

1 BEFORE THE PUBLIC SERVICE COMMISSION

2 STATE OF MISSOURI

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4 TRANSCRIPT OF PROCEEDINGS

5 Prehearing Conference

6 October 7, 2011

7 Jefferson City, Missouri

8 Volume 1

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10
11 Brent Fallon,)

12 Complainant,)

13 vs.)

14 Kansas City Power & Light) File No. EC-2012-0007

15 Company,)

16 Respondent.)

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18 _____
19 DANIEL JORDAN, Presiding

 SENIOR REGULATORY LAW JUDGE

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22
23 REPORTED BY:

 NANCY L. SILVA, CCR

24 TIGER COURT REPORTING, LLC

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A P P E A R A N C E S

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Commission

1 JUDGE JORDAN: Let's go ahead and go
2 on the record.

3 The Commission is calling File
4 No. EC-2012-0007, and that is the complaint of
5 Brent Fallon versus KCP&L Greater Missouri
6 Operations Company.

7 I'm Daniel Jordan. I'm the Senior
8 Regulatory Law Judge assigned to this action. I will
9 begin by taking entries of appearance, and that
10 means, simply, an identification of oneself for the
11 court reporter. We will be transcribing this action,
12 so I'm going to ask everyone to speak up, speak
13 clearly, and it's also helpful if you identify
14 yourself before you talk, since almost everyone is on
15 the telephone.

16 We'll start with an entry of appearance
17 from Mr. Fallon, the Complainant. Please state your
18 name for the court reporter, and also give us your
19 address.

20 MR. FALLON: Yes. This is Brent
21 Fallon. Current address is 9100 El Dorado
22 Avenue, Kalamazoo, Michigan 49009.

23 JUDGE JORDAN: Thank you,
24 Mr. Fallon. Is there going to be anyone else
25 present on this call with you today --

1 MR. FALLON: No, there's not.

2 JUDGE JORDAN: -- on your side? Thank
3 you.

4 MR. FALLON: No.

5 JUDGE JORDAN: Then we'll take an entry of
6 appearance from KCP&L Greater Missouri Operations
7 Company.

8 MR. STEINER: Let the record reflect
9 Roger W. Steiner, Corporate Counsel, Kansas City
10 Power and Light Company, 1200 Main Street,
11 Kansas City, Missouri 64105.

12 JUDGE JORDAN: Thank you, Mr. Steiner.
13 And you have some representatives of your client with
14 you today.

15 MR. STEINER: Right. Tim Rush is on the
16 phone and Brad Lutz.

17 JUDGE JORDAN: Thank you.

18 And for Staff?

19 MS. McCLOWRY: Meghan McClowry for the
20 Staff of the Public Service Commission. My business
21 address is P.O. Box 360, Jefferson City, Missouri
22 65102, and with me today is Mary Sherman-Duncan from
23 the Consumer Services Department.

24 JUDGE JORDAN: Thank you, Counsel.

25 We are here today for a prehearing

1 conference, and we'll do the first part of this on
2 the record. When that is concluded, I will leave the
3 room but leave the telephone line open. We will go
4 off the record, and the parties may use this
5 telephone connection to discuss matters in my
6 absence.

7 We can discuss -- we will discuss the
8 procedure for this action. We can touch upon
9 substantive matters to a degree, and I hope that the
10 parties will take the opportunity to discuss the
11 possibility of settlement, because settlement often
12 yields results that suit the parties better, better
13 meet their needs, than something an outsider, like
14 the Commission, can come up with.

15 And I also want to remind the parties
16 that the Commission does make available mediation
17 services to assist in the settlement of claims.
18 Mediation has a good record of success at this
19 commission. All the regulatory law judges have
20 received training in civil mediation, and I think
21 experience shows that this is a very helpful process.

22 I'd like to just make sure that everybody
23 understands a few of the fundamental aspects of
24 complaint procedure. What we're engaging in is a
25 procedure called a contested case, and that is a

1 formal hearing procedure, and it means this: When
2 someone claims, as Mr. Fallon has, that a public
3 utility has violated a statute or regulation or
4 tariff or order of the Commission, the Commission
5 will decide that issue, and it will do so by this
6 formal hearing process.

7 That process includes matters like
8 dispositive motions, such as the motion for summary
9 determination that has been filed, pending a motion
10 for leave to file the motion for summary
11 determination. It also includes discovery, which is
12 the procedure by which one party can get information
13 from the other parties. It includes an evidentiary
14 hearing also. I'll say a little bit more about that
15 later. It also includes a written decision with
16 separately-stated findings of fact.

17 Now, I will draft that decision. My
18 decision draft is really just a recommendation for
19 the Commission. The commissioners, they have the
20 final word on this action. The parties also have the
21 right to file written briefs, which they have the
22 right to have the Commission read before it makes the
23 final decision.

24 Any questions so far before I start
25 talking about the evidentiary hearing?

1 MR. FALLON: No.

2 JUDGE JORDAN: Not hearing any, so let me
3 say a few words about the evidentiary hearing to make
4 sure that everyone understands what that is. It's
5 pretty much like a trial in circuit court; that is,
6 the parties make opening statements telling me what
7 they think they're going to show. The parties each
8 put on a case in chief. Evidence is presented under
9 oath. There's the right to cross-examination. The
10 rules of evidence are relaxed because there is no
11 jury and because the Commission has some background
12 in the issues before it.

13 I want to give you a citation to a
14 statute that's probably the most important for you to
15 look at in preparing for hearing. The citation is as
16 follows: It is Section 536.070. That's in the
17 Revised Statutes of Missouri. That has all kinds of
18 provisions that relax rules of evidence, like the
19 Best Evidence Rule, the Business Records Rule. It
20 provides for affidavits on a very limited basis,
21 subject to objection and certain others. There are
22 12 subdivisions, and you should go through them in
23 preparing your case for hearing.

24 Any questions about that so far?

25 (No response.)

1 JUDGE JORDAN: Not hearing any, so let's
2 move on to the pending motions, the request to file a
3 motion for summary determination late and, also, if
4 we get that far, summary determination. Here's how I
5 look at it, and here's what I want everyone to
6 understand first: The filing of the complaint gives
7 everyone the right to a hearing, by statute. That is
8 the law. The statute provides that each party may
9 have a hearing on the complaint, a formal evidentiary
10 hearing. That's how the law fundamentally
11 contemplates the resolution of this action.

12 Now, the Commission also has the power to
13 make rules governing its hearings. Among these rules
14 is the rule on summary determination. Summary
15 determination, basically, says this to the
16 Commission: It says, Look, we have the evidence that
17 will win our case. There's really no serious dispute
18 as to this evidence, Commission, so why don't you
19 just decide the case on this evidence. That's what
20 summary determination is.

21 So, for example, the utility has filed
22 its motion for summary determination. It says, Look,
23 Commission, here's this affidavit. Summary
24 determination might also look at things like
25 discovery that's been presented to the Commission,

1 the pleadings, things like that.

2 What one does in summary determination
3 is, first, establish some facts, and not just any
4 facts you're going to win the case without a hearing
5 on summary determination. The facts that you have to
6 establish relate to the ma-- we call them material
7 facts. For the Complainant, basically that means the
8 things you would have to show at a hearing.

9 If you were at a hearing and you had to
10 show X, Y, and Z to prove that there was a violation,
11 well, your motion for summary determination has to
12 show X, Y, and Z, and it does that in a manner
13 described by affidavit, usually, but also, perhaps,
14 by reference to other things on file.

15 Now, if those things show that you win,
16 well, then the other side, they must -- in order to
17 prevail, they've got to put one of those material
18 facts at issue; that is, come up with an affidavit or
19 something else that shows that might not be true.

20 On a motion for summary determination,
21 the Commission does not weigh evidence. It doesn't
22 decide who it believes. It only grants summary
23 determination if someone has established the facts
24 material to their claim or defense and the other side
25 has not raised genuine dispute as to it, and then we

1 look at those facts, and then we decide if they
2 entitle a party to win.

3 I've mentioned how that's done for
4 Complainant. For the responding party, well, their
5 job's a little easier since they don't have the
6 burden of proof. They need to negate, show that it
7 is impossible, to establish one of the elements, or
8 they can establish all of the elements of an
9 affirmative defense. That's basically how summary
10 determination works.

11 If everything goes as it should in
12 summary determination, it will substitute for a
13 hearing. It shows that one party wins without a
14 hearing.

15 Any questions on that so far? Go ahead.
16 Go ahead. Any questions on that so far?

17 (No response.)

18 JUDGE JORDAN: Not hearing any questions,
19 so here's where we stand right now: We have a motion
20 for leave to file a motion for summary determination
21 late. Our rule on summary determination includes one
22 extra little provision which says that we will not
23 grant it if we feel it is not in the public interest,
24 and I'll tell you, these cases are complicated enough
25 without getting into dispositive motions, that the

1 Commission is not terribly comfortable taking away
2 the right to hearing from a pro se litigant unless
3 the pro se litigant really thinks that's a good idea.

4 So here's where we're at: The utility
5 has said, Look, Commission, we can solve this all on
6 paper, but the statutes, as you recall, they say the
7 complainant has the right to an evidentiary hearing,
8 can show up and present his case in that way, if he
9 wants.

10 So in deciding whether to allow KCP&L
11 Greater Missouri Operations to have this motion for
12 summary determination before the Commission, late,
13 because they took one run at it -- they weren't
14 successful -- and they're trying again in the belief
15 that we don't really need an evidentiary hearing, I
16 will ask Mr. Fallon: Mr. Fallon, do you want to
17 solve this case without a hearing, or do you want
18 your day in the hearing room?

19 MR. FALLON: You know, I would go for
20 resolution, the quickest possible way that it can be
21 done. I don't -- I don't feel the need to gather
22 into a formal hearing if we can take care of things
23 without that.

24 JUDGE JORDAN: Okay. Well, that sounds
25 fair. Now, as far as it being quick, here's how it

1 has to go: If I were to grant leave to the utility
2 to file its motion out of time, I would give you some
3 time to put together something to counter that.
4 Understand that will take you some time also so, I
5 mean, we're talking about gathering documents, making
6 sure that they are admissible under the law of
7 evidence, things like that. That, too, will take
8 some time, so I don't really know whether that will
9 be quicker for you or whether simply showing up for a
10 hearing will be quicker for you. As you know, we
11 have the hearing scheduled for a week from today --

12 MR. FALLON: Yes.

13 JUDGE JORDAN: -- and you will need some
14 time. We'll often give two, three, four weeks to
15 respond to a motion like this. In fact, I think
16 there's a -- there may be a provision in our
17 regulation on that, and it may be thirty days.
18 Ordinarily we don't let these motions even get filed
19 less than sixty days before.

20 MS. McCLOWRY: (Nodded.)

21 JUDGE JORDAN: Staff counsel is nodding
22 when I say 30 days, so that's generally what --

23 MS. McCLOWRY: Some do. I'm not sure.

24 JUDGE JORDAN: Sounds about right, yeah.

25 That, generally, is what it takes, so I

1 don't really know which would be quicker for you. I
2 just want to remind you that we have a hearing
3 scheduled for Friday.

4 MR. FALLON: Okay.

5 JUDGE JORDAN: Any idea on which would be
6 quicker for you?

7 MR. FALLON: No, I really don't,
8 honestly. I'm a customer. I'm obviously not an
9 attorney. I believe what I have are -- my only facts
10 are bills from KCP&L --

11 JUDGE JORDAN: Uh-huh.

12 MR. FALLON: -- and electrical usage and
13 nonusage on our home.

14 JUDGE JORDAN: Okay. You know, it seems
15 to me that this may be something that you want to
16 discuss after we go off the record. Staff is a
17 neutral party in this and has expertise as to these
18 issues, so a discussion with all three parties may be
19 helpful in figuring out the best way to resolve this.

20 What I will do is, I will ask Staff to
21 file a memorandum at the end of the day, if that's
22 possible, giving me an idea of what's come out of
23 this as to whether the parties feel they can reach
24 settlement, if they feel they need the Commission's
25 decision on it and, if so, under which format,

1 whether the evidentiary hearing would be the more
2 efficient or maybe summary disposition would be more
3 efficient. Then on review of that, I'll have some
4 idea of what course to take.

5 There's no time limit on this case. The
6 Commission is not required to decide this within a
7 certain time. In other cases we have to decide them
8 within an -- actually 11 months or 180 days. A
9 regulation on small formal complaints aspires to
10 decide actions within 100 days. I've never known
11 that to happen, but the parties can feel free to
12 discuss this, and Staff will report to me what they
13 feel is best.

14 MR. STEINER: This is Roger. Mr. Fallon,
15 did I hear you indicate that you wanted to put
16 something together so there wouldn't be a hearing, or
17 you just didn't know? I was unclear on which way you
18 wanted to go.

19 MR. FALLON: I said it could go either way
20 for me. It really doesn't matter. Whatever is the
21 easiest way to resolve this.

22 MR. STEINER: I think the judge is giving
23 it -- it sounds like he's giving it your option.

24 JUDGE JORDAN: That's correct. Since
25 Mr. Fallon indicated he wanted to do what was most

1 efficient, I don't really know what's more efficient
2 for Mr. Fallon. It may be simply easier to show up
3 for a few hours on Friday morning and present his
4 case. That might be the quickest and easiest way to
5 do it for him, so I don't want to telegraph.

6 I certainly am not telegraphing any
7 preference of the Commission as to that, and I'm
8 certainly, definitely not telegraphing anything about
9 the motion that is pending; that is, I don't know
10 whether if we allowed it to be filed, whether we
11 would grant it or not. I should say, I'm not saying
12 whether it would be granted or not, because there's
13 a lot that goes into it.

14 I mean, I have to look at not only the
15 timeliness, which we can waive, but also, Does this
16 affidavit meet the requirements of admissible
17 evidence? That is, Can I use this affidavit to
18 decide the case? Then I have to look at what the
19 affidavit supports. Are the facts, the attachments
20 to it, are they going to be enough to establish the
21 facts that the Commission -- that the utility would
22 need to establish to prevail?

23 So, I mean, there's a few things that go
24 into that. That all takes a while. Anyway, I'm not
25 indicating a preference. I'm not indicating who

1 would win under either procedure. Just want to make
2 that clear.

3 MR. FALLON: Okay.

4 JUDGE JORDAN: I think that's all I have
5 for the parties.

6 Are there any questions about the
7 procedure that we're looking at just now?

8 (No response.)

9 JUDGE JORDAN: Not really hearing
10 anything.

11 Any questions from Mr. Fallon on that or
12 anything else that I can help you with?

13 MR. FALLON: Not at this time, no.

14 JUDGE JORDAN: Okay.

15 And Mr. Steiner, anything from KCP&L
16 Greater Missouri Operations Company?

17 MR. STEINER: I don't believe so, your
18 Honor.

19 JUDGE JORDAN: Okay. Okay.

20 And Staff, any questions?

21 MS. McCLOWRY: No questions.

22 JUDGE JORDAN: Okay. Well, there being no
23 more matters for me to help the parties with, what
24 I'll do is go off the record and leave the room, but
25 I'll leave this line open. I'll ask Staff to hang

1 up, turn out the lights when everyone's done.

2 I hope the parties will use the remaining
3 time on this telephone connection to work out as much
4 as they can, think the issues through, and maybe,
5 just maybe, make some progress towards settling this
6 action without the Commission's decision.

7 So that's what I will do. Before I do
8 that, one more last call: Any matters for me while
9 I'm here with you?

10 MS. McCLOWRY: What time is the phone line
11 open till?

12 JUDGE JORDAN: These things usually stay
13 open for two hours. I can come back down and tell
14 you for sure.

15 MS. McCLOWRY: Two hours is fine.

16 JUDGE JORDAN: I think -- okay. That's
17 fine.

18 Anything else from the parties before I
19 go?

20 MS. McCLOWRY: No.

21 JUDGE JORDAN: Okay. Not hearing anything
22 else, then, with that I will adjourn this prehearing
23 conference and we will go off the record.

24 (The hearing concluded.)
25

1 CERTIFICATE

2 I, Nancy L. Silva, RPR, a Certified
3 Court Reporter, CCR No. 890, the officer before
4 whom the foregoing hearing was taken, do hereby
5 certify that the witness whose testimony appears
6 in the foregoing hearing was duly sworn; that
7 the testimony of said witness was taken by me to
8 the best of my ability and thereafter reduced to
9 typewriting under my direction; that I am
10 neither counsel for, related to, nor employed by
11 any of the parties to the action in which this
12 hearing was taken, and further, that I am not a
13 relative or employee of any attorney or counsel
14 employed by the parties thereto, nor financially
15 or otherwise interested in the outcome of the
16 action.

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Nancy L. Silva, RPR, CCR
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