

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Union)	
Electric Company d/b/a AmerenUE for)	
an Order Authorizing the Sale and Transfer)	<u>Case No. EO-2010-0263</u>
of Certain Assets of AmerenUE to St. James)	
Municipal Utilities and Rolla Municipal Utilities)	

**PUBLIC COUNSEL’S MOTION FOR RECONSIDERATION
AND MOTION FOR EXPEDITED TREATMENT**

COMES NOW the Office of the Public Counsel for its Motion for Reconsideration and Motion for Expedited Treatment states as follows:

1. In an order issued on September 1, 2010, the Commission dismissed Donna Hawley from this case, ostensibly for her failure to concur in the List of Issues, Order of Witnesses, Order of Cross-Examination, And Order of Opening Statements and Closing Arguments due on August 25. Public Counsel respectfully requests that the Commission reconsider that order pursuant to 4 CSR 240-2.160(2) for the reasons stated herein.

2. From the discussions at the Commission’s open meetings, it appears that the Commission regrets its decision to allow Ms. Hawley into the case in the first place, and is now using her failure to file a statement explicitly concurring in the List of Issues as a pretext for dismissing her. It is not even clear from the July 30 Order Setting Procedural Schedule that Ms. Hawley was required to concur. That order simply states:

1. The following procedural schedule is set:

List of Issues – Order of Witnesses –	August 25, 2010
Order of Cross-Examination, Opening	
and Closing	

The order does not specify who was required to make the filing. The applicant, AmerenUE, timely made the filing, which appears to have satisfied the requirements of the order. If Ms. Hawley had objections to AmerenUE's filing and failed to timely make those objections, it might be reasonable to deem her to have waived them, but it is unreasonable to dismiss her for failing to make a filing that was in fact made. The undersigned can recall no other case in 22 years of practice before, and as an employee of, the Commission in which the Commission has taken such draconian action in response to a party for failing to explicitly concur in a routine procedural filing.¹

3. While the Commission's rules allow dismissal for failure to comply with a Commission order, they certainly do not mandate it. The Commission's response should be tailored to, and commensurate with, the infraction. The Commission's response under 4 CSR 240-2.116(3) is entirely within its discretion, but that discretion may not be abused. In this instance, a much more reasonable sanction would be to require her to proceed with the case using the framing of the issue as filed by the other parties.

4. The Commission, in its order to show cause, did not even suggest that she could remain in the case if she quickly concurred in the framing of the issue or the order of the witnesses. Rather it directed her to explain why she failed to concur on August 25, and she fully complied with the order. Nonetheless the Commission finds her at fault because she has yet to

¹ As noted above, the Commission's action is particularly troubling because the required pleading was in fact timely filed, albeit without an indication that Ms. Hawley concurred in it or disagreed with it. While the List of Issues, Order of Cross Examination and Schedule of Witnesses is an important filing, the failure of a single party to explicitly concur in it or to suggest a different framing of the issue (or a different order of cross-examination) is hardly an impediment to the Commission's ability to process and resolve this matter. Indeed, Ms. Hawley's role in the hearing is fully set forth in the List of Issues that was timely filed.

state whether she affirmatively concurs in the List of Issues even though she has never been explicitly ordered to do so.

5. A decrease in Public Counsel staff and an increase in the number and complexity of PSC cases, particularly in energy-related issues, has made it impossible for Public Counsel to be active in all PSC cases. Public Counsel welcomes the participation of interested and informed consumers, and so should the Commission. The Commission may not agree with Ms. Hawley's position, and may not agree that all the evidence she seeks to present is relevant to the matter before the Commission,² but it should not use her failure to affirmatively concur in a timely-made filing as a pretext to remove her. The Commission has to deal with relatively few *pro se* litigants, but it has long had a practice of granting them a little leeway in procedural matters, so long as it does not grant them an advantage or hinder the processing of a case.

6. Here the Commission has dealt with a *pro se* litigant much more harshly than it typically would. For example, in Case No. EC-2010-0285, decided in the same public meeting in which the Commission dismissed Ms. Hawley, the Commission dismissed a case filed by another *pro se* litigant – but only after hearing almost nothing from the complainant for almost five months! Even though the complainant in Case No. EC-2010-0285 failed to respond to several requests from the Commission, the Commission allowed him more than thirty days to respond to a show cause order, voluntarily forwarded him information already served upon him, and took a number of other steps designed to help him with the Commission's procedures. The Commission has offered no such help to Ms. Hawley, and dismissed her from the case only a

² In fact, based on some of the pleadings to date, Public Counsel is likely to disagree with Ms. Hawley on the ultimate issue in the case and may well disagree on evidentiary matters, but nonetheless supports her participation.

week after her failure to concur in the List of Issues, Order of Witnesses, Order of Cross-Examination, And Order of Opening Statements and Closing Arguments.

7. Moreover, while the Commission has taken the drastic step of dismissing Ms. Hawley for failing to comply with a Commission order when it is not at all clear that she failed to do anything that she was explicitly ordered to do, the Commission has ignored the fact that the List of Issues entirely failed to comply with Commission rule 4 CSR 240-2.080(21). Such disparate treatment of infractions with respect to the same filing is an abuse of discretion.

8. Pursuant to 4 CSR 240-2.080(16), Public Counsel respectfully requests that the Commission take up and rule on this motion expeditiously, and in any event no later than September 7. This pleading was filed as soon as possible after the Commission issued its order dismissing Ms. Hawley (on the very next day). The harm that will be avoided is that Ms. Hawley will not be precluded from participating in the hearing, which begins on September 8, based upon the Commission's ill-considered dismissal.

WHEREFORE, Public Counsel respectfully requests that the Commission expeditiously reconsider its dismissal of Donna Hawley, and upon reconsideration, vacate its dismissal.

Respectfully submitted,

OFFICE OF THE Public Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 2nd day of September 2010.

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