

SMITH LEWIS, LLP
ATTORNEYS AT LAW

RAYMOND C. LEWIS, JR.
BRUCE H. BECKETT
WILLIAM JAY POWELL
JOHN L. ROARK
COLLY J. DURLEY
JAMES B. LOWERY

P.O. BOX 918
COLUMBIA, MISSOURI 65205-0918

...
CITY CENTRE
111 SOUTH NINTH STREET, SUITE 200
COLUMBIA, MISSOURI 65201-4815
(573) 443-3141 • Fax (573) 442-6686

MICHAEL R. TRIPP
PHEBE LA MAR
DAVID M. KURTZ

NURSE CONSULTANT
ANNETTE THORNHILL, RN, PhD

PARALEGALS
KELLY K. BRUCE, CLA
VICKI R. SCHUMACHER

ROBERT C. SMITH
Of Counsel

September 24, 2002

Via Fed/Ex (Telephone 573-751-3234)

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, MO 65101

FILED
SEP 25 2002
Missouri Public
Service Commission

RE: Application for Permission to Construct a New 345 kV
Transmission Line to be known as the Callaway-Franks;
MPSC Case No. EO2002-351

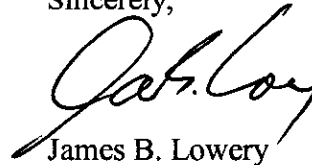
Dear Mr. Roberts:

Enclosed for filing please find an original and eight copies of Union Electric Company's Suggestions in Opposition to Intervenor's Motion for Rehearing, plus one additional copy. Please acknowledge receipt of this filing by stamping the additional copy of the enclosed Suggestions and returning it to me in the enclosed self-addressed envelope.

Copies of these Suggestions have been served upon counsel for all parties of record.

Thank you for your assistance.

Sincerely,



James B. Lowery

smp
Enclosure
c w/enc:

Bruce H. Bates, Missouri Public Service Commission
John B. Coffman, Acting Public Counsel
Joseph H. Raybuck
James B. Deutsch

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED

SEP 25 2002

Missouri Public
Service Commission

Application of Union Electric Company)
for Permission and Authority to Construct,)
Operate, Own and Maintain a 345 kilovolt)
Transmission Line in Maries Osage, and)
Pulaski Counties, Missouri ("Callaway-Franks)
Line"))

Case No. EO-2002-351

UNION ELECTRIC COMPANY'S SUGGESTIONS IN OPPOSITION TO
INTERVENORS' MOTION FOR REHEARING

COMES NOW Applicant, Union Electric Company ("UE"), and files these Suggestions
in Opposition to Intervenor's Motion For Rehearing.

RELEVANT FACTS AND PROCEDURAL HISTORY

By its Order Denying Motion to Dismiss Application adopted September 10, 2002
("Commission's Order"), the Commission previously denied Intervenor's Motion to Dismiss
Application ("Motion to Dismiss"). In its Order, the Commission agreed with the arguments
advanced by UE in UE's Suggestions in Opposition to Motion to Dismiss Application ("UE's
Prior Suggestions"). Commission's Order at 3. The Commission also found that UE had
substantially complied with applicable Commission rules, and in any event, that the Intervenor
had failed to show any prejudice. Id. The Commission also noted the lack of any discovery
disputes between the parties, as discussed further below. Id.

In their Motion for Rehearing, Intervenor, while abandoning certain bases contained in
their original Motion to Dismiss, continue to assert that UE failed to adequately comply with 4
CSR 240-2.060(4)(B). With limited exceptions, Intervenor's current arguments are substantially
the same as those previously rejected by the Commission. Therefore, UE again respectfully

submits that Intervenor's contentions are without merit, and that their Motion for Rehearing should be denied.

ARGUMENT

1. **UE's Application includes plans and specifications meeting, and even exceeding, Commission requirements applied to similarly situated utilities.**

Intervenor's first argue that UE failed to provide plans and specifications. Motion for Rehearing ¶ 5.A. That statement is incorrect, as stated at page 3 of UE's Prior Suggestions and as evidenced by paragraphs 6 and 7 of the Application.

Intervenor's next contend that UE is being given "preferential treatment." Motion for Rehearing ¶ 5.B. While this allegation is new, it too is incorrect. As stated at page 4 of UE's Prior Suggestions, and as confirmed by Staff's Statement in Opposition to Intervenor's Motion to Dismiss Application, the detail included in UE's Application is greater, not less, than the detail required by the Commission in many cases. The Commission has not given UE any preferential treatment.

2. **Substantial compliance constitutes compliance with the Commission's rules.**

As noted above, the Commission found that UE's Application is in substantial compliance with the applicable rules. Without citation to any authority or support whatsoever, however, Intervenor's state that "substantial compliance" with the applicable rule is insufficient. Intervenor's misstate the law.

An agency's interpretation of its own rules is entitled to substantial weight. Willard v. Red Lobster, 926 S.W.2d 550, 553 (Mo. App. E.D. 1996). The power to make rules includes the power to determine any reasonable interpretation thereof. State ex rel. Dail v. Public Serv. Comm'n, 203 S.W.2d 491, 497 (Mo. App. K.C. 1947). Applications filed with the Commission

are to be liberally construed, and technical rules of pleading do not apply. State ex rel. Crown Coach Co. et al. v. Public Serv. Comm'n, 179 S.W.2d 123, 126 (Mo. App. K.C. 1944).

The Commission has previously required only substantial compliance with its rules. See, e.g., In Re St. Joseph Light and Power Company, 1997 WL 233068, Case No. EO-96-5 (Jan. 7, 1997) (finding that the issue in the case was whether the utility's filing was in "substantial compliance with the rules"); and In re Provisioning of Metropolitan Calling Area Service, 1999 WL 1487508, Case No. TO-99-483 (Dec. 10, 1999) (allowing late intervention by a proposed intervenor whose application for intervention was in "substantial compliance" with the Commission's rules). See also State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Serv. Comm'n, 585 S.W.2d 41, 45 (Mo. 1979), where the Supreme Court recognizes that "substantial compliance" with the applicable tariff at issue is all that is necessary. Thus, while UE believes it has fully complied with the letter and spirit of the rules at issue, it is clear that substantial compliance is sufficient.

There exists statutory authority for such interpretation as well. Section 386.610 provides as follows:

substantial compliance with the requirements of this chapter shall be sufficient to give effect to all the rules, orders, acts and regulations of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.

It is self evident that if Commission actions themselves need only be in "substantial compliance" with applicable statutes and rules, a party's actions before the Commission need only be in substantial compliance as well. Otherwise, technical factors that are immaterial to the

decision before the Commission and that do not undermine the public interest would preclude the Commission from fulfilling its mandate that substantial justice be done.

In short, UE has complied with the rules.

3. Intervenors' "waiver" argument fails.

While Intervenors earlier argued that strict, absolute compliance free from even the smallest technical defect is "mandatory, and therefore jurisdictional," Intervenors seem to concede that the Commission can grant a waiver from the requirements of its rules. Motion for Rehearing at ¶ 5.D.¹ Intervenors' Motion for Rehearing therefore does not present an issue of "jurisdiction." In any case, as discussed above, a waiver is not necessary because UE has complied with the rules.

Intervenors' "waiver" argument is an attempt to invalidate the Commission's Order on technical grounds. That attempt must fail, as evidenced by the specific provisions of both Section 386.410.2 and Section 386.610.

Section 386.410.2 specifically provides that Commission orders shall not be invalidated because of the lack of some "formality" in the procedure followed by the Commission. Thus, even if one accepts the Intervenors' assertion that a formal "application for waiver" was warranted, the Commission's Order which, as Intervenors allege, had the effect of granting a waiver, is perfectly valid. Furthermore, as set out above, Section 386.610 evidences a clear legislative intent to give the Commission broad latitude in applying its rules and in ensuring that substantial justice is done. At bottom, the Commission has the authority to call its action a

¹Waivers of Commission rules or tariff requirements are contemplated by 4 CSR 240-2.060(14).

“denial” of Intervenor’s Motion to Dismiss, or to “waive” any technical deficiency alleged with regard to UE’s Application. Regardless of the label or procedure used, the Commission has the power and authority to reasonably interpret and apply its own rules, it has done so, and its actions in so doing are proper and lawful.

4. Intervenors have shown no prejudice.

Intervenors bear the burden to prove that the Commission’s Order is unreasonable or unlawful. § 386.430, RSMo. In order to sustain that burden, Intervenor’s must demonstrate actual prejudice as a result of any alleged failure to comply with the Commission’s rules. Missouri Nat. Educ. Ass’n v. Missouri State Bd. of Mediation, 695 S.W.2d 894, 897 (Mo. banc 1985) (“[F]ailure of any agency to comply with its own rules may invalidate its actions only when prejudice results” (emphasis added)). Paragraph 5.E of Intervenor’s Motion for Rehearing is essentially a restatement of Intervenor’s prior arguments, and is nothing more than a collection of conclusory, unsupported allegations of prejudice that are not borne out by facts. Such conclusory allegations fail to discharge Intervenor’s burden.

Intervenor’s central complaint seems to be that they do not understand the proposed route, and that their lack of understanding lies in failures on the part of UE. Intervenor’s contentions are, at best, mistaken.

UE’s Application contains a description of the route, and UE has presented detailed maps and aerial photos at the public workshops, at the Commission’s Public Hearing in Linn, and at the meeting held between UE and the Intervenor’s in Linn on July 1, 2002. Furthermore, UE has responded to every Data Request propounded by any party. Intervenor’s Data Requests 2 - 4 were all directed to information regarding the route, and in response thereto, UE provided a copy

of the easements that cover land over approximately 80% of the route and a list of more than 175 property owners to be affected. More than two-thirds of the Intervenor who submitted testimony in this case made specific complaints about the location of the line on their property evidencing that many, if not most, Intervenor lack no relevant information with regard to opposing UE's Application in this proceeding. For example, Mr. McDaniel testified that the line will be "less than 50 yards from [his] house and eight feet from [his] barn." McDaniel Rebuttal Testimony, p. 2, l. 15-16. Other Intervenor's sworn testimony contains numerous similar examples not listed here. It is also noteworthy that Intervenor have not alleged that UE failed to properly respond to Data Requests relating to the route of line, have not submitted any follow-up Data Requests, and have not sought to compel further responses to any Data Requests.

In sum, Intervenor have shown no prejudice.

Intervenor's position reflects an apparent desire on the Intervenor's part to put UE and the Commission in an impossible "catch-22" situation. On the one hand, Intervenor allege they do not want the line at all, they want it to be built so it affects others but not them, or they want UE to grant individual landowner accommodations (i.e. move the line around on or near individual properties as requested by each landowner). On the other hand, however, Intervenor apparently take the position that UE must fix, by a surveyed, centerline, legal description, the precise route of the line, else Intervenor will be "prejudiced."

Intervenor cannot have it both ways. UE has provided substantial information in good faith and to the best of its ability so as to ensure that those who are able, and willing, understand the route. More information on the mathematically precise location of the route will not aid Intervenor in preparing their case. In fact, Intervenor's position undermines the public interest

because it would impede ongoing efforts between UE and landowners along the route to make reasonable adjustments in the precise route where feasible and in the public interest as a whole. The rule at issue does not require the "precise" or "exact" route. It does not require that a survey be submitted, or that a precise "legal description," be included. UE has supplied the route, answered the Data Requests, and presented information in reasonable detail at two workshops, a public hearing, and a meeting with Intervenor. UE has therefore provided all the information required by the rule, and more.

For the foregoing reasons, Intervenor's Motion for Rehearing should be denied.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys or parties of record to the above action.

- (☒) By enclosing same in envelopes addressed to each at the address as disclosed in the pleadings of record herein, with first class postage prepaid and by depositing said envelopes in a U.S. Post Office mailbox in Columbia, Missouri
- () By leaving same at the business office with a clerk, secretary, or another attorney
- () By transmitting the same by facsimile to him or her at _____m. to facsimile number _____
- () By handing same to him or her
- On this 2nd day of September, 2002.

James B. Lowery
Smith Lewis, LLP
Attorneys-at-Law
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918

SMITH LEWIS, LLP

James B. Lowery
James B. Lowery, #40703
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, MO 65205-0918
(573) 443-3141
(573) 442-6686 (Facsimile)

Joseph H. Raybuck, #31241
Associate General Counsel
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
Attorneys for Union Electric Company