

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Eddie Shepherd,)	
)	
Complainant,)	
)	
v.)	File No. EC-2011-0373
)	
KCP&L Greater Missouri Operations Company,)	
)	
Respondent.)	

ORDER DENYING MOTIONS TO QUASH AND GRANTING PROTECTIVE ORDER IN PART

Issue Date: September 2, 2011

Effective Date: September 2, 2011

The Missouri Public Service Commission is denying the motions to quash, and granting in part the requests for a protective order, that KCP&L Greater Missouri Operations Company ("GMO") filed on August 19¹ ("first motion")² and August 26 ("second motion").³

A. Background

The complaint of Eddie Shepherd alleges that GMO has failed to comply with duties under statute, regulation, or tariff since a lightning strike in July 2010. Mr. Shepherd sought subpoenas for witnesses and documents. The Commission's July 15 order explained that the Commission does not serve subpoenas for any party, and referred Eddie Shepherd to provisions of law governing service of a subpoena.

On August 9, Mr. Shepherd delivered to GMO a *Subpoena for Witness* ("first subpoena"), which is the subject of the first motion. On August 16, Mr. Shepherd delivered

¹ All dates are in 2011 except as otherwise stated.

² Titled *KCP&L Greater Missouri Operations Company's Motion to Quash Subpoena*.

³ Also titled *KCP&L Greater Missouri Operations Company's Motion to Quash Subpoena*.

to GMO a *Subpoena Duces Tecum* (“second subpoena”), which is the subject of the second motion. Each motion included a request for a protective order.

The Commission received no response to the first motion within the regulatory time,⁴ and the second motion raise identical issues, so the Commission will dispense with further response time for the second motion.⁵

B. Quashal

GMO asks the Commission to quash both the subpoenas in their entirety based on the following requirement:

A request for a subpoena *duces tecum* shall specify the particular document or record to be produced, and shall state the reasons why the production is believed to be material and relevant. [⁶]

But the Commission waived the request requirement in the July 15 order, so the Commission will deny the motion to quash on that basis.

GMO also asks the Commission to quash the subpoenas in their entirety based on service. In support, GMO cites provisions of law governing service of a subpoena. Those provisions include the following for a contested case generally:

. . . Subpoenas . . . shall be served and returned as in civil actions in the circuit court. [⁷]

GMO cites the following circuit court rule:

Service of **process** within the state, except as otherwise provided by law, shall be made by the sheriff or a person over the age of 18 years who is not a party to the action. [⁸]

⁴ 4 CSR 240-2.080(15).

⁵ *Id.*

⁶ 4 CSR 240-2.100(1).

⁷ Section 536.077. Sections are in RSMo 2000.

⁸ Rule 54.13(a). Emphasis added. Rule 57.09, not cited by GMO, specifically requires service by a non-party when serving a subpoena for deposition, which is not at issue here. Rules are in the 2011 Missouri Supreme Court Rules.

But the service of a subpoena is specifically governed by statute under which the bar to service by a party was written out long ago:

A subpoena may be served by a party to a suit, although interested in the same. This construction was given section 8937^{FN2} when it was incorporated in Wagner's Statutes, (2 Wag. St. p. 827, § 2;) and, with this construction before it, the legislature has continued to retain it through two revisions. Plank Road, etc., Co. v. Bowling, 53 Mo. 311. Moreover, it is believed to be the recognized practice throughout the state.

FN2 Rev. St. § 8937, provides: "Subpoenas shall be directed to the person to be summoned to testify, and may be served by the sheriff, coroner, marshal, or any constable in the county in which the witnesses to be summoned reside or may be found, or by any disinterested person who would be a competent witness in the cause; and the sheriff, coroner, marshal, or constable of any county may serve any subpoena issued out of any court of record of their county, in term time, in any county adjoining that in which the court is being held." [9]

The governing statute's language is identical today.¹⁰

Moreover, the following provision applies specifically to actions before the Commission:

All subpoenas . . . may be served by any person authorized to serve process of courts of record or by any person of full age designated for that purpose by the commission [. ¹¹]

Under that language, the Commission may designate Mr. Shepherd to serve the subpoenas. Therefore, the Commission will deny the motions to quash.

D. Protective Order

Mr. Shepherd is entitled to discovery as follows:

Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. [¹²]

⁹ *Larimore v. Bobb*, 21 S.W. 922, 923-24 (Mo. 1893).

¹⁰ Section 491.110.

¹¹ Section 386.440.1.

¹² 4 CSR 240-2.090(1). Section 536.073.2, RSMo 2000.

In civil actions in the circuit court, the scope of discovery as follows.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . if the information sought is reasonably calculated to lead to the discovery of admissible evidence. [¹³]

GMO argues that the subpoenas exceed that scope and asks the Commission to issue a protective order as the Commission “may.”¹⁴

[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown [¹⁵]

Good cause means a good faith request for reasonable relief.¹⁶ “May” means an option, not a mandate.¹⁷ The rules thus commit the motions to the Commission’s discretion. Discretion’s boundaries are careful consideration, the logic of the circumstances, and justice.¹⁸ GMO argues that the subpoenas are vague or overbroad as follows.

*a. Unspecified Matters
(First Subpoena)*

In the first subpoena, Mr. Shepherd asks GMO to produce nine items at hearing but describes only seven. GMO asks the Commission to limit the first subpoena to those seven items. The Commission will grant the request and limit the first subpoena to those seven items.

*b. Not GMO Employees
(First Subpoena, item 6; Second Subpoena, item 7 and 8)*

Mr. Shepherd seeks the production at hearing of “Mary,” a “technical man,” and Gay Fred. GMO states that those persons are not subject to GMO’s control because those

¹³ Rule 56.01(b)(1).

¹⁴ Rule 56.01(c).

¹⁵ *Id.*

¹⁶ *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207, 210 (Mo. App., W.D. 1996).

¹⁷ *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993).

¹⁸ *Peters v. ContiGroup*, 292 S.W.3d 380, 392 (Mo. App., W.D. 2009).

persons are not GMO employees. The Commission will grant the request as to “Mary,” a “technical man,” and Gay Fred.

c. Meter Readers
(First Subpoena, item 4; Second Subpoena, item 3)

Mr. Shepherd seeks the production at hearing of a list naming all meter readers. GMO asks to limit the list to readers for Mr. Shepherd’s account and the time relevant to the complaint.¹⁹ The Commission will grant the request as to limiting the meter readers named to those assigned Mr. Shepherd’s account from July 2010 through the present.

d. Other GMO Employees
(First Subpoena, item 5; Second Subpoena, item 4)

Mr. Shepherd seeks the production at hearing of persons identified as Steeby, Strasser, and workers who removed a limb from a downed power line. GMO asks to substitute an affidavit for Steeby and Strasser but cites no authority for such substitution. As to the workers, GMO argues that the subpoena is vague but, in context, it refers to a lightning strike described in the complaint and later filings. The Commission will deny the request as to Steeby, Strasser, and the workers who removed the limb from the downed power line.

e. Unknown GMO Employee
(First Subpoena, item 4)

Mr. Shepherd seeks the production at hearing of the name of a woman who told her supervisor that the meter was not visible from the road. GMO states that it does not know who that is. The Commission will grant the request as to naming the woman who told her supervisor that the meter was not visible from the road.

¹⁹ GMO argues that the July 15 order determined that relevancy begins in March 2011, but that order contains no such language.

f. Billing Records
(First Subpoena, item 3; Second Subpoena, item2)

Mr. Shepherd seeks the production at hearing of Mr. Shepherd's daily usage information from June 1, 1991, to June 1, 2011. GMO states that all its records are monthly and argues that the period at issue in the complaint begins in July 2010. But billing accuracy is a comparative matter, so some background for the period at issue will lead to the discovery of admissible evidence. The earliest event alleged in the complaint is a meter reading in October 1994. Mr. Shepherd also alleges a lightning strike to a transformer in November 2004. Therefore, the Commission will grant the request as to limiting the records produced to monthly records for Mr. Shepherd from November 2004, to June 1, 2011.

g. 17.000 kwh Bill
(First Subpoena, item 7; Second Subpoena, item 9)

Mr. Shepherd seeks the production at hearing of a bill listing 17.000 kwh daily usage. GMO states that it possesses no such bill, and that it is producing monthly bills. The Commission will grant the request as to limiting bills produced to those described under the First Subpoena, item 3; Second Subpoena, item2.

h. Transformer Work Order
(First Subpoena, item 1; Second Subpoena, item1)

Mr. Shepherd seeks the production at hearing of the work order describing the replacement of a transformer after separate, the earlier lightning strike in November 2004. GMO argues that the transformer is irrelevant to metering and billing issues, but information on the transformer is reasonably calculated to lead to the discovery of admissible evidence. The Commission will deny the request as to the work order describing the replacement of the transformer.

i. Lightning-Struck Meter
(First Subpoena, item 2; Second Subpoena, item 6)

Mr. Shepherd seeks the production at hearing of the meter struck by lightning, which is Meter No. SA40172754. GMO argues that it has admitted that lightning struck the meter and that it replaced the meter, but cites no authority substituting those admissions for producing the item requested. The Commission will deny the request as to Meter No. SA40172754.

j. Other Meters
(First Subpoena, item 2; Second Subpoena, item 6)

Mr. Shepherd seeks the production at hearing of an unspecified meter new-in-box and a digital meter new-in-box. How these items lead to the discovery of admissible evidence is not apparent from the complaint. The Commission will grant the request as to the new-in-box meters.

THE COMMISSION ORDERS THAT:

1. *KCP&L Greater Missouri Operations Company's Motion to Quash Subpoena* is denied in part and granted in part as set forth in the body of this order.
2. This order is effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(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 2nd day of September, 2011.