

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

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

**MOTION TO STRIKE PORTIONS OF EMPIRE DISTRICT
REBUTTAL TESTIMONY ON TRANSPORTATION SSUES**

COMES NOW Constellation NewEnergy-Gas Division, LLC (hereinafter referred to as "Constellation"), by and through counsel, and moves the Commission to strike portions of the "rebuttal" testimony filed by Empire District witness Scott Keith, and the entirety of the "rebuttal" testimony filed by Empire witness Edwin Overcast, on December 9, 2009 in this matter. The "rebuttal" testimony of Messrs. Keith and Overcast should be stricken because it is actually direct testimony that has been filed more than six (6) months out of time. The filing of new, direct testimony less than a month before hearing leaves other parties with insufficient time to evaluate, conduct discovery and rebut, or respond to, this drastically late-filed direct testimony. In addition, permitting such late-filed direct testimony six months after it was properly due subverts the Commission's procedures and rules and should not be permitted.

In support of its motion, Constellation states as follows:

1. On June 5, 2009, The Empire District Gas Company filed tariffs designed to increase rates, and modify numerous rules and regulations, for natural gas service in the service areas of the Company. The filing was

accompanied by the filing of direct testimony on behalf of Empire by twelve (12) witnesses.

2. On June 12, 2009, the Commission issued its *Suspension Order and Notice, Order Setting Hearings, and Order Directing Filing* in this case.

3. On July 31, 2009, the Commission issued its *Order Setting Procedural Schedule and Setting Test Year*, establishing the procedural schedule for this case. The procedural schedule included the filing of direct testimony on rate design issues, by all parties other than Empire, on November 3, 2009, and the filing of rebuttal testimony by all parties on December 4, 2009.

4. On November 3, 2009, Constellation caused to be filed the direct testimony of Mr. Richard Haubensak concerning gas transportation tariffs proposed in this case by Empire.

5. On November 30, 2009, the Commission extended the deadline for rebuttal testimony from December 4, 2009 to December 9, 2009. Although the deadline for rebuttal concerning non-transportation issues was further extended on December 9, rebuttal testimony was filed on transportation issues on December 9 by two witnesses on behalf of Constellation – Richard Haubensak and Wendi P. Brown.

6. On December 9, 2009, Empire District filed testimony concerning natural gas transportation issues of two witnesses, W. Scott Keith and H. Edwin Overcast. This testimony was designated “Rebuttal Testimony.” However, as explained further below, this testimony was largely late-filed direct testimony, not rebuttal, and should not be accepted or considered by the Commission.

Argument:

Empire District filed this case on June 5, 2009, by filing proposed, new tariffs and supporting direct testimony. Empire's filing included natural gas transportation tariffs that were so drastically changed from those currently in effect that Empire claims that it was impossible to provide a red-line version of those changes. (Keith "Rebuttal" at pages 4-6.) One of those proposed changes was to require telemetry equipment, at the customer's expense, for each small-volume transportation customer, although those customers have been receiving transportation service since 2001 without the requirement of buying and installing telemetry equipment. In fact, this tariff change is not even mentioned in Empire District's direct testimony in this case. (Haubensak Direct, p. 3, ll. 10-21.)

Empire's proposed tariffs also include a 333% increase in Empire's charges for balancing service for those small transportation customers using that service, and propose a drastic, new *daily* balancing charge for large transportation customers. However, no cost studies or other documentation were included in Empire's direct testimony supporting these proposals. Now, Empire seeks to present direct testimony purporting to support these proposals in *rebuttal* testimony filed less than a month before hearing.

The burden of proof in this case is on Empire District to justify and support its proposed changes in its existing tariffs. The current tariffs, approved by this Commission, are deemed "just and reasonable" as a matter of law. Empire has the burden of proving that, in fact, its existing tariffs need to be changed and that

its *new, proposed* tariffs would be “just and reasonable.” Empire must meet that burden of proof with competent and substantial evidence.

After Constellation filed its direct testimony on November 3, Empire District apparently realized it had failed to support its transportation proposals in this case. In a flagrant effort to remedy that failure, it filed its direct case concerning its transportation tariff proposals as “rebuttal” testimony on December 9, 2009.

The Commission’s rules define “direct” and “rebuttal” testimony. 4 CSR 240-2.130 (7) states, in part:

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

“Asserting and explaining.” In other words, Empire’s direct testimony was required to *propose and support* its case in chief. Having failed to support (or even clearly state) its proposal to require telemetry of small-volume transportation customers, Empire includes in its “rebuttal” testimony information and arguments that should have been in its direct case. Having failed to support its proposed 333% increase in the fees for balancing service, or its proposed daily balancing charge for large-volume transportation customers, Empire presents information and arguments in its “rebuttal” testimony, including various “cost studies” and data compilations, that should have been part of its direct case.

Empire District failed to justify and support the dramatic changes it proposes to its gas transportation tariffs in its direct testimony in this case. It

should not be allowed, more than six months later and less than one month before hearing, to file its direct case on transportation issues as “rebuttal.”

The “rebuttal” testimony of Mr. Keith filed on December 9, 2009 contains significant portions of information, and schedules and studies, that are clearly direct testimony and not rebuttal, and which should be stricken. In fact, Mr. Keith did not even file direct testimony in this case, although he clearly is the primary supporting witness of Empire on transportation issues. Thus, he had to provide considerable background information (including his educational and professional experience) in his “rebuttal” testimony.

Constellation moves that the following portions of Mr. Keith’s “rebuttal” be stricken, as follows:

Page 5, lines 6 (b) through 9¹

Page 6, lines 12-16

Page 7, lines 11 (b) through 22

Page 9, lines 17 (b) through 22

Page 9, line 23 through page 10, lines 22

Page 11, lines 1-3, and lines 9-22

Page 12, lines 10-23

Page 13, lines 1-23

Page 14, lines 1-6

Schedules WSK-1, WSK-2, WSK-3, WSK-4 and WSK-5

¹ A reference to “(b)” in a line indicates that the language to be stricken begins after a period in that line which ends a sentence that carried into that line of the testimony. For example, “Page 5, line 6 (b)” is the new sentence that begins within line 6 of page 5 with the words, “I have attached copies of the”

All of the schedules attached to Mr. Keith's "rebuttal" testimony, and the language in that testimony describing them, are "asserting and explaining" Empire's case-in-chief, within the meaning of 4 CSR 240-2.130(7)(A), and should have been part of Empire's direct testimony in this case. Mr. Keith's schedules include cost studies and data compilations, thorough analysis of which is not reasonably possible in the time remaining in this case. Had they been included in Empire's direct testimony on June 5, 2009, this objection would have no merit. At this late date, however, adequate discovery and analysis by other parties is not possible.

Mr. Overcast's "rebuttal" testimony should be stricken in its entirety, and Constellation so moves. Arguing that Mr. Haubensak's definition of "transportation service" (in Mr. Haubensak's direct) is "too narrow" (on page 2), Mr. Overcast launches into a multi-page description of EDG operations and operating systems (ANR/Northwest, PEPL/North and Southern Star/South) that is not responsive to anything in Mr. Haubensak's direct. This question and answer *are merely a pretense to add late-filed direct testimony to Empire's case*. Mr. Overcast's lengthy discussion of Empire's gas storage arrangements and telemetry are also direct testimony, not rebuttal, *a transparent effort to belatedly support Empire's daily balancing charge proposal and its mandatory telemetry proposal* for existing, small-volume transportation customers. Mr. Overcast's discussion of Operational Flow Orders (on page 10) does not rebut Mr. Haubensak, but agrees with him. Mr. Haubensak has testified that an OFO may

be called even when there is no pipeline OFO, as long as there is an actual, system emergency on the Empire system that causes the OFO.

If Mr. **Overcast's** "rebuttal" is not stricken in its entirety, ***only the following portions should be admitted:***

Page 1

Page 2, lines 1-13

Page 6, line 16 through page 7, line 1, first two words ("from storage.")

Empire District Gas Company filed its case in June 2009 with massive, and unexplained, changes to its transportation tariff. An existing tariff is presumed to be just and reasonable. The burden of proof is on Empire to support the changes it proposes by competent and substantial evidence. That evidence is required to be presented by the Company in its direct testimony, under 4 CSR 240-2.130(7)(A). Empire has failed to do so, and now brazenly seeks to present its direct case on transportation changes through so-called "rebuttal" testimony. Neither the Commission's rules, nor fundamental fairness, permit this.

If there were problems in Empire's operations that it believed were caused or exacerbated by transportation customers or gas marketers, Empire had the burden of identifying and explaining those problems, in its direct testimony, in support of its proposed tariff changes in this case. Having failed to do so, its blatant effort to submit its direct case to the Commission as "rebuttal" must be rejected by the Commission.

With surrebuttal testimony due in this case on December 29, hearings beginning on January 7, and the Christmas holidays and New Year's intervening,

there is no time for adequate discovery or analysis of Empire's late-filed direct testimony by other parties to this case. Had Empire filed its direct case on transportation issues in June, this would not be a concern. The direct testimony filed by Constellation on November 3 should have been able to address all of Empire's testimony, cost studies and statistical analyses supporting its proposed, extensive changes to its transportation tariffs. Constellation should not be expected or required to rebut Empire's direct case, camouflaged as "rebuttal," in its surrebuttal testimony.

WHEREFORE, for the reasons explained fully above, Constellation NewEnergy-Gas Division respectfully moves the Public Service Commission of Missouri to strike the portions of the "Rebuttal Testimony" of Empire witness Scott Keith identified above, and to strike the "Rebuttal Testimony" of Empire witness Edwin Overcast in its entirety.

Respectfully submitted,

/s/ William D. Steinmeier

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been served electronically on the Office of Public Counsel at opcservice@ded.mo.gov, on the General Counsel's office at gencounsel@psc.mo.gov, and on all counsel of record on this 18th day of December 2009.

/s/ William D. Steinmeier

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