

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

In the Matter of Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities’ Tariff Revisions Designed to Implement a General Rate Increase for Natural Gas Service in the Missouri Service Areas of the Company.)))))) Case No. GR-2014-0152

**MISSOURI DIVISION OF ENERGY’S MOTION TO STRIKE
PORTIONS OF OPC WITNESS GEOFF MARKE’S SURREBUTTAL TESTIMONY
AND MOTION FOR EXPEDITED TREATMENT**

COMES NOW the Department of Economic Development – Division of Energy (“DE”) and moves the Commission, pursuant to Rule 55.27(e) and 4 CSR 240-2.080, to strike the Surrebuttal Testimony of Office of Public Counsel (“OPC”) witness Geoff Marke filed on August 15, 2014 for noncompliance with Commission requirements for surrebuttal testimony at 4 CSR 240-2.130(7)(D) and the *Partial Stipulation and Agreement As To Certain Issues* (“Partial Stipulation”). In support of its motion, DE states as follows:

1. The surrebuttal testimony, which is the subject of this pleading, was filed one business day before evidentiary hearings in GR-2014-0086, in which DE participated as a party. This pleading is filed on the third business day after the conclusion of those evidentiary proceedings. Due to resource limitations, this motion is filed at the earliest practical time.

2. The harm to be avoided is stated below, but includes preventing abuse of the Commission’s evidentiary rules and subsequent use of unfair advantage.

Noncompliance with Commission’s Evidentiary Rules

3. 4 CSR 240-130(7)(D) states that “[s]urrebuttal testimony *shall* be limited to material which is *responsive* to matters raised in another party’s rebuttal testimony.” The Commission has treated violations of this rule as grounds for strike.¹

4. Witness Marke claims to “respond to comments regarding an energy efficiency (EE) program for Liberty in the rebuttal testimony of ... Staff witness Kory Boustead.”² Nowhere in his surrebuttal testimony does witness Marke cite, quote, or otherwise reference witness Boustead’s “comments regarding an energy efficiency program for Liberty.”

5. Indeed, according to Staff witness Boustead, “[t]he purpose of my rebuttal testimony is to address Liberty Utilities . . . *main extension proposal* and the *funding of the Low Income Weatherization Program* in the Direct Testimony of witness John Buchanan, Department of Economic Development, Division of Energy”³ While opposing witness Buchanan’s proposal to fund weatherization separate from the Company’s energy efficiency funding formula, witness Boustead offers no remotely substantive comment on any energy efficiency program. Instead, witness Boustead makes a passing reference to an energy efficiency funding *formula* only as it relates to low-income weatherization.⁴

6. Witness Marke’s surrebuttal, however, “responds” by cataloguing the Company’s energy efficiency programs,⁵ energy efficiency program spending,⁶ and energy efficiency

¹ *E.g.*, Order Granting Ameren Missouri’s Motion to Strike a Portion of David Murray’s Surrebuttal, ER-2011-0028 (striking surrebuttal because of witness’s insertion of new argument); Order Granting Ameren Missouri and Staff’s Motions to Strike a Portion of Michael Walter’s Surrebuttal Testimony, ER-2011-0028 (striking surrebuttal because of witness’s insertion of new arguments).

² Surrebuttal Testimony of Geoff Marke, p. 1, ll. 6-8.

³ Rebuttal Testimony of Kory Boustead, p. 1, ll. 12-16.

⁴ *Id.* at p. 2, ll. 14 & 22.

⁵ Surrebuttal Testimony of Geoff Marke, pp. 3-5.

⁶ *Id.* at p. 5, ll. 4-8.

program cost effectiveness,⁷ and proposing a suspension of future energy efficiency program expenditures⁸.

7. Witness Marke's surrebuttal, to the extent it discusses energy efficiency, is unresponsive to any rebuttal testimony, and stands in direct contradiction to 4 CSR 240-2.130(7)(C). Inserting direct testimony into surrebuttal bestows upon the violating party exactly the kind of unfair strategic advantage against which the Commission's evidentiary process is meant to safeguard. Direct testimony "shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief."⁹ By debuting its energy efficiency recommendations for the first time in unresponsive surrebuttal,¹⁰ OPC deprives DE and other parties of an important procedural tool that they would otherwise have—the chance to respond by written testimony.¹¹

Noncompliance with Partial Stipulation and Agreement

8. The Company currently recovers \$45,000/year of its energy efficiency program expenses in rates. This amount is calculated into the Company's revenue requirement.

⁷ *Id.* at p. 5-6.

⁸ *Id.* at p. 6, ll. 15-18.

⁹ 4 CSR 240-2.130(7)(A).

¹⁰ DE received no notice or other indication of OPC's recommendation regarding energy efficiency until reviewing witness Marke's surrebuttal testimony.

¹¹ *See* Order Granting Ameren Missouri and Staff's Motions to Strike a Portion of Michael Walter's Surrebuttal Testimony, ER-2011-0028 ("Walter's inclusion of thirteen specific proposals for the first time in his surrebuttal testimony is improper under the Commission's rules. Those rules exist so that parties can have a reasonable opportunity to respond to allegations. By waiting until it filed its surrebuttal testimony to raise these new matters, the Unions have not allowed Ameren Missouri and the other parties a reasonable opportunity to respond to those allegations through the testimony of their own witnesses. Therefore, the inclusion of the Union's specific proposals in surrebuttal testimony is improper and in violation of the Commission's regulation regarding direct and surrebuttal testimony.").

9. On August 12, the Company, Staff, and OPC in this case filed an unopposed *Partial Stipulation and Agreement as to Certain Issues* (“Partial Stipulation”), which the Commission approved—and with which it ordered compliance—on August 20.¹²

10. The Partial Stipulation settled the prospective revenue requirement for the Company, subject to “the remaining issues listed below.”¹³ The remaining issues list dollar values, which indicate their potential impact on revenue requirement. Among the remaining listed issues is “Energy Efficiency and Weatherization Program—Division of Energy,” which indicates no dollar amount impact. No party, including DE, at the time of filing the Partial Stipulation proposed any energy efficiency or weatherization modification that would affect revenue requirement or otherwise affect the \$45,000 energy efficiency recovery in rates.

11. Three days after signing and filing the Partial Stipulation, OPC witness Marke proposed in surrebuttal to eliminate all energy efficiency program funding, including the \$45,000 amount in revenue requirement, “until more information becomes available” about the Company’s energy efficiency programs’ cost effectiveness.¹⁴ This proposal violates the Partial Stipulation and the Commission’s order directing compliance therewith.

WHEREFORE, Division of Energy respectfully moves the Commission to strike—prior to the start of the evidentiary hearings on September 8 or at least before witness Marke takes the stand on September 12—all discussion of energy efficiency from the Surrebuttal Testimony of OPC witness Geoff Marke, including p.2, ll.18-20; p.3, ll.1-2 & 6-18; and pp. 4-6.

¹² Order Approving Partial Stipulation and Agreement, (Aug. 20, 2014) (“The signatories are ordered to comply with the terms of the Partial Stipulation and Agreement As To Certain Issues.”).

¹³ Partial Stipulation and Agreement as to Certain Issues, ¶ 16.

¹⁴ Surrebuttal Testimony of Geoff Marke, p.2, ll.18-20; p.3, ll.1-2; p.6, ll.15-18.

Respectfully submitted,

/s/ Jeremy Knee

Jeremy Knee, Bar #64644

Associate General Counsel

Missouri Department of Economic Development

P.O. Box 1157

Jefferson City, MO 65102

Ph: 573-522-3304

E: jeremy.knee@ded.mo.gov

Attorney for Missouri DED

Division of Energy

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been emailed to the certified service list this 27th day of August, 2014.

/s/ Jeremy Knee

Jeremy Knee