

# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Eddie Shepherd,

Complainant,

v.

KCP&L Greater Missouri Operations Company,

Respondent.

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File No. EC-2011-0373

## RECOMMENDED ORDER GRANTING SUMMARY DETERMINATION AND FINAL DECISION

Issue Date: February 22, 2012

Effective Date: April 6, 2012<sup>1</sup>

The regulatory law judge recommends<sup>2</sup> that the Missouri Public Service Commission dispose of this action by:

- Granting the motion for partial summary determination<sup>3</sup> (“motion”);
- Incorporating the Commission’s earlier order of partial dismissal;<sup>4</sup> and
- Denying the complaint;

because KCP&L Greater Missouri Operations Company (“GMO”) has shown that it committed no violation of statute, tariff, or Commission order or regulation charged (“violation”) in the complaint.

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<sup>1</sup> The Commission has provided an effective date other than 30 days to allows time for (i) comments under 4 CSR 240-2.070(14)(H); (ii) a Commission decision under 4 CSR 240-2.070(14)(H); and the ordinary 30-day effective date for a Commission decision under Section 386.490.2, S.B. 48, 96<sup>th</sup> Gen. Assem., 2<sup>nd</sup> Reg. Sess.

<sup>2</sup> As authorized at Commission Regulation 4 CSR 240-2.070(14)(H).

<sup>3</sup> *KCP&L Greater Missouri Operations Company’s Motion for Summary Disposition*, filed on November 4, 2011.

<sup>4</sup> *Order Granting Dismissal in Part for Failure to State a Claim*, issued on July 13, 2011.

## **A. Background**

On May 16, 2011, Eddie Shepherd filed the complaint against KCP&L Greater Missouri Operations Company (“GMO”). The complaint sought a:

- Replacement of appliances on allegations of damage in a lightning strike (“appliance replacement”); and
- Billing adjustment on allegations of inaccurate metering (“meter accuracy”).

The Commission has authority to hear the complaint.<sup>5</sup>

The complaint alleges facts within the small complaint procedure.<sup>6</sup> That procedure includes a time limit for issuing a recommendation subject to good cause. Good cause includes a good faith request for reasonable relief.<sup>7</sup> The parties asked for a hearing date past the deadline and filed several discovery motions, dispositive motions, and requests for extensions of time. Those facts constitute good cause to extend the time limit. Therefore, the time limits are extended.

On June 16, 2011, GMO filed an answer. On June 30, 2011, Staff filed a report. On October 14, 2011 the parties filed a list of issues refining the billing period at issue to July 2010 through March 2011 (“the period”).

The answer included a motion to dismiss for failure to state a claim. Mr. Shepherd filed a response on June 23, 2011. The motion argued that Mr. Shepherd’s complaint, assuming its allegations were true, showed no violation. By order dated July 13, 2011,<sup>8</sup> the Commission ruled on GMO’s motion to dismiss. The Commission granted the motion as to

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<sup>5</sup> Section 386.390.1, RSMo 2000.

<sup>6</sup> 4 CSR 240-2.070(14).

<sup>7</sup> *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App., W.D. 1996).

<sup>8</sup> *Order Granting Dismissal in Part for Failure to State a Claim*.

appliance replacement because it describes no violation even assuming that all its allegations of fact are true. The Commission denied the motion as to metering accuracy count because, if its allegations of fact are true, they describe a violation. The Commission will incorporate that order into this decision.

On November 4, 2011, GMO filed the motion with a supporting affidavit and memorandum. On December 7, 2011, Mr. Shepherd filed a first response to the motion. On January 13, 2012, GMO filed substitute affidavits. On February 6, 2012, Mr. Shepherd filed a second response to the motion. On February 21, GMO filed a reply to the second response.

### **C. The Motion**

The Commission's regulations provide that the Commission may decide the merits of a complaint without hearing when (i) granting its motion is in the public interest, (ii) admissible evidence supports the facts determinative of a claim or defense ("material facts") and (iii) no counter-evidence raises a genuine dispute as to any material fact.<sup>9</sup> The regulation states:

The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. [<sup>10</sup>]

The material facts depend on (i) the claim or defense on which the motion stands and (ii) the burden of proof.

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<sup>9</sup> *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993). That case discusses Missouri Supreme Court Rule 74.04, which is sufficiently similar to the Commission's regulation to make cases interpreting the rule helpful in understanding the regulation. *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 626 (Mo. App., W.D. 2004).

<sup>10</sup> 4 CSR 240-2.117(1)(E) (emphasis added).

In any complaint, the complainant has the burden <sup>11</sup> to prove that a public utility has committed a violation.<sup>12</sup> Therefore, the utility wins if it establishes, without genuine dispute, facts that: (i) establish the elements of an affirmative defense to the violation or (ii) show that complainant will be unable to prove some element of a violation even after discovery, or (iii) negate any one element of the violation charged.<sup>13</sup> A dispute is genuine if it "is real, not merely argumentative, imaginary or frivolous."<sup>14</sup>

The violation charged is inaccurate metering from July 2010 through March 2011. Meter accuracy is the subject of provisions in GMO's tariff and the Commission's regulations, which GMO cites, and alleges compliance. In support of GMO's allegations, GMO's substitute affidavits refer to attached documents. Those documents appear to be of the type that a utility usually makes when conducting a meter test so they are admissible into the record.<sup>15</sup> Therefore, the following facts are subject to no genuine dispute ("undisputed").

#### **D. Findings of Fact**

1. GMO supplies electricity at retail to a service territory that includes 8675 County 372, Andrew County, Missouri ("Mr. Shepherd's service address").

2. From July 2010 through March 2011, ("the period") meter no. SA40M2754 measured the electrical usage at Mr. Shepherd's service address. On July 28, 2010, a lightning strike left burn marks around meter no. SA40M2754. On March 10, 2011, GMO replaced the meter with meter no. LG78224124.

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<sup>11</sup> State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Comm'n of Missouri, 806 S.W.2d 432, 435 (Mo. App., W.D. 1991).

<sup>12</sup> Section 386.390.1, RSMo 2000.

<sup>13</sup> ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 380-82 (Mo. banc 1993).

<sup>14</sup> *Id.*

<sup>15</sup> Section 536.070(10), RSMo 2000.

3. A meterman journeyman tested both meters with at least one of the following: either two test runs that were at least 30 seconds each, and agreed within one percent, averaged together; or one test run that used a stroboscopic or a similarly precise method of testing. Those tests showed accuracy as follows.

<i>Meter No.</i>	<i>Date of Test</i>	<i>Accuracy</i>
SA40M2754	March 10, 2011	100.87 %
LG78224124	July 19, 2011	100.107 %

### **E. Analysis**

GMO alleges compliance with provisions on meter accuracy and billing adjustments in the Commission's regulation<sup>16</sup> and GMO's tariff.<sup>17</sup> Those provisions state that no billing adjustment is due if the meter was accurate within three percent. The first meter was well within that standard during the period.

Mr. Shepherd's second response to the motion states:

The new test reading is not the same as what is displayed on the meter. From March 2011 to February 2012, only 17, 075 Kw have been used in comparison to the amount billed in 2010. [<sup>18</sup>]

In the reply, GMO argues that readings outside the period show nothing about meter accuracy during the period.<sup>19</sup> GMO is correct: the material facts of meter accuracy during the period are undisputed. Those facts bar a billing adjustment, which entitles GMO to a favorable decision.

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<sup>16</sup> 4 CSR 240-10.030(25) and (27) as set forth in the Appendix.

<sup>17</sup> KCP&L Greater Missouri Operations Company Tariff, Tracking No. JE-2009-0312, *P.S.C. Mo. No. 1*, Original Sheet Nos. R-32 through R-33 ("GMO's tariff"), Section 5.03 and 5.04, as set forth in the Appendix.

<sup>18</sup> *Motion to Quash Dismissal from Court and Motion to Quash New Test Reading*, filed on February 6, 2012.

<sup>19</sup> Even if meter accuracy outside the period were material, the undisputed facts also show that the meter in use after the period—the second meter—was accurate.

That decision is also in the public interest, because it reflects the Commission's determination on efficient facilities and substantial justice between patrons and public utilities, as set forth in regulation and tariff.

#### **F. Ruling**

GMO has established facts that show meter and billing accuracy. Those facts entitle GMO to a favorable decision on meter accuracy. Therefore, the Commission will enter summary determination in GMO's favor as to meter accuracy.

#### **THE COMMISSION ORDERS THAT:**

1. *KCP&L Greater Missouri Operations Company's Motion for Summary Disposition* is granted.
2. The *Order Granting Dismissal in Part for Failure to State a Claim* dated July 13, 2011, is incorporated into this decision as if fully set forth.
3. The complaint is denied.
4. This order is effective on April 6, 2012.
5. This file shall close on April 7, 2012.

( S E A L )

Daniel Jordan, Senior Regulatory Law Judge,  
by delegation of authority pursuant  
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 22<sup>nd</sup> day of February, 2012.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

## Appendix

GMO's tariff and the Commission's regulations set the standards of meter accuracy, and the standards for determining meter accuracy, as follows.<sup>20</sup>

### *i. Metering Standards*

Meter accuracy is defined at Commission regulation 4 CSR 240-10.030(27):

Any electric service meter tested on complaint . . . after having been in service may be considered as having been recording within allowable limits of accuracy at any possible load if it is found to register within three percent (3%) of correct registration when tested in accordance with the provisions of section (25)[;]

and GMO's tariff provisions on billing adjustments:

#### Billing Adjustments

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C. Where, upon test, a meter error is found to be three percent (3%) or less, no billing adjustment will be made.<sup>[21]</sup>

### *ii. Testing Standards*

The standards for determining meter accuracy are set forth in GMO's tariff:

#### Meter Testing

[GMO]'s meters shall be tested for accuracy in accordance with the Commission's Rule included in 4 CSR 240-10.030<sup>[22]</sup>

which provides:

(27) Any electric service meter tested on complaint . . . after having been in service may be considered as having been recording within allowable limits of accuracy at any possible load if it is found to register within three percent (3%) of correct

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<sup>20</sup> Emphasis added throughout.

<sup>21</sup> GMO's tariff, Section 5.04.

<sup>22</sup> GMO's tariff, Section 5.03.

registration when tested in accordance with the provisions of section (25)[.]

Both Section (25) and Section (27) of 4 CSR 240-10.030 provide testing at:

(A) . . . five percent to ten percent (5%-10%) [and] seventy-five percent to one hundred percent (75%-100%) [of the meter's] rated capacity[.]

But Section (27) of 4 CSR 240-10.030 also provides:

. . . This procedure may be followed in all cases, at the option of the electric corporation[:]

\* \* \*

(B) Tests for accuracy at each load shall be made with suitable working standards by taking the average of at least two (2) test runs of at least thirty (30) seconds each which agree within one percent (1%) except that where stroboscopic or similarly precise methods of testing are used, only one (1) test run need be made[.]