

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

In the Matter of an Investigation of)	
The Empire District Electric Company's)	EO-2008-0215
Storm Preparation and Restoration Efforts)	

Concurring Opinion Of Commissioner Terry M. Jarrett

This Commissioner files a concurring opinion to highlight my support for this Commission's affirmative use of its authority to investigate that safe and adequate delivery of service by a public utility under its jurisdiction occurred. I, however, believe more than an investigatory case is appropriate in this instance. The Commission's Order specifically states that this is not a contested case¹, but I believe it should be.

A contested case would allow for the presentation of evidence, challenges to the veracity of that evidence, sworn testimony and rebuttal testimony, and examination and cross examination of witnesses, which would allow for advocates of the "parties" to engage in the adversarial process before the Commission. It is the adversarial nature of a contested case that adds to the building blocks of due process and ultimately to the transparency of that process. Moreover, in a contested case, quasi-judicial power is exercised by the Commission, and legal rights, duties or privileges of specific parties are required by law to be determined after a hearing. In that the Commission is not acting in an adjudicative capacity in an investigatory case, the procedural and substantive due process afforded a contested case is distinguishable.

¹ The classification of a case before an administrative agency as "contested" or "noncontested" is not left to the discretion of the agency; rather it is a legal issue to be determined by the court. *Cade v. State*, 990 S.W.2d 32, 36 (Mo App. W.D. 1999) (citing *State ex rel. Valentine v. Board of Police Com'rs of Kansas City*, 813 S.W.2d 955, 957 (Mo. App. 1991). See also, *Shawnee Bend Special Road Dist. "D" v. Camden County Comm'n*, 800 S.W.2d 452 (Mo. App. S.D. 1990) (stating that the classification of contested case is not left to the will of the agency but is determined by law.)

Most importantly in a contested case the Commission makes findings of fact and conclusions of law and ultimately issues an Order, something which does not happen at the conclusion of an investigation.

In this instance, serious questions have been raised, but have yet to be proven, regarding the reliability of utility service during the ice storm of December 2007, including unsubstantiated accusations advanced that this Commission is biased with respect to the balance of interests it regulates.²

This Commission, while fulfilling its obligations, must not be swayed by public pressures and sentiments. Currently absent from the planned investigatory process are hearings where there will be an opportunity for the "parties" to cross examine witnesses, have testimony presented under oath and the opportunity to rebut evidence. In my opinion, testing the veracity of the information presented is an important component to a contested case, and here, I would have preferred a path which included these higher thresholds and standards of due process.

The delivery of safe and adequate utility service is critical, and as such, the impact that the ice storm of December 2007 had on that delivery are worthy of this Commission's inquiry. But in my opinion, this matter calls for more than a mere investigation, not because the ultimate outcome may or may not be any different, but because a contested case provides the necessary transparency in which to conduct this investigation.

While I have not made any determination regarding any allegation or issue that will be before the Commission in this matter, I simply believe that the best way to ensure that the Commission balances the interests would have been by making this a contested case rather than an investigation. In addition, if the investigatory process were to reveal anything which might merit a complaint, wading through an investigation does nothing more than create an added step,

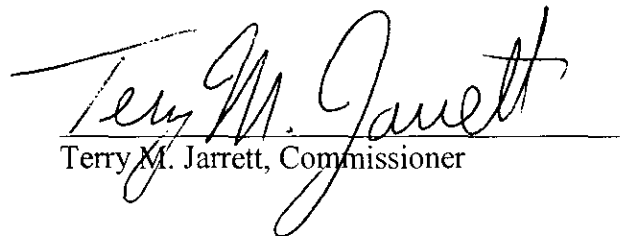
² Derek Spellman, *Opinions vary on Empire's storm response*, Joplin Globe, December 23, 2008.

and utilizes resources which could otherwise be expended in the first instance in a contested proceeding.

In conclusion, this Commission's duty to balance the interests of utility shareholders, ratepayers and the public interest can be met in a variety of ways, but an investigatory proceeding in the face of the allegations and accusations being made will only provide the Commission with an opportunity to either agree or disagree with the information presented to the Commission at the conclusion of the investigation.

The investigatory path chosen by the Commission in this case is better than inaction, and as such, I support the Commission in moving forward. However, in my opinion, a more vigorous and robust path is preferable. I would open this matter as a contested case and insist that transparency in all levels of due process be afforded this matter.

Respectfully submitted,



Terry M. Jarrett, Commissioner

Dated in Jefferson City, Missouri
on this 2nd day of January, 2008.