

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

In the Matter of The Empire District Electric)
Company of Joplin, Missouri for Authority to)
File Tariffs Increasing Rates for Electric Ser-)
vice Provided to Customers in the Missouri)
Service Area of the Company.)

Case No. ER-2011-0004

**STAFF’S MOTION IN LIMINE AND
MOTION FOR EXPEDITED TREATMENT**

COMES NOW the Staff of the Missouri Public Service Commission, by and through Counsel, and for its ***Motion in Limine and Motion for Expedited Treatment***, respectfully states as follows:

1. This case is a general rate case that arose on September 28, 2010, when The Empire District Electric Company (“Empire”) filed proposed tariff sheets providing for a general rate increase for electric service provided to the public within its Missouri service area.

2. Pursuant to Commission Rule 4 CSR 240-2.130 and the Procedural Schedule adopted herein, Empire on April 18, 2011, filed the prepared Rebuttal Testimony of one Ricardo A. Kolster and Staff believes, therefore, that Empire will seek to admit that testimony into the record at the upcoming hearing in this matter.

3. Staff moves the Commission to rule and determine that the prepared Rebuttal Testimony of Mr. Kolster is inadmissible because it is and will be offered in violation of a portion of Paragraph 7 of the ***Stipulation and Agreement***, filed July 18, 2005, in Case No. EO-2005-0263, ***In the Matter of The Empire District Electric Company’s Application for Certificate of Public Convenience and Necessity and Approval of an Experimental Regulatory Plan Related to Generation Plant***, to-wit: “If any party

proposes the disallowance of latan 1 or latan 2 costs, Empire agrees not to seek to avoid such disallowance on the ground that such expenditures were the responsibility of KCPL and were not within Empire's control. Empire maintains the ability to litigate prudence issues related to these expenditures on any other basis."

4. Said **Stipulation and Agreement** was bargained for and relied upon by Staff and the other signatory parties, was fully supported by adequate and substantial consideration, was executed by an authorized representative of Empire, was approved by the Commission in its **Order Approving Stipulation and Agreement**, issued August 2, 2005, in Case No. EO-2005-0263, **In the Matter of The Empire District Electric Company's Application for Certificate of Public Convenience and Necessity and Approval of an Experimental Regulatory Plan Related to Generation Plant**, and Empire was therein directed by the Commission in Ordered Paragraph No. 2 to obey it: "That the parties to the Stipulation and Agreement shall comply with its terms."

5. Mr. Kolster's testimony directly violates the **Stipulation and Agreement** and Commission Order referred to above, as follows:¹

- Mr. Kolster testifies, "[m]y testimony is intended to assist the Missouri Public Service Commission ("Commission") in its assessment of issues related to disallowances suggested by Staff to the extent these are based on actions by KCP&L[.]"²
- Mr. Kolster also testifies, "Staff just imputes to Empire responsibility of unexplained and unidentified costs, managed by KCP&L as Operator,

¹ Should Empire offer the testimony in question and thereby violate the aforementioned Commission order, Staff will have no option but to bring a complaint against Empire pursuant to § 386.390.1, RSMo.

² Kolster Rebuttal Testimony, p. 2, lines 22-23, to p. 3, line 1.

without assessing whether Empire acted prudently within the context of the relationship between KCP&L and the rest of the ownership group.”³

- Mr. Kolster testifies, “Staff’s Report cites claims of unidentified and unexplained cost overruns arising in all instances from alleged failures attributable to KCP&L as Operator. Only at the end does Staff . . . impute responsibility upon Empire.”⁴
- Mr. Kolster further testifies that “Staff’s analysis improperly dismisses the context of the relationship among the ownership group. In asserting Empire was imprudent . . . Staff completely ignores the fact Empire, and the rest of the Ownership group, delegated and assigned responsibility over all construction activities for the Iatan Project to its agent, KCP&L, under the terms of the Ownership Agreement.”⁵
- Similarly, Mr. Kolster testifies, “pursuant to the Ownership Agreement Empire did not have control, nor could have exercised control, over the cost and control systems developed and utilized by KCP&L[.]”⁶

6. As a further ground for excluding Mr. Kolster’s prepared Rebuttal Testimony, Staff notes that the testimony is incompetent expert testimony. The use of expert testimony in administrative proceedings is governed by § 490.065, RSMo. 2000.⁷

³ Kolster Rebuttal Testimony, p. 3, lines 20-23.

⁴ Kolster Rebuttal Testimony, p. 5, lines 4-7.

⁵ Kolster Rebuttal Testimony, p. 5, lines 8-16.

⁶ Kolster Rebuttal Testimony, p. 7, lines 6-7.

⁷ ***State Board of Registration for the Healing Arts v. McDonagh***, 123 S.W.3d 146, 153-54 (Mo. banc 2003). The statute provides that the tribunal may admit expert testimony upon its determination that (1) the expert is qualified; (2) the expert's testimony will assist the trier of fact; (3) the expert's testimony is based upon facts or data that are reasonably relied on by experts in the field; and (4) the facts or data on

Pursuant to § 490.065.1, RSMo, expert testimony is admissible *only* where “scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]” Nowhere in Mr. Kolster’s prepared Rebuttal Testimony is his “specialized knowledge” employed to explain otherwise impenetrable evidence to the Commission. Instead, Mr. Kolster urges the Commission to rely upon the expert testimony of Mr. Meyer and Dr. Nielsen that it has already heard and considered in Case No. ER-2010-0355. It cannot reasonably be asserted that the Commission now needs to hear from Mr. Kolster in order to understand the testimony of Mr. Meyer and Dr. Nielsen. The receipt of incompetent evidence is an abuse of discretion.⁸ “An abuse of discretion occurs when the court’s ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.”⁹ The proposed expert testimony of Ricardo Kolster should be excluded because it will not assist the trier of fact.

7. Because Mr. Kolster’s testimony does not apply any “specialized knowledge,” it is lay testimony and not expert testimony.¹⁰ Lay witnesses are not permitted to offer opinion testimony about a matter in dispute.¹¹ The remainder of the proposed testimony is therefore incompetent, and should therefore be excluded, because it invades the

which the expert relies are otherwise reasonably reliable. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo. banc 2011).

⁸ *Lampe v. Taylor*, ___ S.W.3d ___, 2011 WL 1196031, *9 (Mo. App. S.D. 2011).

⁹ *Id.*

¹⁰ *State v. Winston*, 959 S.W.2d 874, 877 (Mo. App., E.D. 1997).

¹¹ *State v. Bivines*, 231 S.W.3d 889, 892-93 (Mo. App., S.D. 2007).

province of the Commission as trier of fact in that it consists almost entirely of Mr. Kolster's repeated conclusory assertions that Empire acted prudently.¹²

8. Staff further moves that the Commission take up and determine this motion on an expedited basis on or before Friday, May 20, 2011, because the evidentiary hearing in this case is scheduled to begin on Monday, May 23, 2011.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will (1) take up this motion on an expedited basis and (2) rule and determine that the prepared Rebuttal Testimony of Ricardo Kolster, or portions thereof, is inadmissible; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

s/ Kevin A. Thompson
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¹² Kolster Rebuttal Testimony, p. 6, lines 20-22, to p. 7, lines 1-2; p. 8, lines 22-23, to p. 9, lines 1-2.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **17th day of May, 2011**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson