

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
3 TRANSCRIPT OF PROCEEDINGS
4 Prehearing Conference
5 March 29, 2002
6 Jefferson City, Missouri
7 Volume 1
8 Missouri Coalition for Fair)
9 Competition,)
10)
11 Complainant,)
12)
13 vs.) Case No. EC-2002-277
14)
15 Missouri Public Service, a)
16 Division of UtiliCorp United, Inc.)
17)
18 Respondent.)

12 and
13 Missouri Coalition for Fair)
14 Competition,)
15)
16 Complainant,)
17)
18 vs.) Case No. EC-2002-278
19)
20 St. Joseph Light & Power, a)
21 Division of UtiliCorp United, Inc.)
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23 Respondent.)

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1 P R O C E E D I N G S

2 JUDGE DIPPELL: This is Case No. EC-2002-277
3 and Case No. EC-2002-278. No. 277 is titled in the Matter
4 of Missouri Coalition for Fair Competition vs. Missouri
5 Public Service, a Division of UtiliCorp United, Inc., and
6 Case No. 278 is titled Missouri Coalition for Fair
7 Competition vs. St. Joseph Light & Power, a Division of
8 UtiliCorp United, Inc.

9 I had a call earlier from the Office of the
10 Public Counsel. Mr. Coffman called me requesting to be
11 excused, though he didn't really state what his reason for
12 not being here was, but he did indicate that Public Counsel
13 had not really planned to participate in the case. So we
14 will proceed without the Office of the Public Counsel.

15 I'd like to go ahead and ask the other parties
16 present to make their entries of appearance, and let's start
17 with you, Mr. Bates, for Staff.

18 MR. BATES: Thank you, your Honor. My name is
19 Bruce H. Bates, and I represent the Staff of the Missouri
20 Public Service Commission in this matter.

21 JUDGE DIPPELL: Thank you. Mr. Allen.

22 MR. ALLEN: Terry Allen, attorney for the
23 Complainant, the Missouri Coalition for Fair Competition.

24 JUDGE DIPPELL: And Mr. Boudreau.

25 MR. BOUDREAU: Thank you. This may be a

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1 little bit more problematic than it has been in the past,
2 but I'm entering appearance on behalf of Aquila, Inc., and
3 it is now doing business in the Missouri Public Service --
4 what was formerly the Missouri Public Service moniker, now
5 under the name of Aquila Networks - MPS, and a similar
6 change in terms of the d/b/a for the St. Joseph, the former
7 St. Joseph Light & Power area, it's Aquila Networks - L&P.

8 JUDGE DIPPELL: All right. We did receive
9 your notice of name change, Mr. Boudreau, and I'm just
10 wondering, would it make sense at this point to recaption
11 the case?

12 MR. BOUDREAU: I'm not sure that I have a
13 preference one way or the other on that. As far as I'm
14 concerned the caption can remain the same, although I don't
15 have any opposition to the caption being changed either. So
16 I will leave that to the discretion of the Commission.

17 JUDGE DIPPELL: Has that name change been
18 recognized by the Commission formally or is that in the
19 process?

20 MR. BOUDREAU: Well, let me answer this way,
21 because again it's a little bit more involved than you might
22 think. The merger which affected the name change has been
23 approved by the Commission. In fact, it didn't take place
24 until after the Order that was issued by the Commission, and
25 I apologize, I can't remember the case number, but we got an

1 Order approving the merger. The merger itself took place on
2 March 15th. So yes in that sense.

3 In accordance with that Order, the company was
4 directed to file adoption notices to reflect divisional name
5 changes. Those adoption notices have been filed. I don't
6 think they're due to become effective until April 22nd, but
7 that's just the time period for processing, I understand.

8 JUDGE DIPPELL: So at this point if discovery
9 or anything is served on either name, the company's
10 answering?

11 MR. BOUDREAU: It doesn't matter to us. If
12 discovery is served on us, it probably ought to be Aquila,
13 but on either of the divisional names, be it Missouri Public
14 Service, St. Joe Light & Power, Aquila Networks, whatever
15 the variation is, we'll consider it to be appropriate in the
16 circumstances.

17 JUDGE DIPPELL: Okay. Thank you.

18 All right, then. Let's kind of start with the
19 status of the case. Have there been any additional
20 discussions that haven't been in writing on the record?
21 Have you-all discussed settlement at all before coming here
22 today?

23 MR. ALLEN: No.

24 JUDGE DIPPELL: Then I would expect that you
25 will use this time today after we go off the record to

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1 discuss some of those issues.

2 The next thing, then, is there's a pending
3 Motion to Dismiss, and there's been several replies and
4 responses and additional responses to that. This case was
5 originally assigned to Judge Thornburg, and after his
6 leaving the agency it was reassigned to me.

7 So Judge Thornburg had ordered, set this
8 conference and said that he would give you-all a chance to
9 argue the motion if you need additional arguments on that.
10 Since that time there's been several written filings, so
11 you-all have done a pretty good job of arguing it in
12 writing, but I just had a couple of questions.

13 And the first part of the Motion to Dismiss
14 was the failure to state a claim on which relief can be
15 granted. Mr. Allen, you replied, and I just wanted to know
16 if you have any case authority or other legal authority that
17 you can cite to me for in your reply saying that it's
18 sufficient to allege a violation, not to allege the
19 specifics?

20 MR. ALLEN: Well, no, ma'am, I don't. The
21 only thing that I was trying to address was your rule. Your
22 complaint rule as I saw it was just the notice-type
23 pleading. I didn't see anything that makes the argument
24 that you're supposed to recite all these different facts,
25 and I think a lot of the facts from the pleadings are

1 matters of discovery, and that's the way I approached it.

2 I wasn't aware that you had a fact pleading.

3 It doesn't say that. I didn't brief it to that extent. I'd
4 be happy to if you desire.

5 JUDGE DIPPELL: So you would cite to the rule
6 as your --

7 MR. ALLEN: Cite to the rule and also cite to
8 the statute, because one of their major issues seems to be
9 that you have to go talk to the people beforehand, and that
10 didn't seem to be consistent with the requirements of the
11 statute. That's all argued in these Briefs.

12 And it appeared to me that even at that rate
13 that even in your complaint rule that appeared to may not
14 even be jurisdictional, but I've already argued that. So I
15 would cite you to the rule and the affiliated transaction
16 statute.

17 JUDGE DIPPELL: But you do respect the
18 Commission's authority to make rules and --

19 MR. ALLEN: Yes, ma'am, absolutely.

20 JUDGE DIPPELL: -- and the people to come
21 before the Commission to follow those rules?

22 MR. ALLEN: I would hope that I would follow
23 your rules.

24 JUDGE DIPPELL: There was also in one of your
25 replies what appeared to be allegations of additional rule

1 violations or tariff violations. At this point do you have
2 any plans to amend your Complaint?

3 MR. ALLEN: It's my thought to amend the
4 Complaint. The other thing I want to say, though, with
5 respect to some of those arguments, I think they also bear
6 substantially on the issue of control and how you define the
7 relationship between the utility, if you will, and six
8 contractors, for example up at the St. Joe Light & Power.

9 And I think that bears directly on whether
10 there's a violation of the affiliated transaction rule.
11 Plus there are some other concerns with regard to
12 promotional practices and some other things that have come
13 up that I've discussed briefly.

14 And my other thought, just very frankly, I
15 assume that in the course of discovery, if we get that far,
16 that if something would come up that would give additional
17 opportunity for amendment, that I would be permitted upon
18 application to ask for amendment at that point. I don't
19 think you're just precluded from everything because you
20 filed a pleading.

21 JUDGE DIPPELL: And Mr. Boudreau, did you want
22 to make any response to any of those comments?

23 MR. BOUDREAU: The only thing that I would
24 point out is the Commission's rule again defines what
25 control is, and I would just refer the Commission to its own

1 rule to find what control is.

2 It's hard to respond more specifically to it
3 than that. I mean, it just seems to me that the
4 complainant's got the burden of establishing the basic facts
5 that the defined terms of the complaint alleges, and it's
6 difficult and one of the problems that I've had in handling
7 this case is I really don't know what the complaints are. I
8 just -- there's a couple of advertisements attached to the
9 Complaint says this is a violation of the act, and there's
10 really no bottom line facts.

11 One of the things that's been elicited is that
12 the Complainant apparently will try to establish control,
13 and I would just suggest to the Commission that if we're
14 going to look at control, we need to take a look at how
15 that's defined in the rule. And if the amended pleading's
16 going to set forth what the facts are, then that'll give me
17 an opportunity to respond to the facts that are being
18 alleged. If there's a legitimate factual dispute, then it
19 will come to a head, but there has to be a legitimate
20 factual dispute at some point. I haven't seen it yet.

21 JUDGE DIPPELL: Mr. Bates, if you have
22 anything further that you want to add, feel free to let me
23 know. I'm going to kind of -- since this is a complaint
24 case, it's a little bit more between the two other parties,
25 but I'm not excluding you by not asking you that.

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1 MR. BATES: Thank you.

2 JUDGE DIPPELL: So Mr. Boudreau, one of your
3 other items in your Motion to Dismiss then was no subject
4 matter jurisdiction, which is more of an issue for the
5 Commission obviously because we have to have jurisdiction.

6 MR. BOUDREAU: There's no question that the
7 Commission has jurisdiction under the enactment under the
8 state enactment to administer the provisions of the HVAC
9 act, and we don't dispute that.

10 That conclusion, that's more of a conclusion
11 that comes from whether or not there's any facts that would
12 implicate the act in the first place, and I have to admit
13 it's somewhat derivative of the defenses that have already
14 been postulated in the Motion to Dismiss. If, in fact,
15 there's a legitimate factual dispute, the Commission has got
16 jurisdiction over the factual dispute.

17 I think the point is there's no, as far as I
18 can see, no legitimate factual dispute identified so far,
19 and that being the case, there would be no jurisdiction over
20 it.

21 JUDGE DIPPELL: Okay. Let's go ahead, then,
22 and talk about discovery a little bit. Mr. Allen, if this
23 case survives the Motion to Dismiss -- and I'm not planning
24 on ruling on that today. I'll make a ruling in writing. I
25 expect to do that next week depending on the Commission's

1 agenda.

2 But if your case survives the Motion to
3 Dismiss, do you have any projections on how long you think
4 discovery would take in this case?

5 MR. ALLEN: Well, I would have -- you, I know,
6 in your rules some expedited discovery mechanisms. I'd say
7 about 90 days from then, depending on the disputes that
8 might arise from some of my requests.

9 JUDGE DIPPELL: All right. And I assume also
10 if this case goes forward, Mr. Boudreau, that the company
11 might be asking for a Protective Order?

12 MR. BOUDREAU: Its possible. It just depends
13 on what's being asked for.

14 JUDGE DIPPELL: I will just reiterate that
15 there hasn't been one granted thus far. So when you get
16 into discovery, if you find that you need one --

17 MR. BOUDREAU: I do appreciate that. So far
18 it hasn't become an issue. If it becomes an issue, I'll
19 request the Commission to provide one to facilitate
20 discovery.

21 JUDGE DIPPELL: And then the Commission has
22 sort of in the last few years updated its discovery rules,
23 and there are some rules about if you have discovery
24 disputes, actions you should take before you come to the
25 Commission, and I would expect you-all to review those

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1 and --

2 MR. ALLEN: Kind of like the golden rule type
3 issues.

4 JUDGE DIPPELL: The golden rule, that's right.
5 And I would expect you-all to follow the golden rule and be
6 generally civil to one another in your discovery practices.

7 So then my final issue is a proposed
8 procedural schedule. I'd like you-all to talk today, try to
9 settle this, and look toward the future today as if this
10 case is going forward and think about what kind of
11 procedural dates you would need and have in mind.

12 And Mr. Bates, I will ask you to coordinate
13 the filing of a proposed procedural schedule, and do you
14 think that would be possible by a week from today or do you
15 need more time than that?

16 MR. BATES: I believe it should be possible,
17 although, of course, the parties will be interested in the
18 Commission's disposal of the Motions to Dismiss.

19 JUDGE DIPPELL: That's true. Perhaps I'll go
20 ahead and give you until Wednesday, April 10th, to file the
21 proposed procedural schedule, and that should give me enough
22 time to have disposed of the Motion to Dismiss.

23 MR. BATES: Your Honor, thank you, and may I
24 ask one other question? The Commission has been issuing its
25 Orders in this case on the same headings, both cases on the

1 same headings, but as I understand it the cases have not
2 actually been consolidated; is that correct?

3 JUDGE DIPPELL: That's correct. Thank you for
4 bringing that up. I meant to mention that before we even
5 began. These cases have not been consolidated at this
6 point. I guess they really asked to be consolidated. They
7 are very similar and they deal with the same company.

8 I think Judge Thornburg's opinion was to keep
9 them separate, and as it is right now we'll have separate
10 transcripts for, like, this prehearing to go in each case
11 although we're hearing one prehearing on that.

12 I don't know procedurally if the Orders will
13 continue to come out with one caption or not. So I suppose
14 it will depend, but right now the cases are separate.

15 MR. BATES: Would you prefer, though, that the
16 procedural schedules be the same for both cases and that
17 they be tried together?

18 JUDGE DIPPELL: It appears that that would be
19 the easiest way to handle it, unless when you get into the
20 course of discovery, different issues, or if you find that
21 you could settle one and not the other.

22 So for right now, let's keep them going on the
23 same track. If when you get into discovery you find that
24 you need to actually separate them, it's not practical to
25 keep them together, we can do that, and we can always modify

1 our procedural schedule if we need to for that to make
2 separate hearing dates or whatever.

3 So are there any other issues that you needed
4 to bring to me today or any other motions that I haven't
5 talked about?

6 MR. BOUDREAU: I don't believe so.

7 JUDGE DIPPELL: All right, then. That will
8 conclude the on-the-record portion of the prehearing
9 conference and I will leave you-all to your discussions. I
10 should be upstairs most of the day if you have questions for
11 me.

12 We can go ahead and go off the record.

13 WHEREUPON, the recorded portion of the

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