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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 14th
day of April, 1982.

CASE NO. ER-82-39

In the matter of Missouri Public Service
Company of Kansas City, Missouri, for
authority to file tariffs increasing rates
for electric service provided to customers
in the Missouri service area of the
Company.

CASE NO. WR-82-50

In the matter of Missouri Public Service
Company of Kansas City, Missouri, for
authority to file tariffs increasing rates
for water service provided to customers in
the Missouri service area of the Company.

ORDER CONCERNING MOTIONS

At the formal hearing of these cases between March 8 and 19, 1982, ruling was reserved on two motions: a Motion by the Staff to Reopen its Direct Case on the Clinton Feeder Line Issue, and the Staff's Motion to Strike the testimony of Company Witness Sanders on the issue of the Peabody settlement. The Commission concludes that the first motion should be granted, and the second denied.

Concerning the Motion to Reopen Staff's Direct Case on the Clinton Feeder Line issue, the Staff first raised the feeder line issue in its prefilled direct testimony and exhibits in Case No. WR-82-50. At the hearing of the issue on March 18, 1982, the Staff witness adopted his prepared direct testimony and exhibits and was cross-examined by counsel for the Company. At the conclusion of the presentation of Staff's case on the issue, counsel for the Company announced that the Company had no rebuttal testimony. The Company had prepared rebuttal testimony on the issue, and

had informally distributed such prepared rebuttal testimony to the other parties and to the Commission on or about March 16, 1982, but chose not to present the rebuttal testimony at hearing. Thereupon Staff moved to reopen its direct case on the Clinton feeder line issue in order to present three witnesses which Staff had apparently intended to present as surrebuttal witnesses. Company objected to the reopening of the record and the presentation of the additional Staff witnesses, on the grounds that the Staff was precluded from presenting direct testimony which had not been prefiled in accordance with the Second Suspension Order and Notice of Proceedings in this case, that surrebuttal testimony could not be presented where no rebuttal testimony had been presented, and that reopening the Staff's direct case would deny the Company an adequate opportunity to prepare cross-examination or rebuttal testimony based on the additional Staff direct.

The Staff Motion to Reopen its Direct Case on the Clinton feeder line issue was taken under advisement, and the additional testimony was taken, with directions to the court reporter to place the additional testimony in a separate volume of the transcript which would, in turn, not be considered by the Commission in its deliberations in this case if the Staff Motion to Reopen its Direct Case was denied. The testimony which is the subject of the Motion to Reopen is that of William E. Hills, Robert L. Harrell, and Bill L. Sankpill, and does appear in a separate transcript volume in this case (Volume No. 12). Mr. Sankpill had previously testified on the Clinton Feeder Line issue, and Mr. Harrell had testified at the local hearing in this case held in Clinton, Missouri, on February 18, 1982.

By its Second Suspension Order and Notice of Proceedings issued in each of these cases on October 1, 1981, the Commission directed the Commission Staff to file its prepared direct testimony and exhibits with the Secretary of the Commission, and to serve copies of same upon the Company, the Public Counsel and each Intervenor, on or before February 19, 1982. That Second Suspension Order further directed that all

parties to these cases should file rebuttal testimony and exhibits no less than two days prior to the hearing before the Commission of the issue addressed by that rebuttal testimony. The Second Suspension Order and Notice of Proceedings of October 1, 1981, defined "direct testimony and exhibits" and "rebuttal testimony and exhibits". That order provided, inter alia, as follows:

Each party's "direct" testimony and exhibits must include all testimony and exhibits asserting and explaining that party's proposed adjustments to the Company's book figures, as well as all testimony and exhibits asserting and supporting that party's proposed rate base, proposed rate of return, proposed rate design, and any other proposed changes in or additions to the Company's tariffs. The "direct" testimony and exhibits must also include all testimony and exhibits regarding issues concerning the quality of service being provided by the Company. Each party shall file its entire "direct" case in accordance with the deadlines established and all direct testimony and exhibits shall be prefiled. Witnesses will not be permitted to supplement the prefiled direct case at the hearing.

"Rebuttal" testimony and exhibits include testimony and exhibits which explain why a party rejects or disagrees with adjustments to book figures proposed by another party, and testimony and exhibits which explain why a party rejects or disagrees with the rate base, rate of return, rate design or any other changes in or additions to the Company's tariffs proposed by another party. "Rebuttal" testimony and exhibits also include testimony and exhibits which are responsive to the testimony and exhibits contained in any other party's direct case regarding the quality of service being provided by the Company. Rebuttal testimony and exhibits on any issue in this case must be prefiled, and shall be served on all parties not less than two (2) days before the hearing of that issue before the Commission. Witnesses will not be permitted to supplement prefiled rebuttal testimony. The Commission will not countenance any effort to present a party's entire case as "rebuttal."

Nothing herein, nor in any other order in this case, shall preclude a party from addressing, or having a reasonable opportunity to address, matters not previously disclosed and arising at the hearing. The Commission, in its discretion and for good cause shown, may waive strict application of these requirements. [Emphases added].

The Staff, by its Motion, acknowledges that the additional testimony it sought to adduce on the Clinton Feeder Line issue was, in fact, direct testimony which had not been prefiled. However, that testimony centers around the results of

some tests of fire flows, in Clinton, on March 8, 1982, in which the Company, in fact, participated. As stated in the Second Suspension Order and Notice of Proceedings of October 1, 1981, the practice of prefiling testimony is designed to give parties notice, at the earliest reasonable opportunity, of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays in the proceedings caused by allegations of unfair surprise at the hearing. The Commission concludes that the Company has had very adequate notice of the alleged inadequacy of fire flows in north Clinton. (See, for example, P.S.C. Case No. WC-78-51; the Layne-Western Company study frequently referred to throughout this case; Staff's February 19, 1982 prefiled testimony on this issue; and Fire Chief Harrell's testimony at the February 18, 1982 local hearing in Clinton). While the prefiled rebuttal testimony of Company witness Kasper on this issue was not offered at hearing, and cannot therefore be considered as to the merits of this case, equity requires the Commission to note that said rebuttal testimony (duly prefiled under the Commission's requirements in this case) did discuss, inter alia, residual pressures on the north Clinton water system under maximum or emergency flow conditions, i.e. the basic subject of the additional direct testimony sought to be introduced by the Staff. The March 8, 1982 test results were also referred to by Mr. Sankpill on cross-examination and redirect examination, without objection.

As stated in the Second Suspension Order, it is within the Commission's discretion to waive strict application of the definitions and prefiling requirements of prepared direct testimony and exhibits, for good cause shown. The potential danger to Clinton residents of allegedly inadequate water pressure for firefighting purposes is clearly good cause to waive strict technical compliance with the prefiling requirements as to this issue. Nor can the Commission conclude that the Company is prejudiced by the admission of this testimony. For these reasons, the Staff's Motion to Reopen its Direct Case on the Clinton Feeder Line issue will be

granted, and the two exhibits offered in the severed portion of the hearing on the issue (Exhibits 46 and 47) will be received in evidence.

Concerning the Staff's Motion to Strike the testimony of Mr. Sanders on the Peabody Settlement issue, the Staff asserts that Mr. Sanders' testimony (Exhibit No. 49 and cross-examination thereon) is barred by the parol evidence rule. That rule provides that an integrated, unambiguous contract may not be varied, and a new and different contract substituted, by parol evidence, in the absence of fraud, duress, mistake or mental incapacity. Commerce Trust Company v. Watts, et al., 231 S.W.2d 817 (Mo. 1950). As stated by the Supreme Court in that case, at p. 820:

The agreement of the contracting parties merges in their written instrument and (except in certain instances not appearing here) is not subject to be varied by oral testimony or extrinsic circumstances. The parol evidence rule is one of substantive law. It is not a rule of evidence. In a proper case for the application of the rule, even if the parol evidence be received without objection, it must be ignored. The writing itself becomes and is the single and final memorial of the understanding and intention of the parties.

Staff offered into evidence as Exhibit No. 50 a "Settlement and Release" entered into between Missouri Public Service Company and Peabody Coal Company on July 29, 1981, in settlement of Cause No. CV75-1785 in the Circuit Court of Jackson County (Missouri Public Service Company v. Peabody Coal Company). Exhibit No. 50 was received in evidence. Staff asserts that Exhibit No. 50 constitutes the agreement between Missouri Public Service Company and Peabody Coal Company and that Mr. Sanders' parol evidence should not be received to vary the terms of Exhibit No. 50.

The parol evidence rule does not exclude evidence which does not tend to vary, alter or contradict the terms of the written instrument in question. Kemper Mill Elevator Co. v. Hines, 239 S.W. 803, 807 (Mo. 1922); Shapiro v. Childs Co., 17 S.W.2d 677, 681 (K.C.Mo.App. 1929); Henneke v. Gasconade Power Co., 152 S.W.2d 667, 674 (K.C.Mo.App. 1941). See also Feldman v. Goldman, 164 S.W.2d 634, 638

(St.L.Mo.App. 1942). The Commission concludes that the testimony of Mr. Sanders in this case does not tend to vary, alter or contradict the terms of the "Settlement and Release" received in evidence as Exhibit No. 50, and therefore is not subject to exclusion under the parol evidence rule. For this reason, the Staff's Motion to Strike the Testimony of Company witness Sanders (Exhibit No. 49 and cross-examination thereon) will be denied. Thus, that testimony, which appears in a separate volume of the transcript of this case, (Volume No. 14) will be considered by the Commission.

It is, therefore,

ORDERED: 1. That the Motion of the Commission Staff to Reopen its Direct Case on the issue of the Clinton Feeder Line, made on March 18, 1982, be, and is hereby, granted; and that the testimony adduced subject to said Motion pending a determination on the Motion, and placed in a separate volume of the transcript of these proceedings, will be considered by the Commission in its deliberations in this case.

ORDERED: 2. That Exhibits No. 46 and 47 are received in evidence.

ORDERED: 3. That the Motion of the Commission Staff to Strike the Testimony of Company witness Sanders (Exhibit No. 49 and cross-examination thereon) on the Peabody Settlement issue, based upon the parol evidence rule be, and is hereby, denied; and Exhibit No. 49 is hereby received in evidence, and the testimony adduced subject to said Motion pending a determination on the Motion, and placed in a separate volume of the transcript of these proceedings, will be considered by the Commission in its deliberations in this case.

ORDERED: 4. That this Order shall become effective on the date hereof.

BY THE COMMISSION

Harvey G. Hubbs
Harvey G. Hubbs
Secretary

(S E A L)

McCartney, Dority and Shapleigh,
CC, Concur.

Fraas, Chm., and Musgrave,
Absent.