

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held by telephone and internet audio conference on the 9th day of September, 2020.

Barbara Edwards,)
)
Complainant)
)
v.)
)
Evergy Missouri West, Inc.,)
d/b/a Evergy Missouri West,)
)
Respondent)

File No. EC-2020-0252

ORDER ALLOWING REMOTE APPEARANCE AT HEARING

Issue Date: September 9, 2020

Effective Date: September 9, 2020

On February 24, 2020, Barbara Edwards, Complainant, filed a complaint with the Commission against Evergy Missouri West, Inc. d/b/a Evergy Missouri West (“Evergy Missouri”). This matter is set for hearing on September 24, 2020, in Jefferson City, Missouri, as agreed by the parties.

On August 3, 2020, the Staff of the Commission (“Staff”) filed a joint proposal of dates for hearing. The proposal included a request from Evergy Missouri to allow appearance of its witnesses by telephone or video conference because of the COVID-19 pandemic. On August 6, 2020, the Commission ordered that any response to Evergy Missouri’s request should be submitted no later than August 17, 2020. Staff did not file a response.

On August 17, 2020, Ms. Edwards submitted an objection to Evergy Missouri’s

request, stating she prefers a “live hearing,” but is willing to consider a request to appear by phone if provided with each prospective witnesses’ name, title and nature of testimony.

On August 17, 2020, Evergy Missouri filed a request that Alicia Duarte, a senior customer care advisor, be allowed to appear by telephone or video because of her responsibility as a primary caregiver to her father, “who is over 70 years old and has high blood pressure.” On August 20, 2020, the Commission ordered the Complainant and Staff to submit any response to Evergy Missouri’s request by no later than August 31, 2020. Staff did not file a response.

On August 31, 2020, Ms. Edwards filed an objection to Evergy Missouri’s request and opposed any remote testimony by Evergy Missouri witnesses. Ms. Edwards’ objection asserts she is concerned Evergy Missouri lawyers may be able to inappropriately communicate with remote witnesses appearing by video or phone.

The Commission notes that its formal proceedings sometimes use testimony by telephone or video conference, including the cross-examination of witnesses. In its discretion, the Commission has allowed witnesses to appear by phone or video for a variety of reasons. Since state government issued a stay-at-home advisory on April 3, 2020,¹ the Commission has held four evidentiary hearings in which all of the witnesses and party representatives appeared by phone or video.²

Given Ms. Edwards’ objection, the Commission has considered whether the use of remote testimony in this case would conflict with statutes that govern the Commission’s hearings and “contested cases” in Missouri. The Commission has also considered

¹ “Stay at Home Order,” Missouri Dep’t of Health and Senior Servs., April 3, 2020 (accessed on Sept. 1, 2020, at <https://governor.mo.gov/priorities/stay-home-order>).

² Evidentiary hearings conducted on May 19, 2020 (File No. WA-2019-0299); June 3, 2020 (File No. WO-2020-0190); June 25, 2020 (File No. WC-2020-0181); and July 8, 2020 (File No. EC-2020-0183).

whether remote testimony in this case will undermine a fair and meaningful hearing of Ms. Edwards' complaint, as required by constitutional due process guarantees. While the Commission acknowledges Ms. Edwards' preference for an in-person hearing with all parties and witnesses appearing at the same location, the Commission is not aware of any provision of law or any decision by a Missouri court that requires such a procedure in this case.

Missouri law requires that "administrative hearings be fair and consistent with rudimentary elements of fair play."³ By statute, Commission hearings are governed by rules adopted and prescribed by the Commission.⁴ Under the Commission's rules, presiding officers in small formal complaints may allow "any party, witness, or attorney to participate in the hearing by telephone."⁵ Remote appearances are entrusted to the presiding officer's discretion, given the regulatory law judge's obligation to conduct fair, orderly hearings without unnecessary delay.⁶

Under the statutes that govern Commission hearings, parties are entitled to introduce evidence and "be heard in person or by attorney."⁷ A party's right to be heard "in person" does not require that all witnesses appear at the same location for hearing. In fact, when a witness's physical presence is inconvenient or impossible, allowing remote testimony when appropriate can preserve the parties' ability to present evidence.

Remote testimony is also permissible under Missouri's administrative law. Small formal complaints, such as Ms. Edwards' complaint, have long been treated by the

³ *State ex rel. Fischer v. Pub. Serv. Comm'n*, 645 S.W.2d 39, 42 (Mo. App. 1982).

⁴ Section 386.410, RSMo (2016). All citations to Missouri statute are to the Revised Statutes of Missouri (2016), unless otherwise noted.

⁵ Commission Rule 20 CSR 4240-2.070(15)(E).

⁶ Commission Rule 20 CSR 4240-2.120.

⁷ Sections 386.420.1 and 386.420.4.

Commission as “contested cases” under Missouri’s Administrative Procedure Act (MAPA). MAPA’s procedural requirements can be met with testimony by video or telephone. Requirements for the taking of testimony on oath or affirmation,⁸ and the ability to call, examine and cross-examine witnesses,⁹ may all be accomplished through the use of live telephone and video testimony.

Just as Missouri statute poses no barriers to the use of remote testimony in this case, allowing remote testimony does not raise any due process concerns at this time. The due process clauses of the U.S. and Missouri constitutions prohibit the taking of life, liberty or property “without due process of law.”¹⁰ Due process concerns arise when a constitutionally protected liberty or property interest is at stake.¹¹ For purposes of deciding Evergy Missouri’s request to allow remote testimony, the Commission assumes procedural due process requirements attach to determination of Ms. Edwards’ complaint.¹²

Due process requires “such procedural protections as the particular situation demands.”¹³ This “flexible” analysis, which depends on the circumstances of each case, considers: (1) the private interest affected by official action; (2) the risk of an erroneous deprivation of that interest and the value of additional procedural safeguards; and (3) the

⁸ Section 536.070(1). Sworn testimony is also required by Commission Rule 20 CSR 4240-2.130.

⁹ Section 536.070(2).

¹⁰ *Jamison v. Dep’t of Soc. Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007).

¹¹ *Id.*

¹² The Commission in a complaint proceeding cannot issue a money judgment or grant equitable relief. *Staff of the Mo. Pub. Serv. Comm’n v. Consol. Pub. Water Supply Dist. C-1 of Jefferson Cty*, 474 S.W.3d 643, 657-58 (Mo. App. W.D. 2015)(citing *May Dep’t Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41 (Mo. 1937) and *Am. Petroleum Exch. v. Pub. Serv. Comm’n*, 172 S.W.2d 952 (Mo. 1943)). These limits on the Commission’s authority also arguably restrict the extent of any potential interference with any liberty interest held by Ms. Edwards.

¹³ *Jamison*, 218 S.W.3d at 405 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *State ex rel. Cook v. Saynes*, 713 S.W.2d 258, 262 (Mo. banc 1986)).

government's interests, including the "function involved" and the "fiscal and administrative burdens" of additional procedures.¹⁴

In deciding complaints under Section 386.390, RSMo (Cum. Supp. 2019), the Commission's authority is limited to determining whether there has been a violation of "any provision of law subject to the [C]ommission's authority, of any rule promulgated by the [C]ommission, of any utility tariff, or of any order or decision of the [C]ommission." Thus, due process analysis would require the Commission to weigh the risk of a faulty deprivation of Ms. Edwards' interests, based on improperly influenced testimony, against the Commission's duty to fairly and efficiently decide this complaint in the midst of a threat to public health. Because the Commission concludes measures can be taken as needed to address Ms. Edwards' concerns about improper communication between counsel and a remote witness, the Commission concludes allowing telephone or video testimony in this case will not obstruct a full, fair and meaningful hearing of Ms. Edwards' complaint.

Missouri courts have not been asked to consider the propriety of remote testimony in Commission complaint cases, and little relevant case law exists.¹⁵ Litigants have been just as likely to complain about refusal to allow appearance by telephone¹⁶ as they have been to complain about the use of such testimony.¹⁷ Testimony by video, in a closed-circuit system, was approved by the Missouri Supreme Court in *Kansas City v. McCoy* in

¹⁴ *Jamison*, 218 S.W.3d at 405 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹⁵ *Charles v. Mo. Div. of Employ't Sec.*, 750 S.W.2d 658 (Mo. App. W.D. 1997) (refusing to decide objection to use of telephone proceeding in unemployment proceeding before Labor and Industrial Relations Commission when applicant agreed to telephone hearing).

¹⁶ See *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194 (Mo. banc 2015) (declining, on procedural grounds, to hear inmate's appeal from dismissal of divorce action after trial court failed to allow appearance by video).

¹⁷ See cases collected in: Fern L. Kletter, Annotation, *Constitutional and Statutory Validity of Judicial Videoconferencing*, 115 ALR5th 509 (2004); Russell G. Donaldson, Annotation, *Propriety of telephone testimony or hearings in unemployment compensation proceedings*, 90 A.L.R.4th 532 (1991).

the context of a municipal charge for marijuana possession.¹⁸ After the Missouri Supreme Court in 1987 disapproved remote appearance by defendants in criminal cases, the General Assembly enacted a law to allow appearance in criminal proceedings by two-way video connections.¹⁹ The Missouri Supreme Court recently affirmed that incarcerated people must be given an opportunity to appear in civil proceedings, which is usually accomplished through telephone or video conference.²⁰

Missouri courts have themselves been compelled by the COVID-19 pandemic to use remote technology for hearings. Some courts have established protocols to help address some of the concerns Ms. Edwards raises in regard to inappropriate communication with witnesses.²¹ Such guidelines bar attorney communication with witnesses during testimony. The Commission is confident that many of the measures used to protect the integrity of testimony before Missouri courts can be used in this proceeding as well.

Under present circumstances, when Missourians continue to be urged to maintain physical distance and use masks to avoid the spread of COVID-19, testimony by phone or video allows real-time “live” questioning of witnesses while diminishing health risks for everyone in attendance. Concerns about inappropriate contact between witnesses and legal counsel can be addressed if any indication of impropriety should arise.

The Commission finds appearance by telephone or video will not interfere with a

¹⁸ 525 S.W.2d 336, 339 (Mo. banc 1975) (finding no violation of the Constitution’s confrontation clause in the testimony of a crime lab expert delivered live via closed-circuit television).

¹⁹ See *Guinan v. State*, 769 S.W.2d 427, 430 (Mo. banc 1989).

²⁰ See *Henry v. Piathek*, 578 S.W.3d 374, 379 n.8 (Mo. banc 2019) (citing *McNeal*, 472 S.W.3d at 194-96).

²¹ “Administrative Order 43 – Video Conferencing During COVID,” St. Louis County Circuit Court, 21st Judicial Circuit of Missouri, Aug. 5, 2020 (accessed on Sept. 2, 2020, at <https://wp.stlcourtscourts.com/st-louis-county-circuit-court-coronavirus-update/>).

fair hearing in this case, and Evergy Missouri's request is reasonable under the circumstances and should be granted. The regulatory law judge assigned to this case may issue orders regarding remote testimony at any hearing in this case.

THE COMMISSION ORDERS THAT:

1. Ms. Alicia Duarte may appear at hearing by telephone or video.
2. Consistent with Commission Rule 20 CSR 4240-2.070(15)(E), the regulatory law judge has authority to determine any additional requests for remote appearance at a hearing in this matter and to specify the requirements for such appearance.
3. This order shall be effective on September 9, 2020.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Rupp, Coleman, and
Holsman CC., concur.

Jacobs, Regulatory Law Judge