

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of)
Nancy and Ron Gilkey, Jr.,)
for a Change of Electrical Supplier)

File No. EO-2009-0315

DISSENTING OPINION OF
COMMISSIONER TERRY M. JARRETT

I dissent from the Order Granting Motion to Add Parties (the “order”) because such order is unnecessary as a legal matter and unsound as a matter of policy.

This action began on March 5, 2009, when Nancy and Ron Gilkey (“applicants”) filed a verified application (the “application”). The application asks the Missouri Public Service Commission to change applicants’ electrical supplier from the current supplier City of Rich Hill (“Rich Hill”) to prospective supplier Osage Valley Electric Cooperative (“Osage Valley”). On March 30, 2009, applicants, Rich Hill and Osage Valley filed affidavits in support of the application.

The verified application and affidavits would support a finding in favor of every element required of the ten-factor balancing test that the Commission conducts when deciding such an application.¹ On April 9, 2009, the Commission’s staff (“Staff”) filed neither a recommendation on the application nor a status report on its progress in making such recommendation.² Thus, nothing before the Commission supports denying the application. Also, no party has requested a hearing, so the Commission need not convene one, and may rely on the affidavits to grant the application.³

¹ *Smith v. Union Electric Company*, Case No. EC-2007-0106 (Dec. 5, 2006).

² As was ordered by the Commission on March 9, 2009; *Order Directing Filing*, Case No. EO-2009-0315.

³ *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com’n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

On such facts and under such law, the Commission has sufficient verified and sworn information to determine whether a change in electric supplier is in the public interest and grant the application.

A. Background

On March 25, 2009, Staff filed a motion seeking to add parties. On April 8, 2009, Staff's recommendation or status report was due.⁴ Instead, on that date, Staff filed Staff's Motion for an Extension to File a Status Report or Recommendation and Renewal of Staff's Motion to Add Parties ("the renewal"). On April 15, 2009, the Commission voted 3 to 2 in favor of issuing the order, which I vigorously opposed for reasons that follow.

B. Procedure on the Motion

The order misstates the law and facts related to the motion:

Commission Rule 4 CSR 240-2.080(15) allows ten days for response to pleadings. The Commission received no response from Rich Hill or from Osage Valley. As such, the Commission will take up Staff's motion unopposed.

The assertion that "Staff's motion [was] unopposed" has no support in 4 CSR 240-2.080(15) because that regulation applies only to parties:

Parties shall be allowed not more than ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission[.]⁵

Such ten-day response deadline did not apply to Rich Hill and Osage Valley because they were not parties until the order issued. Thus, the Commission's decision to take up the motion "unopposed" is patently incorrect.

C. Law Governing the Motion

The motion includes no citation to any law supporting the relief it seeks. The law

⁴ According to the Commission's March 9, 2009, order.

⁵ 4 CSR 240-2.080(15).

governing the application is § 91.025,⁶ § 394.315, regulation 4 CSR 240-3.140, and chapter 4 CSR 240-2.⁷ Those provisions provide no support for the motion under any of Staff’s arguments, which are as follows.

1. Application Content

Staff argues in the motion:

2. The Applicants state the request for a change in electrical supplier “is due to safety concerns because there is something wrong with their electrical service and they fear there could be a fire.”

* * *

5. If made parties, . . . Staff will be able to submit data requests to Rich Hill and the Cooperative regarding the safety and service concerns of Applicants.

But Staff also cites the primary regulatory mechanism for investigating “safety and service concerns of the Applicants” in the motion:

3. If an application cites service issues as a reason for the request, 4 CSR 240-3.140 (1)(E) and (F) require the applicant to provide a description of the problems and dates of occurrence, a description of the contacts which applicant has had with the current supplier regarding the problems, and what efforts the current supplier has made to solve the problems.

Why Staff must, and even how Staff can, address its data requests regarding the Gilkey’s safety and service concerns to Rich Hill and Osage Valley before ascertaining such concerns according to the regulation on pleading, Staff does not say.

2. Jurisdiction

Staff argues in the motion:

5. If made parties, any Commission order will be binding upon Rich Hill and the Cooperative[.]

⁶ Sections are in the Revised Statutes of Missouri.

⁷ Section 386.310 also applies to “health and safety” with regard to rural electric cooperatives, which is also applicable here.

WHEREFORE, the Staff requests the Missouri Public Service Commission add the City of Rich Hill, Missouri and Osage Valley Electric Cooperative as necessary parties to this case.

By granting Staff's motion, the majority misconstrues the Commission's jurisdiction over municipal utilities as well as rural electric cooperatives. No order of the Commission can bring Rich Hill and Osage Valley within Commission jurisdiction. Jurisdiction exists in any agency only by statute.⁸

For municipal utilities like Rich Hill, § 91.025 limits the Commission's jurisdiction to "public interest determinations ...". Likewise, for a change in electrical suppliers (including those involving rural electric cooperatives like Osage Valley), § 394.315 limits the Commission's jurisdiction to "public interest determinations." Thus, in this matter, the Commission's jurisdiction is limited to public interest determinations.⁹ Rich Hill and Osage Valley are not necessary parties for the Commission to determine whether the change in supplier is in the public interest.¹⁰

The only statute applicable to this action¹¹ that mentions "necessary parties" is:

In any contested case:

(1) The agency shall promptly mail a notice of institution of the case to all necessary parties[.]¹²

⁸ *State Bd. of Regis'n for the Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974).

⁹ Section 386.310 also gives the Commission jurisdiction over rural electric cooperatives " ... to promote and safeguard the health and safety of ... the public ...". In this instance, the Applicants have raised concerns regarding their health and safety regarding electrical service being provided by Rich Hill (a municipal utility). The Commission does not have the same jurisdiction over "health and safety" concerns of municipal utilities like Rich Hill which it has over Osage Valley (a cooperative).

¹⁰ This Commission has no authority over the health or safety of the public regarding municipal utilities, including the imposition of conditions relative to the grant of an application for change of supplier. Neither the statutes or rule which prescribe the procedure and requirements for a change of electrical supplier contemplate that grant being conditioned in any way; to the contrary, the threshold is whether the change is in the public interest.

¹¹ The statutes expressly provide that the Commission may direct its general counsel to bring an action in circuit court to prevent violations of law or tariff, and that the Commission may join certain persons as parties. This is not such an action.

¹² Section 536.067.

That provision's plain language applies only in a contested case, and Staff does not argue that this matter currently constitutes a contested case. A contested case also requires the Commission to serve¹³ notice with specific content,¹⁴ which has not occurred. All that has occurred is Staff's service of the motion on Rich Hill and Osage Valley on March 25, 2009.¹⁵

The term "necessary parties" also appears in the Missouri Supreme Court's Rules of Civil Procedure. But those rules do not apply to the Commission except where expressly incorporated by statute.¹⁶ No statute incorporates the rule on necessary parties to the Commission's procedure on the application. Even if the Commission's procedure on the application included such rule, that rule would not apply to Rich Hill and Osage Valley because they are not necessary parties. No statute or regulation requires electric providers to be parties to a change of supplier application. The Commission has so ruled often and recently.¹⁷

In any event, the absence of a necessary party is not fatal to jurisdiction.¹⁸

3. Commission Resources

Finally, I note that Staff has stated in the testimony filed in other Commission actions that it cannot complete its duties in those cases in a timely fashion.¹⁹ Yet protracting this action appears to constitute the best allocation of Staff resources, according to Staff. Staff's reasoning

¹³ Section 536.067(1).

¹⁴ Section 536.067(2).

¹⁵ Staff claims service of the motion on Rich Hill and Osage Valley on March 25, 2009; however, I would note that no service of process or other documentation verifying receipt is included in the filing in this matter.

¹⁶ *State ex rel. Jarrett v. Rosenberg v. Jarrett*, 233 S.W.3d 757, 762 (Mo.App. W.D. 2007).

¹⁷ *In the Matter of the Application of Greg Withers for Change of Electric Supplier from Union Electric Company d/b/a AmerenUE to Jackson Electric Distribution Department*, EO-2006-0555, August 22, 2006; *In the Matter of the Application of Steve Jones for Change of Electric Supplier from Union Electric Company d/b/a Ameren UE to Jackson Electric Distribution Department*, Case No. EO-2006-0553, August 22, 2006; *In the Matter of the Application of Cletus Uhrhan for Change of Electric Supplier from Union Electric Company d/b/a Ameren UE to Jackson Electric Distribution Department*, Case No. EO-2006-0554, August 22, 2006; *In the Matter of the Application of Julia Bennington for Change of Electric Supplier*, Case No. EO-2003-0564, August 11, 2003; *In the Matter of the Application of Gary Hudlemeyer For Change of Electric Supplier*, Case No. EO-2002-1105, June 21, 2002. In all of these cases, the Commission granted the customers' applications without adding the electric suppliers as parties.

¹⁸ *Edmunds v. Sigma Chapter of Alpha Kappa Lambda*, 87 S.W.3d 21, 27 (Mo.App. W.D. 2002).

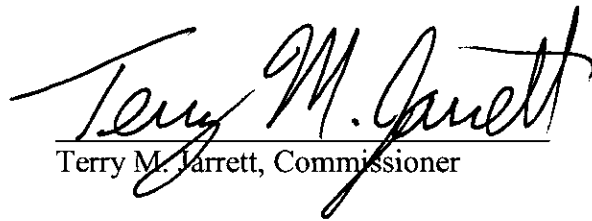
¹⁹ See ER-2009-0089, ER-2009-0090, HR-2009-0092.

defies understanding.

Conclusion

As set out above, adding Rich Hill and Osage Valley as necessary parties is unnecessary as a matter of law. With no support in fact or law, the order imposes needless expenses on non-business entities—a municipal corporation, a rural electrical cooperative, and this Commission—and as such is unsound as a matter of policy. Accordingly, I dissent from the order

Respectfully Submitted,


Terry M. Jarrett, Commissioner

Dated at Jefferson City, Missouri
on this 22nd day of April, 2009.