

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

In the Matter of KCP&L Greater Missouri Operations)
Company's Request for Authority to Implement a) File No. ER-2016-0156
General Rate Increase for Electric Service)

**Office of the Public Counsel's Response to Motion to Strike Portions of Direct
Testimony of Witness Michael P. Gorman**

COMES NOW the Office of the Public Counsel ("OPC"), by and through counsel, and tenders this *Response to Motion to Strike Portions of Direct Testimony of Public Counsel Witness Michael P. Gorman*, filed by KCP&L Greater Missouri Operations ("GMO" or "Company") on July 20, 2016, stating:

1. On July 7, 2016 OPC filed the direct testimony of witness Michael Gorman, which explained OPC's case in chief pursuant to Commission Rule 4 CSR 240-2.130(7) which states as follows in pertinent portion:

(7) For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows:

(A) Direct testimony shall include *all testimony* and exhibits asserting and explaining that party's *entire case-in-chief*;

Emphasis added.

2. GMO claims OPC's direct case in chief filing is somehow "masquerading" as something other than what it is. However, it is clear on the face of both the Commission rule as well as the content of the testimony itself OPC has presented to the parties and to this Commission its entire case in chief which in part includes, responding to the case in chief filed by GMO. Absolutely nothing in the plain language of (7)(A) of the rule prohibits the ability of a party to respond to the pre-filed direct testimony of another party. Additionally, nothing in the rule would prohibit

GMO from responding to the direct filed by OPC in its rebuttal due on or before August 15, 2016. It is for a party to determine what their case in chief looks like and it is not for another party to control how that may look.¹

3. The facts and circumstances in this case fail to justify exclusion of Mr. Gorman's pre-filed direct testimony. The Commission has addressed when it will consider motions to strike pre-filed testimony. In rejecting a motion to strike in Ameren Missouri's recent rate case, this Commission cautioned against striking pre-filed testimony explaining:

“A motion to strike testimony can be appropriately brought before the Commission, *but the Commission must exercise caution in dealing with such a motion at this stage of the proceeding*. Mr. Meyer's direct testimony has been prefiled, but it has not yet been offered into evidence. Generally, the proper time to object to the admissibility of evidence is after it has been offered. But in some circumstances prefiled testimony may be so inappropriate and prejudicial to make it unjust to require the other parties respond to that testimony. In such circumstances, the Commission might appropriately grant a motion to strike.”

Emphasis added (In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariff to Increase Its Revenues For Electric Service, File No. ER-2014-0258, *Order Denying Motion in Limine or to Strike Testimony*, p. 2, Iss'd Jan. 14, 2015). As the Commission has already stated, a Motion to Strike should not be granted without an abundance of caution. This case does not present an inappropriate, prejudicial, or unjust situation for GMO as they have the complete

¹ If this Commission were to adopt GMO's view of (7)(A), it could be argued that this would result in a due process violation by the Commission limiting the ability of OPC to present its case in chief. The Commission cannot preclude a party from addressing relevant issues in a rate case. See *State ex rel. Fischer v. Public Service Com.*, 645 S.W.2d 39 (Mo. Ct. App. 1982).

ability to respond to OPC's direct in rebuttal and will subsequently be able to respond in surrebuttal. In fact, it could be argued that to strike the testimony at this point would create a prejudicial and unjust situation for OPC who has not violated any statute or Commission rule.

4. OPC does not disagree with GMO's request to respond to Mr. Gorman's testimony in surrebuttal or rebuttal, as that is already entirely within the Company's discretion and control under 4 CSR 240-2.130 (7)(B).

5. As explained herein, GMO's motion lacks any legal basis to support its request and should be rejected.

WHEREFORE, OPC prays that the Commission reject GMO's Motion to Strike.

Respectfully submitted,

/s/ Cydney D. Mayfield
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission, **on this 25th Day of July, 2016.**

/s/ Cydney D. Mayfield