

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 15th day of
February, 2007.

Cathy J. Orlor,)	
)	
Complainant,)	
)	
v.)	
)	
Folsom Ridge, LLC, Owning and Controlling)	
the Big Island Homeowners Association,)	
)	
Respondent.)	

Case No. WC-2006-0082, et al.

ORDER DENYING MOTION FOR RECONSIDERATION

Issue Date: February 15, 2007

Effective Date: February 15, 2007

Background

On February 13, 2007, Cathy Orlor, one of several individual complainants in this matter, filed a motion seeking urgent reconsideration of the Commission's February 8, 2007 "Order Denying Motion to Amend Procedural Schedule to Permit Live Testimony But Allowing Additional Time to File Written Direct Testimony." Ms. Orlor asserts that because of geographical and logistical limitations of individuals she expects to utilize as witnesses, and because of the hostile nature of some of those witnesses due to their opposition to PSC regulation, she is unable to pre-file direct testimony from these individuals within the deadline set by the Commission, i.e. February 13, 2007. Ms. Orlor further alleges that the

Commission's order requiring all parties to prefile direct testimony is impractical and denies her due process of law.

Commission Rule 4 CSR 240-2.160 addressing motions for reconsideration or rehearing provides:

(1) Applications for rehearing may be filed pursuant to statute.

(2) Motions for reconsideration of procedural and interlocutory orders may be filed within ten (10) days of the date the order is issued, unless otherwise ordered by the commission. Motions for reconsideration shall set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable.

(3) The filing of a motion for reconsideration shall not excuse any party from complying with any order of the commission, nor operate in any manner to stay or postpone the enforcement of any order, unless otherwise ordered by the commission.

(4) The commission may correct its own orders *nunc pro tunc* as provided by law.

On February 13, the Commission directed Ms. Orlor to clarify her motion to provide for the Commission the following information:

- a. A list of all prospective witnesses, names and addresses, for which Ms. Orlor believes she will be unable to obtain direct testimony to prefile.
- b. A statement for each named prospective witness explaining why no other means is available to obtain that witness's testimony, i.e. why a list of questions could not be tendered to this witness via mail, facsimile, e-mail, or by telephonic contact, and why that witness could not respond and verify that testimony by affidavit.

- c. A separate list of the prospective witnesses identifying which ones have actually refused to provide direct testimony so as to be classified as being hostile witnesses.

Discussion

On February 14, 2007, Ms. Orler filed the response as directed by the Commission, and identified the potential witnesses from which she believes she would be unfairly prohibited from obtaining testimony. In the first part of Ms. Orler's response, she lists a total of twenty-one persons for whom she claims she will not be able to obtain direct testimony because the filing deadline has now passed. The reasons offered for her inability to obtain this testimony; however, are inadequate to justify reconsideration of the Commission's order requiring prefiled direct testimony.

Ms. Orler's complaint was filed on August 18, 2005 and was originally scheduled for hearing in July of 2006. The hearing was stayed, however, while the Commission evaluated Case Number WA-2006-0480, a case involving the transfer of assets of Respondents water and sewer operations. On December 26, 2006, Ms. Orler, along with a number of other complainants, requested that the stay be lifted, and the Commission lifted the stay by order on January 11, 2007. Ultimately, the procedural schedule was set on January 26, 2007. That procedural schedule required prefiled direct testimony setting the deadline for that testimony to be filed on February 13, 2007.

Ms. Orler offers no reason why testimony was not obtained from fifteen of the twenty-one individuals listed except to say that the requirement for prefiled testimony was a departure from the original procedural schedule for the hearing set in July 2006, and the deadline has passed to obtain that testimony. One of these listed individuals, Mr. Mike

McDuffey, has provided direct testimony in this matter and will be subject to cross examination by Ms. Orlor at hearing.

Ms. Orlor has demonstrated that she is fully capable of filing prefiled testimony and she offers no explanation, other than the deadline has passed, for why these individuals could not provide testimony to Ms. Orlor in person, or by electronic, telephonic, or any other means prior to the deadline for filing. To adopt Ms. Orlor's position would be the equivalent of adopting a policy advocating willful neglect on the part of the parties in this matter, encouraging the parties to allow deadlines to run and then claim that because the deadline had passed they were unable to comply.

In the second part of Ms. Orlor's response she attempts to explain why she did not file direct testimony from six individuals on her list, plus one additional person (Rick Rusaw). Ms. Orlor claims that these individuals resisted providing responses to data requests or would not respond to her attempts to contact them by phone. Ms. Orlor offers no explanation as to why she could not depose these potential witnesses, to compel them to provide deposition testimony that could be used at hearing. Moreover, Rick Rusaw has provided directed testimony in this matter and will be subject to cross examination by Ms. Orlor at hearing.

Finally, in the third part of Ms. Orlor's response, she identifies seven potential witnesses from her list, plus two additional persons, that she labels as being hostile. She begins with six prospective Missouri Department of Natural Resources ("DNR") witnesses and states that Shelly Woods, Assistant Attorney General, informed Ms. Orlor that the DNR would not be providing prefiled testimony in this matter, thus, in Ms. Orlor's view, making these individuals hostile witnesses.

The DNR is not a party to this action and is not required to file testimony in this case. Ms. Orler was free to depose any of these six individuals prior to hearing and use that deposition testimony at hearing, an option she apparently has not exercised. Moreover, one of the potential DNR witnesses she identified, Mr. John D. MacEachen, provided deposition testimony for Respondents on January 30, 2007. Ms. Orler was notified of this deposition and could have attended and asked Mr. MacEachen questions. Ms. Orler declined to attend this deposition.

The final three prospective witnesses listed by Ms. Orler are Gail Snyder, Don Bracken, and Jim Grayam. Ms. Orler states that that these individuals stated to her that they would not be available to testify on any date. Again, Ms. Orler offers no explanation as to why she could not have deposed these potential witnesses. Additionally, Ms. Gail Snyder has provided direct testimony in this case and will be subject to cross examination by Ms. Orler at hearing.

Decision

The Commission will deny Ms. Orler's motion. The Commission will not alter its order requiring prefiled direct testimony in this matter. It is Ms. Orler's responsibility to secure the testimony of her witnesses and file it with the Commission. Ms. Orler has had ample opportunity to develop her case since its original filing and it is no fault of the Commission if she has declined to explore all aspects of prosecuting her action. The Commission finds that there was no limitation as to Ms. Orler's ability to obtain the testimony from any of the potential witnesses she has identified, and, accordingly, there is no due process violation when it is the party proponent of those witnesses who fails to secure that testimony.

The deadline has passed for the filing of direct testimony. However, this does not preclude Ms. Orlor from obtaining rebuttal or surrebuttal testimony from any these individuals, if such testimony is filed within the established deadlines.

IT IS ORDERED THAT:

1. Cathy J. Orlor's Motion for Reconsideration of the Commission's February 8, 2007, "Order Denying Motion to Amend Procedural Schedule to Permit Live Testimony But Allowing Additional Time to File Written Direct Testimony," is denied.
2. This order shall become effective on February 15, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray and Appling, CC., concur
Gaw, C., dissents
Clayton, C., absent

Stearley, Regulatory Law Judge