BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Kansas City Power & Light Company's Request for Authority to Implement A General Rate Increase for Electric Service	)	Case No. ER-2018-0145
In the Matter of KCP&L Greater Missouri Operations Company's Request for Authorization to Implement A General Rate Increase for Electric Service	)	Case No. ER-2018-0146

RESPONSE TO ORDER DIRECTING FILING OF
KANSAS CITY POWER & LIGHT COMPANY AND
KCP&L GREATER MISSOURI OPERATIONS COMPANY

COME NOW Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") (collectively "Company"), pursuant to 4 CSR 240-2.080, and respectfully submit the following Response to Order Directing Filing issued on June 28, 2018. In support thereof, the Company states as follows:

1. On June 27, 2018, the Company filed a "Notice of Public Counsel's Stated Intent to Violate PSC Rules and Procedural Order, and Motion to Enforce Rules and Order" ("Motion"). In its Motion, the Company notified the Commission and the parties that the Office of the Public Counsel ("Public Counsel") had stated its intent to violate 4 CSR 240-2.130(7)(A) by failing to include in its direct testimony "all testimony and exhibits asserting and explaining [Public Counsel's] entire case-in-chief." (Motion, p. 2). Instead, all of the Public Counsel witnesses announced their intentions to file additional positions and adjustments to support the Public Counsel's case-in-chief in rebuttal and/or surrebuttal testimony. In its Motion, the Company requested that the Commission enforce its rule 4 CSR 240-2.130(7)(A) and (8) and its Procedural Order, and not permit Public Counsel to supplement its case-in-chief in rebuttal or surrebuttal with new affirmative positions or additional revenue requirement adjustments.

2. Later in the day on June 27, 2018, Public Counsel filed its response to the Company's Motion incorrectly stating that a case-in-chief is only for parties with the burden of proof; namely KCP&L and GMO. On this basis, Public Counsel argues that it is not required to file its case-in-chief in its direct testimony, but may file "whatever evidence responsive to KCPL's and GMO's direct testimony and exhibits it chooses to rebut those testimonies and exhibits . . . because, unlike KCPL and GMO, it [Public Counsel] does not have the burden of proof, and chose to file direct testimony it was not required to file." (Public Counsel Response, p. 2). The Commission should note that OPC has not alleged that the Company has failed to provide timely responses to data requests during the five months which have passed since these cases were filed on January 30, 2018.

3. On June 28, 2018, the Commission issued its *Order Directing Filing* in which it directed the Staff to respond to Public Counsel's arguments, and permitted other parties to respond if they wished to do so. The purpose of this pleading is to respond to the Commission's Order and refute Public Counsel's flawed arguments.

COMPANY'S RESPONSE TO PUBLIC COUNSEL

4. Public Counsel's position is contrary to the PSC rules and the Commission's long-standing procedures and rate case practice, and should therefore be rejected. Under Public Counsel's interpretation of the rule, direct testimony asserting and explaining its affirmative positions and proposed adjustments need not be filed by any party to a rate case, with the exception of the public utility, because only the utility bears the ultimate burden of proof. Notably, Public Counsel has pointed to absolutely no precedent whatsoever in support of its baseless interpretation. This failure to cite any supporting authority is understandable, because under Public Counsel's

interpretation, the Commission would have no reason to require the filing of direct testimony at all by any party other than the public utility.

5. According to 4 CSR 240-2.130(7)(B), "[W]here 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." (emphasis added) In other words, in rate cases like this where all parties file direct testimony, rebuttal testimony is designed to respond to, criticize, or explain why a party disagrees with an affirmative position or proposed revenue requirement adjustment asserted and explained by another party in direct testimony. In rate cases like this where all parties file direct testimony, rebuttal testimony is not intended to state and support an affirmative position or proposed revenue requirement adjustment of a party.[1] As explained in the Commission orders discussed below, in rate cases like this where all parties file direct testimony, affirmative positions and proposed adjustments to revenue requirement must be asserted and explained in the party's case-in-chief which is filed in its direct testimony so that all parties have an opportunity to respond to them in rebuttal testimony. Surrebuttal testimony is "limited to material which is responsive to matters raised in another party's rebuttal testimony." 4 CSR 240-2.130(7)(D).

6. If adopted by the Commission, Public Counsel's interpretation of 4 CSR 240-2.130(7)(A) would severely disadvantage public utilities and other parties since the affirmative positions and revenue requirement adjustments proposed by Public Counsel will not be known until the filing of rebuttal testimony. There is typically limited time between the filing of rebuttal

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[1] In fact, the Commission's rule expressly recognizes the difference between cases in which all parties file direct testimony, like this rate case, and cases where only the moving party files direct testimony. Under the provisions of 4 CSR 240-2.130(7)(C), "[W]here only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees with or proposes an alternative to the moving party's direct case."

and surrebuttal testimony in rate cases, and little time for discovery related to the rebuttal testimony. As a result, it would be difficult to adequately rebut the affirmative positions and proposed revenue requirement adjustments proposed by Public Counsel in rebuttal testimony. This would also compromise the orderly development of a full and adequate record impairing the Commission's ability to base its decision on the best information available.

7. Public Counsel's proposed interpretation of 4 CSR 240-2.130(7)(A) is contrary to long-standing practice and procedure before the Commission. This issue has been addressed by the Commission in previous rate cases, and the provisions of 4 CSR 240-2.130(7)(A) have been applied not just to public utilities, but also to Staff, Public Counsel and intervenors.

8. In Ameren Missouri's 2010 rate case, Case No. ER-2011-0028, Ameren Missouri filed a motion asking the Commission to include additional language in its scheduling order to clarify the requirements of other parties' cases-in-chief and direct testimony. In particular, Ameren Missouri was concerned that the parties would not state their positions on the Sioux scrubbers and Taum Sauk facility in their direct testimony. Staff and Public Counsel opposed Ameren Missouri's request, and pointed out:

> [T]he additional language Ameren Missouri requested mirrored the requirements of Commission Rule 4 CSR 240-2.130(7) & (8). They [Staff and Public Counsel] contended that the rules are adequate and the Commission's practice should not be modified unnecessarily. In addition, Staff stated that it fully intended to make its direct case regarding the Sioux scrubbers and the Taum Sauk facility in its direct case <u>as required by the regulation</u>." (*Order Adopting Procedural Schedule And Establishing Test Year*, <u>Re Ameren Missouri</u>, Case No. ER-2011-0028 (issued on November 10, 2010; *emphasis added*)(Attachment A).

In response to Ameren Missouri's motion, the Commission held:

> The Commission's rule on what must be included in direct testimony is quite clear; "direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in chief". Ameren Missouri does not attempt to explain why that rule is not sufficient. The Commission

> concludes that the additional language proposed by Ameren Missouri is an unnecessary duplication of the requirement of the rule. The Commission will deny Ameren Missouri's motion. (Id.at 2)

9. Public Counsel's argument that only the public utility has a "case-in-chief" in a rate case is therefore obviously wrong because the Commission ruled in Ameren Missouri's 2010 rate case that Staff and Public Counsel were bound to follow 4 CSR 240-2.130(7)(A) to include in their direct testimony all testimony and exhibits asserting and explaining the Staff and Public Counsel's entire case-in-chief, including their positions on the Sioux scrubbers and Taum Sauk facility.

10. In Missouri Gas Energy's 2004 rate case, Case No. GR-2004-0209, the Commission reached a similar conclusion and enforced the provisions of 4 CSR 240-130(7)(A) against the Staff. During the course of the hearings, the Midwest Gas Users' Association ("MGUA") made an oral motion, citing 4 CSR 240-2.130(7), asking the Commission to strike the portion of the testimony of a Staff witness that pertained to the Staff's class cost of service study because Staff had not included the substance of the Staff position in the direct and rebuttal testimony, and did not reveal the basis for its testimony until Staff filed surrebuttal testimony. MGUA contended that by concealing Staff's methodology until the filing of surrebuttal testimony, the Staff deprived opposing parties of the ability to propound data requests or to seek other discovery regarding Staff's method. MGUA referred to this practice as sandbagging, or trial by ambush. MGUA contended that by concealing Staff's position until the filing of surrebuttal testimony, Staff forced the other parties to attempt to ferret out Staff's position based on testimony in other proceedings. (*Order Regarding Midwest Gas Users' Association's Motion To Strike A Portion Of The Testimony of Daniel I. Beck*, Re Missouri Gas Energy, Case No. GR-2004-0209, pp. 1-4)(issued July 22, 2004)(Attachment B).

11. In MGE's 2004 rate case, consistent with its ruling in Ameren Missouri's 2010 rate case, the Commission ruled in favor of MGUA and struck most of the testimony of the Staff witness, stating:

> Beck's direct testimony does not assert and explain Staff's entire case-in-chief…The Commission's rule requires a party to assert and explain its position in direct testimony. It does not require the other parties to ferret out that position by taking depositions…Aside from the prejudice it causes other parties, Staff's failure to effectively support its class cost of service study in its testimony means that there is absolutely nothing in the record by which to Commission could justify its decision to accept Staff's study. (Id. at 4; emphasis added).

12. The Commission's ruling in MGE's 2004 rate case again makes clear that parties other than the public utility filing the rate case are required to assert and explain their case-in-chief in direct testimony. Clearly, the Commission practice has been to require all parties, including Staff and Public Counsel, to include in their direct testimony all testimony and exhibits asserting and explaining their affirmative positions proposed revenue requirement adjustments in the case.

13. In Missouri-American Water Company's 2008 rate case, the Commission held that the requirements of 4 CSR240-130(7) that direct testimony include all testimony and exhibits asserting and explaining the party's entire case-in-chief applied to intervenors. Intervenors City of Riverside and Missouri Gaming Company requested permission to file rebuttal testimony out of time within ten days of the hearing. Missouri-American argued in opposition that it would be prejudiced because it would not have the opportunity to conduct discovery concerning the intervenors' allegations or the opportunity to file responsive surrebuttal testimony. The Commission denied the intervenors' motion citing 4 CSR 240-130(7) and stating: "Not only is it questionable that this evidence should have been offered as part of their case-in-chief, Movants offer no reason for making its untimely request." *Order Denying Motion For Leave To File Rebuttal Testimony*, Re Missouri-American Water Company, Case No. WR-2008-0311 (issued

October 30, 2008) (Attachment C). Similarly, Public Counsel has offered no explanation for its failure in this case to include in its direct testimony all testimony and exhibits asserting and explaining the Public Counsel's entire case-in-chief, as required by 4 CSR 240-2.130(7).

14. In summary, the Commission has consistently found for many years that the requirements of 4 CSR 240-2.130(7)(A) apply to all parties to a rate case, not just the public utility, and required that direct testimony include all testimony and exhibits asserting and explaining the entire case-in-chief of each party proposing affirmative positions or revenue requirement adjustments. Consequently, the Commission should reject the interpretation of 4 CSR 240-2.130(7)(A) advanced by Public Counsel and enforce the rule's provisions in this case.

WHEREFORE, having fully refuted Public Counsel's flawed arguments, the Company respectfully renews its request that the Commission enforce its rule 4 CSR 240-2.130(7)(A) and (8) and its Procedural Order, and not permit Public Counsel to supplement its case-in-chief in rebuttal or surrebuttal testimony with new affirmative positions or additional revenue requirement adjustments.

Respectfully submitted,

/s/ Robert J. Hack

Robert J. Hack MBN 36496
Roger W. Steiner MBN 39586
Kansas City Power & Light Company
1200 Main Street, 16th Floor
Kansas City, MO 64105
(816) 556-2785 (Phone)
(816) 556-2787 (Fax)
rob.hack@kcpl.com
roger.steiner@kcpl.com

Karl Zobrist MBN 28325
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2400 (Phone)
(816) 531-7545 (Fax)
karl.zobrist@dentons.com

James M. Fischer MBN 27543
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
(573) 636-6758 (Phone)
(573) 636-0383 (Fax)
jfischerpc@aol.com

Attorneys for Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6th day of July 2018.

/s/ Robert J. Hack
Robert J. Hack

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 10th day of November, 2010.

In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service	)))	File No. ER-2011-0028 Tariff No. YE-2011-0116

ORDER ADOPTING PROCEDURAL SCHEDULE AND ESTABLISHING TEST YEAR

Issue Date: November 10, 2010 Effective Date: November 10, 2010

On November 2, 2010, most of the parties in Union Electric Company, d/b/a Ameren Missouri's general rate increase case filed an agreement as to proposed procedural schedule, related procedural items, and test year true-up cut-off dates. The parties that joined in the agreement are Union Electric Company, d/b/a Ameren Missouri, the Staff of the Commission, the Office of the Public Counsel, the Missouri Department of Natural Resources, the Missouri Energy Group, the Missouri Industrial Energy Consumers, AARP, the International Brotherhood of Electrical Workers and International Union of Operating Engineers Locals, the Midwest Energy Users Association, Consumers Council of Missouri, the Missouri Retailers Association, Charter Communications, Inc., and the Natural Resources Defense Council. Not all parties joined in the agreement, so on November 2, the Commission directed that any party wishing to object to the agreement file its objection by November 4. On November 4, the Municipal Group filed notice indicating it does not object to the agreement. No party has objected to the agreement.

On November 5, Ameren Missouri filed a motion asking the Commission to include additional language in this scheduling order to clarify the requirements of the other parties' cases-in-chief and direct testimony. In particular, Ameren Missouri expresses concern that Staff will fail to include the results of its construction audits for the Sioux scrubbers and the Taum Sauk facility in its direct testimony, and asks the Commission to include language in this order that would make it clear that each party must fully support its proposed rate base in direct testimony. Ameren Missouri patterns its proposed language from a Commission scheduling order in a 1984 rate case.

The Commission allowed the other parties until Noon on November 9 to respond to Ameren Missouri's motion. Staff and Public Counsel filed timely responses opposing Ameren Missouri's motion. Staff and Public Counsel point out that the additional language Ameren Missouri asks the Commission to include essentially mirrors the requirements of Commission rule 4 CSR 240-2.130(7)&(8). They contend the rules are adequate and the Commission's practice should not be modified unnecessarily. In addition, Staff states that it fully intends to make its direct case regarding the Sioux scrubbers and the Taum Sauk facility in its direct case as required by the regulation. Thus, no additional language is needed.

The Commission's rule on what must be included in direct testimony is quite clear; "direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief."[1] Ameren Missouri does not attempt to explain why that rule is not sufficient. The Commission concludes that the additional language proposed by Ameren Missouri is an unnecessary duplication of the requirement of the rule. The Commission will deny Ameren Missouri's motion.

[1] 4 CSR 240-2.130(7).

The Commission will adopt most of the procedural schedule proposed by the proponents, including an adjustment of the previously scheduled evidentiary hearing. However, the Commission prefers to issue its Report and Order resolving this rate case approximately thirty days before the operation of law date to allow time to deal with implementing tariffs and requests for rehearing. Since the operation of law date for this case is July 31, the Commission will need to issue its Report and Order during the first week of July. The proposed procedural schedule would have reply briefs filed on June 20, leaving the Commission only two weeks to deliberate, write, approve, and issue a report and order. To remedy that situation, the Commission will adjust the post-hearing schedule proposed by the parties.

The proponents agree the test year should be the twelve calendar months ended March 31, 2010, with a true-up cut-off date of February 28, 2011. The Commission will accept the test year and true-up period agreed to by the proponents.

The proponents also agreed to certain procedural matters and ask the Commission to order compliance with those procedures. The Commission will do so.

THE COMMISSION ORDERS THAT:

1. The test year for this case is the twelve months ending March 31, 2010, trued-up as of February 28, 2011.

2. The following procedural schedule is established:

Non-AmerenUE parties to file Direct Testimony on revenue requirement	**-**	**February 4, 2011**
Non-AmerenUE parties to file Direct Testimony on rate design	**-**	**February 10, 2011**
Local Public Hearings (locations and dates to be established by		

subsequent order)	**-**	**February 2011**
Technical/Settlement Conference (This is an informal conference among the parties and will not be "on-the-record")	**-**	**February 28 to March 4, 2011**
All parties to file Rebuttal Testimony	**-**	**March 25, 2011**
All parties to file Surrebuttal or Cross-Surrebuttal Testimony	**-**	**April 15, 2011**
List of Issues, Order of Witnesses, Order of Cross-Examination, Order of Opening	**-**	**April 19, 2011**
Reconciliation	**-**	**April 20, 2011**
Statements of Position	**-**	**April 21, 2011**
Hearing	**-**	**April 26 through April 29, May 2 through May 6, and May 10 through May 13, 2011, beginning each day at 8:30 a.m.**
All parties to file True-Up Direct Testimony (if necessary)	**-**	**May 16, 2011**
All parties to file True-Up Rebuttal Testimony (if necessary)	**-**	**May 20, 2011**
True-Up Hearing (if necessary)	**-**	**May 23 and 24, 2011, beginning at 8:30 a.m.**
All parties file Initial Post-Hearing Briefs	**-**	**June 1, 2011**
All parties file Reply/True-Up Briefs	**-**	**June 13, 2011**

3. Ameren Missouri's Motion to Provide Additional Clarification of Requirements for the Parties' Cases-in-Chief and Direct Testimony is denied.

4. The parties shall comply with the following procedural requirements:

(A) Testimony shall be prefiled as defined in Commission Rule 4 CSR 240-2.130. All parties must comply with this rule, including the requirement that testimony be filed on line-numbered pages.

(B) The parties shall agree upon and Staff shall file a list of the issues to be heard, the witnesses to appear on each day of the hearing, the order in which they will be called, and the order of cross-examination for each witness. The list of issues should be detailed enough to inform the Commission of each issue that must be resolved. The Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission.

(C) Each party shall file a simple and concise statement summarizing its position on each disputed issue.

(D) All pleadings, briefs, and amendments shall be filed in accordance with Commission Rule 4 CSR 240-2.080. Briefs shall follow the same list of issues as filed in the case and must set forth and cite the proper portions of the record concerning the remaining unresolved issues that are to be decided by the Commission.

(E) All parties shall bring an adequate number of copies of exhibits that they intend to offer into evidence at the hearing. If an exhibit has not been prefiled, the party offering it must bring, in addition to the copy for the court reporter, copies for the five Commissioners, the Presiding Judge, and all counsel.

(F) All parties shall provide copies of testimony (including schedules), exhibits, and pleadings to other counsel by electronic means and in electronic form, essentially contemporaneously with the filing of such testimony, exhibits, or pleadings where the information is available in electronic format (.PDF, .DOC, .WPD, or .XLS). Parties are not required to put information that does not exist in electronic format into electronic format for purposes of exchanging it.

(G) The parties shall make an effort to not include highly confidential or proprietary information in data request questions. If highly confidential or proprietary information must be included in data request questions, the highly confidential or proprietary information shall be appropriately designated as such pursuant to Commission Rule 4 CSR 240-2.135.

(H) Each party serving a data request on another party shall provide an electronic copy of the text of the "description" of that data request to counsel for all other parties contemporaneously with service of the data request. Regarding Staff-issued data requests, if the description contains highly confidential or proprietary information, or is voluminous, a hyperlink to the EFIS record of that data request shall be considered a sufficient copy. If a party desires the response to a data request that has been served on another party, the party desiring a copy of the response shall request a copy of the response from the party answering the data request. Data requests, objections to data requests, and notifications respecting the need for additional time to respond to data requests shall be sent by e-mail to counsel

for the other parties. Counsel may designate other personnel to be added to the service list for data requests, but shall assume responsibility for compliance with any restrictions on confidentiality. Data request responses shall be served on counsel for all parties, unless waived by counsel, and on the requesting party's employee or representative who submitted the data request. All data request responses from all parties shall also be served on counsel for Ameren Missouri or company counsel's designee. All data request responses shall be served electronically, if feasible and not voluminous as defined by Commission rule. In the case of Ameren Missouri data request responses, Ameren Missouri shall post its data request responses on its Case Works Extranet site. However, in the case of responses to data requests Staff issues to it, Ameren Missouri shall also submit the response to Staff data requests in EFIS, if feasible, or if submission of responses to Staff data request in EFIS is infeasible, then Ameren Missouri shall submit to Staff its response in electronic format or compact disc or by other means agreed to by Staff counsel. For attachments to data requests relating to the Sioux scrubber project, Ameren Missouri shall make the attachments accessible via its Relativity Extranet site.

(l) Until direct testimony is filed on February 4, 2011, the response time for all data requests shall be twenty calendar days, with ten calendar days to object or notify the requesting party that more than twenty calendar days will be needed to provide the requested information. After February 4, 2011, until rebuttal testimony is filed on March 25, 2011, the response time for data

requests shall be fifteen calendar days to provide the requested information and eight calendar days to object or notify the requesting party that more than fifteen calendar days will be needed to provide the requested information. After rebuttal testimony is filed on March 25, 2011, the response time for data requests shall be five business days to provide the requested information and three business days to object or notify the requesting party that more than five business days will be needed to provide the requested information. If a data request has been responded to, a party's request for a copy of the response shall be timely responded to, considering that the underlying data request has already been responded to (except that responses shall not be needed for data request responses posted on AmerenUE's Caseworks Extranet site).

(J) Workpapers that were prepared in the course of developing a witness' direct or rebuttal testimony shall not be filed with the Commission, but, without request, shall be submitted to each party within two business days after the particular testimony is filed. Workpapers prepared in the course of developing a witness' surrebuttal, true-up direct, or true-up rebuttal testimony shall not be filed with the Commission, but shall be submitted to each party simultaneously with the filing of the particular testimony. Workpapers need not be submitted to a party that has indicated it does not want to receive some or all of the workpapers. Workpapers containing highly confidential or proprietary information shall be appropriately marked. Since workpapers for certain parties may be voluminous and generally not all parties are interested

in receiving workpapers or a complete set of workpapers, a party shall be relieved of providing workpapers to those parties indicating that they are not interested in receiving workpapers or a complete set of workpapers. If there are no workpapers associated with testimony, the party's attorney shall so notify the other parties within the time allowed for providing those workpapers.

(K) Where workpapers or data request responses include models or spreadsheets or similar information originally in a commonly available format where inputs or parameters may be changed to observe changes in inputs, if available in that original format, the party providing the workpaper or response shall provide this type of information in that original format with formulas intact. Ameren Missouri may provide workpapers by posting them on its Caseworks Extranet site, with e-mail notification to counsel for the parties to be provided essentially concurrently with the posting of workpapers on the Caseworks Extranet site. Ameren Missouri shall provide its work papers to Staff in electronic format by e-mailing or by delivery of a compact disk or other electronic storage media.

(L) For purposes of this case, the Commission waives Commission Rules 4 CSR 240-2.045(2) and 2.080(11) so that prefiled testimony and other filings made in EFIS are timely if filed before midnight on the date the filing is due.

(M) Documents filed in EFIS are properly served if provided to counsel of record for all other parties via e-mail.

5. The transcripts of the evidentiary hearing shall be expedited.

6. The hearing shall be held at the Commission's office at the Governor Office Building, Room 310, 200 Madison Street, Jefferson City, Missouri. This building meets accessibility standards required by the Americans with Disabilities Act. If you need additional accommodations to participate in this hearing, please call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or Relay Missouri at 711 before the hearing.

7. This order shall become effective immediately upon issuance.

BY THE COMMISSION

Steven C. Reed
Secretary

(S E A L)

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

Woodruff, Chief Regulatory
Law Judge

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 22nd day of July, 2004.

In the Matter of Missouri Gas Energy's Tariffs to Implement a General Rate Increase for Natural Gas Service	)))	**Case No. GR-2004-0209** Tariff No. YG-2004-0624

ORDER REGARDING MIDWEST GAS USERS' ASSOCIATION'S MOTION TO STRIKE A PORTION OF THE TESTIMONY OF DANIEL I. BECK

On July 1, 2004, during the course of the hearing in this case, Midwest Gas Users' Association (MGUA) made an oral motion asking the Commission to strike the portion of the testimony of Staff witness Daniel I. Beck that pertains to the Staff's class cost of service study. MGUA contends that Beck withheld the substance of his testimony from his direct and rebuttal testimony and did not reveal the basis for his testimony until he filed his surrebuttal testimony, in violation of the Commission's rule regarding the filing of testimony. As a further basis for striking Beck's testimony, MGUA argued that Beck had merely borrowed the class cost of service study that was referenced in his testimony and that the Staff employee who actually performed that study was not available for cross-examination regarding the methods used in the study.

At the time MGUA made its motion, the presiding officer announced that the Commission would defer ruling on the motion until after completion of the hearing, as permitted by Section 536.070.7. At the conclusion of the hearing, the presiding officer

directed that any party wishing to file a written response to MGUA's motion should do so no later than July 13. Staff filed such a response on July 13. On the same day, MGUA, joined by the University of Missouri – Kansas City and Central Missouri State University, filed a memorandum in support of its motion to strike.

MGUA argues that Beck's testimony should be struck on the basis of Commission Rule 4 CSR 240–2.130(7) which provides as follows:

> For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows: (A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief; …

MGUA contends that Beck did not even attempt to explain the method that he used to prepare his class cost of service study until his surrebuttal testimony. By concealing his methodology until filing his surrebuttal testimony, Beck deprived opposing parties of the ability to propound data requests or to seek other discovery regarding his method. MGUA refers to this practice as sandbagging, or trial by ambush, and contends that by concealing its position until it filed surrebuttal testimony, Staff forced the other parties to "attempt to ferret out Mr. Beck's position based on his testimony and that of other unnamed Staff witnesses in other proceedings."[1]

Staff responds to MGUA's allegation of sandbagging by claiming that Staff fully asserted and explained its position on the class cost of service study in Beck's direct testimony. Staff further asserts that the other parties in general, and MGUA in particular, could not have been surprised or disadvantaged by Beck's testimony because Donald Johnstone, MGUA's witness, extensively discussed and criticized Staff's class cost of service study in his rebuttal testimony. Furthermore, MGUA extensively, and

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[1] Transcript, Page 2198, Lines 16-19.

knowledgably, cross-examined Beck at the hearing. According to Staff, this means that Beck's testimony must have "sufficiently apprised MGUA of his position."

In order to understand the arguments of the parties, it is necessary to review the written testimony filed by Beck. In introducing Staff's class cost of service study in his direct testimony, Beck merely states that he updated the class cost of service study that Staff filed in Case No. GR-2001-292, MGE's last rate case. Beck testifies to some details about how the old study was updated, but he provides no testimony that would explain the method by which the original class cost of service study was developed. Beck testifies that he has included his updated calculations in his work papers and indicates that he will discuss any areas of disagreement that the other parties may raise in his rebuttal testimony.

During cross-examination, Beck revealed that the class cost of service study that Staff filed in GR-2001-292 was itself just an update of an earlier study. Staff's original class cost of service study, upon which Staff is relying in 2004, was actually first developed and filed in MGE's 1996 rate case, GR-96-285.[2] Furthermore, much of the study was not developed by Beck, but rather by Eve Lissek, a former employee of the Commission.[3]

Beck again addresses the issue of class cost of service in his rebuttal testimony. He compares the results of the studies prepared by Staff, Public Counsel, and MGE, but does not offer any further explanation of Staff's class cost of service study.

Finally, in his surrebuttal testimony, filed just one week before the start of the hearing, Beck provides a few details about Staff's class cost of service study. He explains that Staff's study is based on a "stand-alone allocator that takes into account the number of

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[2] Transcript, Page 2208, Lines 12-13.

[3] Transcript, Page 2209, Lines 8-11.

customers, the size of their service line, the relative cost of their service line, and the length of the main that borders an average customer's property."[4] Beck did not offer any further explanation of what a "stand-alone allocator" is or why its use would be appropriate in this case.

Beck did explain in his surrebuttal testimony that Staff had to estimate the length of main bordering an average customer's property because that information was not available from the City of Kansas City, MGE's largest service area, at a reasonable cost. On cross-examination, Beck revealed that Staff last sought that information from Kansas City in 1995 or 1996 and that he had not attempted to update that information for this case.[5]

Beck's direct testimony does not assert and explain Staff's entire case-in-chief. In fact, it does not inform the Commission or the other parties of much of anything. It essentially just says to go look at what Staff said in an earlier case and that Staff may answer your questions if you have any. It is not enough to say, as Staff does, that if MGUA or other parties had wanted to learn more about Beck's position they could have taken his deposition. The Commission's rule requires a party to assert and explain its position through its direct testimony. It does not require the other parties to ferret out that position by taking depositions. That MGUA was able to prepare effective rebuttal testimony and to conduct a knowledgeable cross-examination is a tribute to the knowledge and skill of MGUA's witness and counsel, rather than a justification for Staff's deficient testimony.

Aside from the prejudice it causes other parties, Staff's failure to effectively support its class cost of service study in its testimony means that there is absolutely nothing in the record by which to Commission could justify its decision to accept Staff's study, if it were

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[4] Beck Surrebuttal, Exhibit 805, Page 4, Lines 5-7.

[5] Transcript, Page 2215, Lines 11-15.

inclined to do so. Beck's work papers and testimony from a 1996 rate case are not in the record, nor should they be. Staff is not required to explain the details of each and every calculation that supports it testimony. But it must present its case in a clear and coherent manner. It has not done so and MGUA and the other parties have been prejudiced as a result. The testimony of Daniel I. Beck regarding the Staff's class cost of service study will be struck.

MGUA's motion requests that specific portions of Beck's testimony be struck. The Commission will strike the requested portions of testimony with one exception. MGUA asks the Commission to strike page 5, lines 7-17 of Beck's direct testimony. That section is under the heading of Rate Design and concerns Staff's proposed rate design. Although it refers back to the class cost of service study, that section is not a part of Staff's testimony regarding its class cost of service study and will not be struck.

IT IS THEREFORE ORDERED:

1. That Midwest Gas Users' Association's motion to strike portions of the testimony of Daniel I. Beck is granted.

2. That the following portions of Daniel I. Beck's prefiled testimony are struck:

Direct - Page 2, Lines 8-10
Direct - Page 2, Line 16 through Page 4, Line 9
Direct - Page 4, Lines 16-23
Direct - Page 5, Line 4, the sentence beginning with "The results …" and ending on line 5.
Direct - Schedule 1
Rebuttal - Page 13, Line 17 through Page 15, Line 11
Surrebuttal - Page 3, Line 21 through Page 5, Line 19.

3. That this order shall become effective on July 22, 2004.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Gaw, Ch., Murray, Clayton, Davis and Appling, CC., concur

Woodruff, Senior Regulatory Law Judge

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 30th day of October, 2008.

In the Matter of Missouri-American Water Company's Request for Authority to Implement a General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas	))))	**Case No. WR-2008-0311**

ORDER DENYING MOTION FOR LEAVE TO FILE REBUTTAL TESTIMONY

Issue Date October 30, 2008 Effective Date: October 30, 2008

On October 20, 2008, City of Riverside and Missouri Gaming Company filed a motion requesting leave to file out of time the rebuttal testimony of Michael Duffy, the Director of Community Development for the City of Riverside. Movants opine that its filing will prejudice no party because all parties will have an opportunity to cross-examine the witness and that it will suffer significant prejudice if the testimony is not permitted. Thereafter, Missouri-American Water Company filed a response opposing the motion.

Missouri-American argues that it will in fact be prejudiced because it will not have the opportunity to conduct discovery concerning the witness' allegations or the opportunity to file responsive surrebuttal. Missouri-American points out that the request was filed 10 days prior to the start of the hearing and that it is too late in the process for the Commission to grant Movants' request.

In its reply, Movants defend the request by emphasizing the importance of the issues addressed in the offered rebuttal testimony. They then argue that Missouri-American will

not be prejudiced because the relevant issues were raised at the local public hearing held in Parkville on September 9; furthermore, that they and Missouri-American have been informally discussing these issues over the course of the proceedings. Based on this, Movant concludes that Missouri-American has had time to conduct discovery. Movants finally point out that the transcript from the local public hearing was not available until October 2, which was after the deadline for filing rebuttal.

Discussion

Commission rule 4 CSR 240-2.130 (7) states that "direct testimony shall include all testimony and exhibits asserting and explaining the party's entire case-in-chief." Direct testimony was due no later than September 3. In all likelihood, the evidence that Movants offer existed prior to September 3 and should have been a part of their case-in-chief. If, however, the evidence is arguably in response to direct testimony filed by Missouri-American, rebuttal testimony was due September 30.

Even if the Commission gives any weight to the fact that the transcript of the local public hearing at which these issues were discussed was not available until October 2, Movants did not file this motion until October 20.

Not only is it questionable that this evidence should have been offered as part of their case-in-chief, Movants offer no reason for making its untimely request. The Commission will therefore deny the requested relief. The Commission notes, however, that local public hearings are part of the record and the testimony and evidence admitted at those hearings are considered by the Commission when making its final determination.

THE COMMISSION ORDERS THAT:

1. The motion for leave to file rebuttal testimony of Michael Duffy requested by City of Riverside and Missouri Gaming Company is denied.

2. This order shall become effective upon issuance.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, and Jarrett, CC., concur.
Clayton and Gunn, CC., dissent.

Jones, Senior Regulatory Law Judge