

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

In the Matter of the Application of KCP&L)
Greater Missouri Operations Company for) Case No. ER-2010-0356
Approval to Make Certain Changes in its Charges)
for Electric Service)

**KCP&L GREATER MISSOURI OPERATIONS COMPANY’S
OPPOSITION TO STAFF’S MOTION IN LIMINE
REGARDING DSM PROGRAMS COST RECOVERY**

KCP&L Greater Missouri Operations Company (“GMO” or “Company”) states the following in opposition to Staff’s Motion in Limine Regarding DSM Programs Cost Recovery:

I. A Motion in Limine is Not an Appropriate Remedy.

A motion in limine “is normally used to exclude evidence in a jury trial that would be unfairly prejudicial or inflammatory.” Roth v. Roth, 176 S.W.3d 735, 738–39 (Mo. App. W.D. 2005). It is a procedural device used to suppress evidence, typically with the salutary purpose of pointing out evidence which may not be only objectionable, but sufficiently prejudicial that if presented to a jury would warrant the declaration of a mistrial. See Cass Bank & Trust Co. v. Mestman, 888 S.W.2d 400, 404 (Mo. App. E.D. 1994); Robbins v. Jewish Hospital, 663 S.W.2d 341, 348 (Mo. App. E.D. 1983).

Accordingly, the Commission has characterized a motion in limine as a procedural device “which is properly used to exclude tainted or prejudicial evidence.” See In re Lake Region Water & Sewer Co., Case No. SR-2010-0110, Order Regarding Staff’s Motion in Limine at 4 (Mar. 24, 2010).

There is nothing inherently prejudicial, inflammatory, or tainted about the testimony in this case regarding GMO’s demand-side management programs, the Missouri Energy Efficiency

Investment Act (“MEEIA”), or cost-recovery mechanisms for demand-side programs. Yet Staff alleges it is prejudiced by Company witness Tim M. Rush’s testimony on these issues because Mr. Rush testifies that GMO “is not seeking to change the cost recovery mechanism in its initial filing” but “hopes that the Commission changes the current method used to recover the costs of implementing these DSM programs.” See T. Rush Direct Testimony at 23 and 27–28.

As Staff correctly points out, the Commission’s rules require fair and full disclosure of the testimony and exhibits each party expects to offer at the hearing so as to avoid any prejudice to other parties. See 4 CSR 240-2.130(7)–(8). Rather than prejudicing Staff, however, GMO has avoided any potential prejudice at the hearing by explicitly testifying to its preference that a rulemaking will be implemented that addresses the uncertain environment of DSM programs and that such rulemaking becomes part of the outcome of this proceeding. Merely stating that the Company hopes that the Commission implements a comprehensive cost recovery approach is hardly prejudicial.

Neither is this testimony sufficiently prejudicial to warrant its striking. Staff is free to rebut this preference in its prefiled testimony, and to testify to any preference that such rulemaking not become part of the outcome of this proceeding, in accordance with Commission rules. Thus, Staff has not been denied any due process right to respond to the Company’s preference. Because GMO’s testimony regarding DSM programs has been fully and fairly disclosed, and is neither inflammatory nor tainted, Staff’s Motion in Limine is inappropriate at this stage of the proceedings and should be denied.

Motions in limine are particularly inappropriate for administrative proceedings where there is no jury, as such motions are traditionally used to prohibit testimony that if presented would warrant a mistrial. See Roth, 176 S.W.3d at 738; Rhodes v. Blair, 919 S.W.2d 561, 564

(Mo. App. S.D. 1996). The concern that motions in limine address is that “the mere asking of an improper question in front of a jury may be so prejudicial that a party will be denied a right to a fair trial.” Cass Bank & Trust, 888 S.W.2d at 404.

The Company’s evidence, however, is presented to experienced, sophisticated, and knowledgeable Commission fact-finders. Thus, Staff’s Motion in Limine is misplaced and must be denied.

II. A Motion in Limine is Premature.

Staff improperly attempts to use this procedural device “which is properly used to exclude tainted or prejudicial evidence” to block testimony regarding the Company’s hope that a rulemaking will be implemented by the time the tariffs in this case are effective. See Lake Region Water & Sewer at 4. This testimony properly raises the issue of Company’s preference that the Commission change the current method used to recover the costs of implementing DSM programs and that this change becomes effective in time to become part of the outcome of this proceeding, an issue that can now be addressed by the other parties to this case.

It is improper for Staff to use a motion in limine to “choke off” any testimony on DSM program issues. See Roth, 176 S.W.3d at 738–39. Indeed, it would be contrary to Commission rules to strike GMO’s direct testimony regarding DSM program issues, as GMO cannot know if another party will raise DSM program issues in its direct testimony, thus preventing GMO from discussing its preference at all. See 4 CSR 240-2.130(7)–(8).

Furthermore, because GMO cannot know at this time what issues or proposals will be raised by other parties to this case, it is inappropriate to limit or strike testimony before all testimony has been filed. Until the Company has had an opportunity to evaluate the issues and

analyze the positions of the other parties, including possible positions regarding Commission changes to the current method used to recover the costs of implementing DSM programs, it is premature for the Commission to grant a motion in limine so far in advance of the hearing.

WHEREFORE, GMO respectfully requests that the Commission deny Staff's Motion in Limine Regarding DSM Programs Cost Recovery.

Respectfully submitted,

/s/ Karl Zobrist

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing KCP&L Greater Missouri Operations Company's Opposition to Staff's Motion in Limine was emailed to counsel of record on this 6th day of December, 2010.

/s/ Lisa A. Gilbreath
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