter time reasonable. Provided that
6 when a longer time than 10 days is prescribed by statute, no
7 time shorter than that so prescribed shall be deemed
8 reasonable.

9 Accordingly, we object to the Commission's
10 proceeding on these matters at this date and time pursuant to
11 that statute.

12 Now, we have some other areas, but I think
13 we'll just stop at that point and see where this goes.

14 JUDGE DALE: So would you care for the record
15 to identify yourself?

16 MR. CONRAD: We're appearing specially on
17 behalf of Praxair and Explorer. And my name is Stuart W.
18 Conrad and I'm associated here with Mr. Woodsmall.

19 JUDGE DALE: Thank you. We will be in recess
20 for the next 10 minutes.

21 MR. FISCHER: Judge, before we go off the
22 record, could I enter an entry as well?

23 JUDGE DALE: Oh, yes. I'm sorry.

24 MR. FISCHER: On behalf of Kansas City Power &
25 Light Company, James M. Fischer, Fischer and Dority, PC,

1 101 Madison Street, Suite 400, Jefferson City, Missouri 65101.

2 JUDGE DALE: Thank you.

3 Ten minutes. Off the record.

4 (A recess was taken.)

5 JUDGE DALE: Before we went off the record,
6 Mr. Conrad made an objection to the proceeding. At this time
7 we would like to hear arguments from the other parties or
8 responses from the other parties as to whether or not we
9 should, as Mr. Conrad, has suggested, suspend these
10 proceedings. We'll begin with Staff.

11 MR. THOMPSON: Thank you, your Honor. Kevin
12 Thompson for the Staff of the Commission.

13 I would suggest, first of all, that 536-- I
14 understand Mr. Conrad cited 536.065.5. That statute only
15 applies to the Commission's proceedings if there is nothing in
16 386 that covers the matter. And having not had an opportunity
17 to research it, I can't tell you whether it applies or not.
18 But that's certainly the first question.

19 Secondly, even if it does apply, Mr. Conrad's
20 argument succeeds only if the statute is jurisdictional. That
21 is if a tribunal that fails to meet the requirements of
22 536.065.5 is unable to proceed.

23 I suggest to you that the statute is not
24 jurisdictional. It simply reflects due process.

25 Mr. Dottheim is informing me that I'm really

1 talking about 067.4. I apologize. But that doesn't take away
2 from the force of what I'm saying.

3 If this statute is intended only to ensure
4 that administrative tribunals provide due process to
5 litigants, then I suggest to you that you'll see that the
6 cases say that due process is a practical thing. It is
7 substance, not form that we're concerned with.

8 Given that the parties are here, notice is met
9 because the parties have every opportunity to stand up and say
10 that for some reason, the notice has been inadequate to permit
11 them to prepare such that they have a meaningful opportunity
12 to be heard today. Since they are present, the onus then
13 passes to them to show why notice was insufficient. Thank
14 you.

15 JUDGE DALE: Empire?

16 MR. COOPER: Your Honor, we have not had an
17 opportunity to research this issue and do not have argument at
18 this point in time for you.

19 MR. MILLS: I have not had time to research it
20 either, but I did read the statute that Mr. Conrad cited while
21 we took a break and it seems fairly straightforward to me. It
22 looks as though it says, you know, you need to give a
23 reasonable time and a reasonable time is defined as at least
24 10 days.

25 And I can't quibble with his math either. I

1 think it has been seven days since notice was issued, so I
2 think he may very well have a point. But like I said, I
3 haven't done the research.

4 Certainly if there is something in 386, as
5 Mr. Thompson pointed out, that sets a time for PSC
6 proceedings, that would essentially trump 536, but I've spent
7 a considerable amount of time in 386 over the years and I've
8 never -- I don't recall anything like that. So I think 536
9 probably does apply in this instance.

10 JUDGE DALE: I would like to -- at this point
11 just to clarify for everyone since Mr. Conrad has read into
12 the record the section from 536, I would like to read into the
13 record 386.390, subsection 5, The Commission shall fix the
14 time when and the place where a hearing will be had upon the
15 complaint and shall serve notice thereof not less than 10 days
16 before the time set for such hearing unless the Commission
17 finds that the public necessity requires that such a hearing
18 be held at an earlier date.

19 Do you have any comment about whether that
20 applies in this instance or not?

21 MR. MILLS: Well, to me it sounds as though it
22 sets the time frame. And as I recall, the Commission's order
23 setting the hearing, it didn't find any necessity to set it on
24 a shorter period of time. So I think regardless of whether --
25 which 10-day time period applies, it sounds to me as though

1 one or the other one does

2 JUDGE DALE: Thank you.

3 Mr. Fischer?

4 MR. FISCHER: KCPL has no position on this
5 particular issue, Judge. I would note it is Halloween.
6 Thanks.

7 JUDGE DALE: Commissioner questions.

8 CHAIRMAN DAVIS: Judge, can I -- Mr. Conrad,
9 assum-- assuming your legal argument is correct, and I believe
10 that there is a high probability that it is very well correct,
11 is it your position that you need another full 10 days or that
12 for good cause that we could order it on less than 10 days
13 notice, you know, in light of the fact that you have already
14 had some notice, which would maybe be a consideration, but not
15 the overwhelming consideration?

16 MR. CONRAD: We are prejudiced by the absence
17 of 10 days. The procedural orders that have preceded this
18 have set 10 days as a minimum turnaround time for data
19 requests. Accordingly, although it would be a squeeze, if we
20 had requests, we would not have been able to get those
21 answered.

22 Moreover, our witness on this matter, as
23 further prejudiced, has numerous other matters around the
24 country. And although he worked very diligently to get his --
25 his schedule, he is not here today.

1 I also would raise the question since it's --
2 since it seems to have been asked any finding of necessity
3 that would shorten that. And I think the grounds are the
4 public morals, health, safety or interest may make a shorter
5 time reasonable.

6 It would not, in my view, be possible for the
7 Commission to make a finding as to any of those matters or all
8 of them without evidence because the Commission's orders must,
9 as you know, be supported by competent and substantial
10 evidence on the whole record. And it would further not be
11 possible, in my view, for evidence to be taken at a proceeding
12 which is convened on inadequate notice.

13 JUDGE DALE: Is there anyone who wishes to
14 reply?

15 CHAIRMAN DAVIS: I'm through.

16 COMMISSIONER MURRAY: Mr. Conrad, when did you
17 receive notice?

18 MR. CONRAD: Probably in my office, Judge, on
19 about the 26th. It usually takes about two days for mail to
20 get to our office.

21 COMMISSIONER MURRAY: And you did not object
22 or file anything at that time; is that correct?

23 MR. CONRAD: Nor -- no, ma'am. Nor was I
24 required to.

25 COMMISSIONER MURRAY: And you certainly didn't

1 make the effort to do that to let us know?

2 MR. CONRAD: Well, ma'am, since you raised the
3 point, we have throughout the proceedings filed a number of
4 applications for rehearing and motions for reconsideration,
5 virtually all of which, up to now, have been ignored.

6 And indeed I have been chastened by none other
7 than your general counsel in a recent e-mail, Why do you guys
8 persist in making the arguments contained in paragraph 2 of
9 your motion with respect to interlocutory orders of the
10 Commission? Your only immediate appeal of such orders is by
11 extraordinary writ.

12 So if that's -- if that's what we must do per
13 your general counsel's instructions, then we will make the
14 record, ma'am, to that effect to support that application.

15 COMMISSIONER MURRAY: Okay. I believe there's
16 a separate issue there.

17 You say you're prejudiced by the absence of
18 10 days and you go on to say that DRs, had you submitted any,
19 would have been -- had 10 days for response. Did you submit
20 any DRs that were not permitted to be answered?

21 MR. CONRAD: We did not have an opportunity to
22 do so, ma'am, because we did not have an opportunity to
23 consult with our witness.

24 COMMISSIONER MURRAY: And when did you
25 understand that your witness could not be here today?

1 MR. CONRAD: Today. And I have not checked
2 his calendar nor have I had any occasion to as to other days
3 in the future.

4 COMMISSIONER MURRAY: But as of yesterday
5 evening, you expected him to be here today?

6 MR. CONRAD: No, ma'am.

7 COMMISSIONER MURRAY: Did you attempt to get
8 him here today?

9 MR. CONRAD: We -- we had called him. And as
10 I've said, he struggled with his calendar, but he is not here
11 today.

12 COMMISSIONER MURRAY: And he didn't tell you
13 until today that he couldn't make it today?

14 MR. CONRAD: No, ma'am. He told me when I
15 advised him of the setting of the hearing that he was not able
16 to -- he was going to have to try to move some things around.

17 COMMISSIONER MURRAY: When you contacted
18 him -- when did you contact him?

19 MR. CONRAD: Shortly after we got the order.

20 COMMISSIONER MURRAY: And at that point he
21 told you he would try to be here?

22 MR. CONRAD: No.

23 COMMISSIONER MURRAY: He was going to try to
24 move some things around?

25 MR. CONRAD: He was going to try to move some

1 things around.

2 COMMISSIONER MURRAY: For what purpose?

3 MR. CONRAD: Well, ma'am, I'm not going to
4 inquire. If he tells me that he has some things to move
5 around, I'm not going to ask him for what it is.

6 COMMISSIONER MURRAY: But I'm assuming you
7 were talking about moving things around to be here today.

8 MR. CONRAD: Other things that he might have.
9 This is not the only matter that he is engaged on.

10 COMMISSIONER MURRAY: Okay. So are you
11 telling me you did not expect him to be here today? You never
12 expected him to be here today?

13 MR. CONRAD: I didn't -- I told you that he is
14 not here today and that he apparently was not able to get
15 his -- get his schedules adjusted.

16 COMMISSIONER MURRAY: Did you ask him to try
17 to be here today?

18 MR. CONRAD: Earlier, yes, when he --

19 COMMISSIONER MURRAY: So it was your
20 intention --

21 MR. CONRAD: His response, ma'am -- as I've
22 said this again, his response, ma'am, was that he would
23 endeavor to try to move things around, but he was not
24 successful.

25 COMMISSIONER MURRAY: Okay. As a followup to

1 that, then it was your intention to go forward with the
2 hearing today --

3 MR. CONRAD: No.

4 COMMISSIONER MURRAY: -- had he been here?

5 MR. CONRAD: I'm not prepared -- I'm not going
6 to answer that because it has always been my belief that the
7 Commission had a minimum of 10 days unless you made certain
8 findings, which you didn't make.

9 COMMISSIONER MURRAY: And you purposely did
10 not raise that before today; is that correct?

11 MR. CONRAD: Well, I guess if I didn't raise
12 it before today, that would have to be purposeful, yes,
13 because it would require purpose for me to have raised it
14 before that.

15 COMMISSIONER MURRAY: All right. Thank you.

16 COMMISSIONER GAW: Just a few questions.
17 Maybe just a couple.

18 Mr. Conrad, can you give me an idea, assuming
19 this matter is put off today, how quickly you might be able to
20 let us know, if there was interest in knowing by anyone, when
21 your witness might be available?

22 MR. CONRAD: I do -- the -- the quick and
23 honest answer is I do not know how quickly I could establish
24 contact with him in which a decision is made.

25 COMMISSIONER GAW: I'm not trying to pin you

1 down to a minute or anything. Just is this -- is this a
2 matter of a day or two in order to communicate with him about
3 when he's available?

4 MR. CONRAD: Well, a day or two to catch up
5 with him --

6 COMMISSIONER GAW: Yes.

7 MR. CONRAD: -- to try to find out what his
8 calendar is.

9 COMMISSIONER GAW: That's what I'm asking.

10 MR. CONRAD: That's probably the correct
11 answer there.

12 COMMISSIONER GAW: And I'm not asking you for
13 a commitment here, but if you -- if it's -- if you determine
14 that he is available sooner than 10 days from today, would
15 that make it possible to consider whether or not to have the
16 hearing rescheduled at an earlier time by consent?

17 MR. CONRAD: If your question is, is it
18 possible, I guess the answer would be yes. But I don't -- I
19 can't opine sitting here the probabilities.

20 COMMISSIONER GAW: I'm not asking you to. I'm
21 just trying to determine what our drivers are here as far as
22 timing is concerned. Is that the main issue you have in
23 regard to timing at this point, at this stage or is it -- do
24 you anticipate the possibility of sending DRs out going
25 forward?

1 MR. CONRAD: Your Honor, we may. One of the
2 problems that we have here and to -- and I think this deserves
3 to be noted on the record also, is we were confronted with a
4 somewhat precipitous order that -- that simply said all the
5 evidence is in, didn't even have exhibits on it. And -- and
6 that has a tendency to disrupt your case preparation and your
7 analysis of material.

8 So we never really got to that point because,
9 you know, it's -- it's entered in. So at that point our -- my
10 resources, Mr. Woodsmall's resources, turned to the question
11 of, you know, what -- what do we do now if the testimony has
12 been put in. And the answer is you file an Application for
13 Rehearing and point out the error.

14 And to Commissioner Murray's point, we did do
15 that. But that application still pends. So if the testimony
16 has been put in the record pursuant to an order that has not
17 been -- as to which rehearing has not been granted, then there
18 is no point, on a whole other level, to this proceeding here
19 today because everything's already in.

20 To go back, I think to your question,
21 hopefully I did answer it.

22 COMMISSIONER GAW: I think you did.

23 MR. CONRAD: Okay.

24 COMMISSIONER GAW: Can you tell me how many --
25 off the top of your head, about how many motions you think

1 have not been ruled on that you have filed?

2 MR. WOODSMALL: Approximately seven.

3 MR. CONRAD: I'm advised approximately seven
4 without counting, without actually going through the record.

5 COMMISSIONER GAW: Okay. I think that's all I
6 have.

7 Thank you, Judge.

8 JUDGE DALE: Does anyone else have anything to
9 add on this argument?

10 MR. THOMPSON: If I may, your Honor,
11 Mr. Conrad responded to my argument by suggesting that, in
12 fact, he is prejudiced by the lack of sufficient notice. And,
13 consequently, Staff believes that the suggestions that he has
14 made are sufficient.

15 JUDGE DALE: Thank you. We will be off the
16 record again. Back in 10 minutes -- probably the same 10
17 minutes as before.

18 (Off the record.)

19 JUDGE DALE: Then without further ado, we will
20 reconvene -- well, we won't reconvene. We will convene on
21 November 20th unless the parties come up with an earlier date.
22 I can tell you that November 10th is a State holiday, the 13th
23 14th and 15th will not be available as the Commissioners will
24 be at NARUC, and the 15th and 16th will be the true-up for the
25 KCP&L case. So if you are able to come up with an earlier

1 date, love to hear it. With that, we will be adjourned.

2 WHEREUPON, the hearing was adjourned until

3 November 20th, 2006.

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