

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Prehearing Conference

March 23, 2001
Jefferson City, Missouri
Volume 2

ZOLTEK CORPORATION,)
)
 Complainant,)
)
 vs.) Case No.
) EC-2001-345
UNION ELECTRIC COMPANY, doing))
Business as AmerenUE,)
)
 Respondent.)

KEVIN A. THOMPSON, Presiding,
DEPUTY CHIEF REGULATORY JUDGE.

REPORTED BY:

MELINDA ADOLPHSON, CSR
ASSOCIATED COURT REPORTERS, INC.

ASSOCIATED COURT REPORTERS, INC.
(573) 636-7551 JEFFERSON CITY, MO 65102
(573)442-3600 COLUMBIA, MO 65201

1 APPEARANCES:

2 BRIAN H. MAY, Attorney at Law
Kodner, Watkins, Muchnick & Dunne, L.C.
3 168 N. Meramec Avenue, Suite 200
St. Louis (Clayton), MO 63105-3758
4 314-727-9111

5 AND

6 TERRY C. ALLEN, Attorney at Law
Allen, Holden & McIntosh Law Offices, L.L.C.
7 102 East High Street, Suite 200
P.O. Box 1497
8 Jefferson City, MO 65102
573-636-9667

9

FOR: Zoltek Corporation.

10

11 JAMES J. COOK, Attorney at Law
1901 Chouteau Avenue
12 P.O. Box 66149
St. Louis, MO 63166
13 314-554-2237

14 FOR: Union Electric Company.

15

LERA L. SHEMWELL, Assistant General Counsel
16 Governor Office Building
P.O. Box 360
17 Jefferson City, MO 65102
573-751-3234

18

FOR: Staff of the Missouri Public Service
19 Commission.

20

M. RUTH O'NEILL, Assistant Public Counsel
21 Governor Office Building
P.O. Box 7800
22 Jefferson City, MO 65102
573-751-3234

23

FOR: Office of the Public Counsel and the
24 Public.

25

ASSOCIATED COURT REPORTERS, INC.
(573) 636-7551 JEFFERSON CITY, MO 65102
(573)442-3600 COLUMBIA, MO 65201

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

JUDGE THOMPSON: Good morning. My name is Kevin Thompson. I'm the Regulatory Law Judge assigned to preside over this matter, which is Zoltek Corporation, Complainant versus AmerenUE, formerly Union Electric Company. This is Case No. EC-2001-345.

Let's go ahead and take oral entries of appearance, please, beginning with Complainant.

MR. ALLEN: Terry Allen, Allen, Holden and McIntosh Law Offices, L.L.C., Jefferson City, Missouri. I supplied the court reporter with my card with the full information representing co-counsel with Mr. May, who will enter his appearance on behalf of Zoltek.

JUDGE THOMPSON: Thank you, Mr. Allen.

Mr. May?

MR. MAY: Good morning, Judge. Brian May, M-a-y, from Kodner, Watkins in St. Louis on behalf of Zoltek Corporation. I as well supplied a card to the reporter with the address, phone number, what have you.

JUDGE THOMPSON: Thank you.

Respondent, Mr. Cook?

MR. COOK: James J. Cook, Post Office Box,

1 66149, St. Louis, Missouri 63166, appearing on
2 behalf of Union Electric Company/AmerenUE.

3 JUDGE THOMPSON: Thank you.

4 Ms. O'Neill?

5 MS. O'NEILL: Ruth O'Neill, Office of the
6 Public Counsel, P.O. Box 7800, Jefferson City,
7 Missouri 65102.

8 JUDGE THOMPSON: Thank you.

9 Ms. Shemwell?

10 MS. SHEMWELL: Good morning. Lera
11 Shemwell, representing the Staff of the Missouri
12 Public Service Commission, Post Office Box 360,
13 Jefferson City, Missouri.

14 JUDGE THOMPSON: Thank you very much.

15 This case is in a somewhat unusual posture
16 for a complaint case. This is our second
17 prehearing conference. And I believe the business
18 before the parties today is to finalize a proposed
19 procedural schedule for the remainder of the case;
20 is that correct?

21 MS. O'NEILL: That's my understanding.

22 MS. SHEMWELL: A procedural schedule was
23 to be filed on the 30th, I believe, your Honor?

24 MR. ALLEN: That's correct.

25 JUDGE THOMPSON: I believe that's true.

ASSOCIATED COURT REPORTERS, INC.
(573) 636-7551 JEFFERSON CITY, MO 65102
(573)442-3600 COLUMBIA, MO 65201

1 MR. ALLEN: I thought the first issue was
2 the preliminary list of issues and then the
3 procedural schedule.

4 JUDGE THOMPSON: Okay.

5 MR. ALLEN: However you want to proceed,
6 but that's my understanding.

7 JUDGE THOMPSON: I see that. Thank you.

8 Petitioners' attorneys do not generally
9 practice before the Public Service Commission, so
10 let me just go through a little basic procedural
11 outline so you will understand what's going on and
12 what we do and how we try to do it.

13 In our contested cases, we basically seek
14 a proposed procedural schedule from the parties
15 early on, and this will set out days for important
16 dates for important procedural events up to and
17 including the evidentiary hearing. Our testimony
18 is generally prefiled, so it's like using a
19 deposition in civil court. We have typically three
20 rounds. We'll have direct, which is testimony by
21 whoever has the affirmative of the question and
22 support of their point of view.

23 Then we have rebuttal, which is testimony
24 on behalf of whoever is opposing the party with the
25 affirmative in support of their point of view. And

1 then we have surrebuttal, which is essentially
2 responsive testimony. Rebuttal testimony in a
3 civil sense again from whoever has the
4 affirmative. There maybe also cross or rebuttal
5 and the like.

6 We also ask for a list of issues, a list
7 of contested issues to be filed jointly by all the
8 parties. And this is used primarily to brief the
9 Commissioners on what they need to decide. In the
10 past we used to have something called a hearing
11 memorandum that was prepared by the Staff, again
12 from input from all the parties that would include
13 the issues, it would include the witness list, it
14 would include the order of cross.

15 Now, those things are done differently.
16 We ask the parties to give us the issues list, we
17 ask the parties then to give us position statements
18 with respect to the issues, and we ask that you
19 give us those electronically, which will allow me
20 to put together the hearing memorandum and use it
21 to brief the Commissioners. So the Commissioners
22 will come into the hearing knowing what they are
23 going to decide, knowing what the positions of the
24 parties are.

25 We also ask you to give us a list of all

ASSOCIATED COURT REPORTERS, INC.
(573) 636-7551 JEFFERSON CITY, MO 65102
(573)442-3600 COLUMBIA, MO 65201

1 your witnesses, the order in which they are going
2 to appear and to agree among yourselves what the
3 order of cross-examination is going to be, because
4 we always have more than two parties, so it's never
5 really apparent what the order of cross-examination
6 is going to be. Okay.

7 Would you say that's a fair summary,
8 Mr. Cook, of how we do it?

9 MR. COOK: I believe it is, yes, sir.

10 JUDGE THOMPSON: Okay. So those are the
11 dates that we want for our proposed procedural
12 schedule. And I'm happy to see that you're
13 addressing issues early. Often in our cases the
14 parties wait until after all of the testimony has
15 been filed, and then they decide what the issues
16 are. Personally, I would think it would be helpful
17 to know what the issues are before I go about
18 getting my testimony, but whatever order you like
19 is okay with me.

20 After we conclude the recorded portion, I
21 will go up and get you a printout of the ALJ
22 calendar and bring it down to you. That will save
23 you tripping up to the ninth floor to examine our
24 hearing calendar. You can see when the rooms are
25 available for the hearing.

ASSOCIATED COURT REPORTERS, INC.
(573) 636-7551 JEFFERSON CITY, MO 65102
(573)442-3600 COLUMBIA, MO 65201

1 The other thing we hope you will do today
2 is talk settlement. That is why we always require
3 that prehearing conferences at the Commission be
4 done face to face even though this imposes at least
5 a two-hour journey on many of the participants, if
6 not longer, to bring you together face to face in a
7 room which is available to you until 5:00 p.m.
8 Hopefully you can discuss the issues that are
9 dividing you and resolve them, as many of them as
10 possible without the need for further litigation.
11 So I hope you will address that goal today as
12 well.

13 Do the parties have anything at this time
14 to bring to my attention?

15 Sir?

16 MR. COOK: If I can, just so the record is
17 clear, on the issues point, I think the document
18 that we will probably be filing will also make this
19 clear, but just so you understand that, I believe
20 it's agreeable that this is a preliminary list of
21 issues that we're putting together now which will
22 give the parties a better notion of the kind of
23 testimony that's going to be put in, better notion
24 of the amount of the testimony and the timing
25 required.

ASSOCIATED COURT REPORTERS, INC.
(573) 636-7551 JEFFERSON CITY, MO 65102
(573)442-3600 COLUMBIA, MO 65201

1 And that we anticipate, at least Company
2 anticipates, that after the testimony is actually
3 in, and all the testimony is in, we will then
4 re-examine the list of issues and may modify them
5 to a certain extent, perhaps whittle them down,
6 maybe not. Still, at least in my mind, that the
7 anticipation is that there will be a final list of
8 issues, which will be not necessarily the same
9 exactly as this one.

10 JUDGE THOMPSON: Okay. Very good.

11 MR. ALLEN: And, Judge, the other thing
12 along the same lines, this came up originally and
13 it still kind of comes up now in part when we talk
14 about the list of issues, it's kind of in my mind
15 that the purpose of the preliminary list of issues
16 and the ultimate list of issues also is to avoid
17 having to amend the complaint. There is still a
18 question about whether it should be amended because
19 of the form it was submitted in. And there are
20 some questions that had arisen about that, that
21 will come up, I think, in the course of discussion
22 today relative to, you know, are you still
23 thinking, Complainant, that the PSC can determine
24 damages? We're prepared to address that now unless
25 someone feels that we need to amend this complaint

1 doing this list of issues satisfactory to pinpoint
2 what we're all talking about.

3 JUDGE THOMPSON: Right. You raise a very,
4 very good point, and I think that's perhaps worthy
5 of some discussion. This case is a little bit
6 unusual in Commission practice, because we have
7 pleadings, we have a complaint, we have a response
8 and that's very similar to civil practice. And as
9 you know, the purpose of those pleadings in civil
10 practice is to frame the issues. In many, if not
11 most Commission cases, we don't really have initial
12 pleadings. We don't have pleadings back and forth
13 framing the issues, which is one reason why we
14 require an issues list.

15 The purpose of the issues list, as I
16 indicated, is to help the Commissioners understand
17 what they are here to decide. We don't consider it
18 to be in the nature of an issue-framing pleading,
19 however. There have been cases where the
20 Commission has resolved the case without addressing
21 all of the issues identified by the parties. Some
22 of those are on appeal now, and I guess we'll find
23 out whether we have to address all the issues
24 identified by the parties or not.

25 But sometimes the parties, at least in my

1 opinion, have added issues that they would like to
2 see resolved, questions they'd like an answer to,
3 but that are not necessarily required to resolve
4 the case. Okay. So this whole thing with the
5 issues list is a new thing, a new development in
6 Commission practice. Certainly not older than two
7 years and I don't think we've seen quite what all
8 of the ramifications are. But I just want to make
9 it clear to you the Commission views it as a
10 helpful memorandum to the Commissioners to help
11 them understand what they are deciding. In this
12 complaint case, I think the issues are actually
13 framed by the pleadings. The complaint, the
14 response of pleading to the complaint.

15 So with respect to your question about
16 amending your complaint, I think you would want to
17 have your complaint expressing everything you want
18 decided, regardless of what the issues list may or
19 may not say. The issues list is not an amendment
20 to the complaint, and I do not see it as becoming
21 part of the complaint.

22 MR. ALLEN: And I would assume in light of
23 those comments which I more or less anticipated
24 what you might say that as part of the procedural
25 schedule if you need to amend the complaint, that

1 can also be part of that schedule.

2 JUDGE THOMPSON: Well, you know, any time
3 before -- our rule, as I understand it is, any time
4 before testimony has been filed, you're free to
5 amend your complaint. Once testimony is filed, you
6 need permission from the Commission to amend your
7 complaint, which may or may not be contested. If
8 it's not contested, I can't imagine why the
9 Commission would refuse it unless it's done very
10 late or, you know, who knows. There's always --
11 who knows what can happen.

12 But the point is if it's not opposed, it
13 would, generally, I think, be granted. If it is
14 opposed, then the Commission would decide.

15 MR. ALLEN: And I guess why I'm being a
16 little bit more curious about it, if you will, is
17 Brother Cook has raised by motion, you know, a
18 question about the complaint, and the Motion to
19 Dismiss, and I don't know if that's going to be
20 dealt with. Except I understood from what he said
21 last time we were here was, Well, maybe the list of
22 issues will kind of guide us and control us if it's
23 not amended.

24 So I guess what I'm asking in some measure
25 is, you know, do you-all deal with this Motion to

1 Dismiss at any point or do you just leave it be and
2 we go on about our business?

3 JUDGE THOMPSON: Is your Motion to Dismiss
4 contained in your responsive pleading?

5 MR. COOK: Yes.

6 JUDGE THOMPSON: Because I don't see
7 anything on the docket denominated as Motion to
8 Dismiss.

9 MR. ALLEN: Right. It's in the pleading
10 or do you take it with the case?

11 JUDGE THOMPSON: No. I think we'll
12 probably take it up. Have you responded to it?

13 MR. ALLEN: No.

14 JUDGE THOMPSON: Okay.

15 MR. ALLEN: We don't agree with it, but we
16 have --

17 JUDGE THOMPSON: I assumed you didn't
18 agree with it.

19 MR. ALLEN: No. From your practice or
20 from your rules, and I apologize for being ignorant
21 on this, I know there's a certain period of time in
22 which you're supposed to respond to those things,
23 but would you prefer a formal response, and, if so,
24 we would certainly ask to be able to respond to
25 it?

1 JUDGE THOMPSON: Well, I would suggest
2 this: Our rule provides a minimum of ten days.
3 You get ten days to respond to any filing. The
4 Commission can shorten that. There is no maximum
5 have to respond within X time. But if it goes past
6 ten days, and you haven't responded, then the
7 Commission may just go ahead and act on it assuming
8 you're not going to respond.

9 Since this has been sitting since January,
10 what, 16, why don't you include in your procedural
11 schedule dates for filing, suggestions in support
12 or in opposition to the Motion to Dismiss, because
13 certainly if that disposes of the case, saves
14 everybody time and trouble, because you're not
15 going to be coming back.

16 MR. ALLEN: The motion almost appears
17 procedural in nature as far as the substance of
18 what he's arguing. So what you end up with is just
19 bluntly, and maybe I'm getting the suggestions in
20 verbal as opposed to written before the Regulatory
21 Law Judge, but it seemed to me like if that's
22 favorably ruled on and not taken with the case, we
23 just clean it up and refile it, and we're back here
24 doing the same thing. That's my view of it, so
25 we're not trying to create extra problems. We're

1 just trying to get to the nut of the thing.

2 MR. COOK: For clarification.

3 JUDGE THOMPSON: Yes, sir.

4 MR. COOK: The pleading was entitled
5 Answer and Objections of Union Electric to the
6 complaint, and the pleading starts with what I call
7 preliminary objections, so it's not technically a
8 Motion to Dismiss, as it is an objection to the
9 fact that the -- I believe it is an objection to
10 the format of the complaint of being an unworkable
11 document for the Commission or the respondent to
12 deal with.

13 JUDGE THOMPSON: And that's how I read
14 it.

15 MR. COOK: Yes. And then I think we read
16 the Commission's order to come up with a list of
17 issues is sort of the Commission's answer to that.

18 MR. ALLEN: That's the way I read it, too,
19 and that's what I'm trying to resolve up here.

20 JUDGE THOMPSON: Of course the order
21 directing the filing of issues list is standard.
22 We always ask for one at some point.

23 MR. COOK: But this time it was asked for
24 up front specifically, which was sort of addressing
25 my concern on how can I address these complaints

1 when they are all over the board. And so the
2 Commission said, Well, let's have an issues list
3 first. Now, my concern, frankly, from a procedural
4 point of view, I guess, and maybe I need to make it
5 more of a Motion to Dismiss or something, is that
6 assuming we go by these list of issues, and the
7 complainant may then feel that, well, paragraphs 42
8 through 62 were still not addressed from my
9 complaint, even though they were kind of in the
10 issues and maybe not so that there would be plenty
11 of opportunity on appeal, even though all the
12 parties thought they were really addressing
13 everything in the complaint it wanted because of
14 the agreed upon list of issues.

15 When they compare that again then to the
16 original pleading, then we've got a mismatch that
17 would leave us all open for further litigation,
18 which obviously you don't want.

19 JUDGE THOMPSON: I understand your
20 concern, and I think that's a very valid one.

21 I can't tell you to revise your pleading
22 or amend your pleading, but it sounds to me like
23 that might be a good idea at this point. Like I
24 said, I think anything you want the Commission to
25 determine needs to be in the pleadings, needs to be

1 framed in the pleadings. The issues list is, as I
2 say, mostly a memorandum to assist the
3 Commissioners. To the extent it helps the parties
4 determine what they are here fighting about, that's
5 good, too, but we do not take it as a pleading that
6 obligates us to answer all these questions.

7 And as I pointed out, it's been my
8 experience the parties will often throw in
9 additional questions, Gee, we would like to know
10 the answer to this or what's the ramification three
11 years out to that, so let's throw those things in.
12 And if they are not necessarily resolving the case,
13 the Commission won't reach them, won't settle them,
14 but that's up on appeal now, so who knows what the
15 answer might be. They might say, you know, if
16 you're going to ask for an issues list, then you're
17 stuck with it, right, we need to solve all those
18 issues.

19 But I would certainly suggest that if you
20 feel your pleading needs -- your complaint needs to
21 be amended, that you do so. And then that, of
22 course, will permit Respondent to file a new
23 answer.

24 MR. ALLEN: So you don't anticipate you
25 ordering us to amend it? And I guess that's really

1 what I'm asking, if the objection is to the
2 format. I mean, if you can read the petition and
3 understand it from the standpoint of safety,
4 reliability and adequacy with specific statements
5 that, you know, we're really not asking for the
6 Commission to determine negligence and damages and
7 all this stuff that's raised in a civil case. And
8 it's --

9 JUDGE THOMPSON: And as I understand it,
10 you're here to exhaust.

11 MR. ALLEN: That's right.

12 JUDGE THOMPSON: You're here to exhaust.
13 You started out in civil court, right, and civil
14 court said, Well, you've got to go to the PSC
15 first, so here you are touching base.

16 MR. ALLEN: For certain issues, yes.

17 JUDGE THOMPSON: For certain issues.

18 MR. COOK: If I may interject, and I can
19 do this somewhat freely since the actual author of
20 the complaint is not in this room, it was clearly a
21 cut and paste rehash or reinstatement, a copy of
22 the very lengthy civil filing, which included
23 all -- and still includes all sorts of things that
24 are inappropriate to this proceeding, not least of
25 which is a request for damages. So I think that's

1 what concerns us. I don't know that we -- frankly,
2 I'm not sure that a Motion to Dismiss would have
3 been appropriate except for the fact that, I guess,
4 to the extent that it did not state a clear request
5 for relief. Hidden in there somewhere is that
6 which this Commission is appropriately being asked
7 to determine.

8 My concern is that when the Commission
9 does determine that which it is authorized to
10 determine, when that's done, that the Complainant
11 can say, Well, all sorts of stuff here that they
12 didn't address in my complaint, and the Company
13 didn't address it in their responses to testimony,
14 and so we're going to take this up on appeal.

15 JUDGE THOMPSON: Well, you know, the
16 cleaner it is, the better it is for everybody.
17 Because nobody wants -- whoever gets the outcome
18 they want here, is going to want to keep that
19 outcome later.

20 MR. ALLEN: Well, we can then consider it
21 in terms of the procedural schedule down the line
22 and talk about it a little bit more, Judge.

23 JUDGE THOMPSON: Sure.

24 MR. ALLEN: I think we can resolve that.
25 I was kind of interested in where we were on the

1 front end of this business.

2 JUDGE THOMPSON: Well, let me repeat what
3 I said when I first got here, which is, this case
4 is in a somewhat unusual procedural stance.

5 MR. ALLEN: Thank you.

6 JUDGE THOMPSON: I did not read your
7 objections as a motion, and therefore they haven't
8 been ruled on. If you want to make a motion, then
9 obviously you're free to do so, and that will get
10 ruled on.

11 MR. COOK: I think it's possible that we
12 can --

13 MR. ALLEN: I think we can work it out.

14 MR. COOK: We can work out an agreed upon
15 procedure to handle this matter.

16 MR. ALLEN: I think we can.

17 JUDGE THOMPSON: Well, it sounds to me
18 like you guys have your work cut out for you
19 today. Thank you very much. It's nice to see
20 you-all.

21 Hearing nothing further, that will
22 conclude the recorded portion of the prehearing
23 conference. The room is yours till 5:00. You've
24 got a lot to do.

25