

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

In the matter of The Empire District Gas)
Company of Joplin, Missouri for Authority to) Case No. GR-2009-0434
File Tariffs Increasing Rates for Gas Service) Tariff No. YG-2009-0855
Provided to Customers in the Missouri Service)
Area of the Company.)

EDG’S RESPONSE TO CONSTELLATION’S MOTION TO STRIKE

Comes now The Empire District Gas Company (EDG), and, in response to the Motion to Strike Portions of Empire District Rebuttal Testimony on Transportation Issues filed by Constellation NewEnergy-Gas Division (Constellation), states as follows to the Missouri Public Service Commission (Commission):

1. On December 18, 2009, Constellation filed its Motion to Strike Portions of Empire District Rebuttal Testimony on Transportation Issues (Motion to Strike). On the same day, the Commission issued its Order Shortening Time for Responses, therein directing that responses to the Motion to Strike be filed no later than 5:00 p.m. on December 22, 2009.

2. Constellation alleges that certain portions of the rebuttal testimony of EDG witnesses Scott Keith and H. Edwin Overcast “should be stricken because it is actually direct testimony” that has been filed out of time. In support of this allegation, Constellation quotes the definition of direct testimony found in Commission Rule 4 CSR 240-2.130(7) (“Direct testimony shall include all testimony and exhibits asserting and explaining that party’s entire case in chief.”).

3. What Constellation does not provide is the definition of “rebuttal testimony” found in the same rule. Rebuttal testimony is defined by the Commission as follows:

Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case.

Commission Rule 4 CSR 240-2.130(7)(B).

4. In this case, all parties have had the opportunity to file direct testimony and Constellation did file such direct testimony. Thus, in analyzing rebuttal testimony, the question for the Commission is not whether information could have been provided in direct, but rather whether the information found in rebuttal is responsive to the testimony and exhibits contained in any other party's direct case. In other words, if an opposing party "opens the door" through its direct testimony, other parties are allowed to respond to that testimony, whether or not the substantive response could have been included in earlier prefiled testimony.

5. The subject EDG rebuttal testimony in this case is very much responsive to Constellation's direct testimony. Both Mr. Keith and Mr. Overcast provide specific references within the first few pages of their rebuttal to the testimony to which they are responding.

6. Mr. Keith identified the four specific areas of Constellation witness Haubensak's Direct Testimony to which he would respond on page 3 of his Rebuttal Testimony. These responses are then provided on pages 4-14 of Mr. Keith's Rebuttal Testimony. Mr. Keith also provides a response to the Staff's direct testimony on pages 14 and 15 of his Rebuttal Testimony.

7. EDG witness Overcast identifies Mr. Haubensak's definition of "transportation" to which he will respond on pages 1-2 of his Rebuttal Testimony. Mr.

Overcast summarizes his disagreement on page 2 and then provides the specific facts in support of his position on pages 2-6. At the bottom of page 6, Mr. Overcast identifies another of Mr. Haubensak's Direct Testimony statements with which he disagrees. This statement concerns Mr. Haubensak's assertion as to when he believes EDG must inject and withdraw gas to or from storage. On pages 7-10, Mr. Overcast explains why Mr. Haubensak's assertion is not correct.

8. Constellation's Motion to Strike is further flawed in that it misinterprets how the Commission's rules have been applied to the processing of rate cases. First, Constellation seems to believe that every aspect of the utility's case must be addressed in the "case in chief" referred to by the Commission's direct testimony rule. This is inaccurate. The rate case process contemplates that a utility will not be able to anticipate in its initial filing every issue that may be raised during the course of a rate case. This Commission has stated in regard to rate cases that "utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent." *In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increase*, Report and Order, Case No. WR-2000-281 (August 31, 2000), quoting *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985). Thus, EDG was not required to address every issue in its case in chief.

9. Second, it must be remembered that the issues addressed by the testimony in question concerns revised tariff language applying to transportation customers, their

conduct on EDG's system and the interaction between the fees to be paid by those customers and the purchased gas adjustment clause. While these tariff sheets have been filed for the Commission's consideration as a part of this rate case, the tariff sheets also could have been filed separately utilizing the Commission's file and suspend method. If filed separately, they could have gone into effect by operation of law, without the filing of any testimony. Therefore, it is misleading to suggest that there is some inherent level of testimony that must be filed to support a transportation tariff change.

10. EDG does agree with Constellation that as the proponent of the transportation tariffs, EDG has the burden of proof as to those tariff sheets. Motion to Strike, p. 3. Whether EDG has met this burden will be determined by the Commission at a later date after it has heard all the evidence, to include all of the prefiled and live testimony in this case.

11. EDG does not agree, however, with Constellation's assertion that "Empire has the burden of proving that, in fact, its existing tariffs need to be changed. . . ." Motion to Strike, p. 3. Constellation provides no citation for this proposition and EDG believes there are none to be found. This is not a complaint case where a non-company party must show that existing tariffs are not reasonable and just. Here, EDG, as it is permitted to do by statute, has proposed revised tariff sheets. The question for the Commission is whether those proposed tariff sheets are "just, reasonable, and in the public interest." In fact, this is the standard described by the Commission's Suspension Order in this case ("In order to allow sufficient time to study the effect of the proposed tariffs and *to determine whether they are just, reasonable, and in the public interest*, the Commission will suspend the proposed tariffs for a period of 120 days beyond the requested effective

date.”). Suspension Order, p. 2 (emphasis added). Neither the Commission’s order nor any other source creates an obligation for EDG to show that its existing tariffs are unreasonable.

12. Constellation seems to suggest that it has been surprised by EDG’s rebuttal testimony as it emphasizes that EDG’s rebuttal testimony was filed “less than a month before hearing.” Of course, rebuttal testimony is almost always filed less than a month before hearing. Surrebuttal testimony will be filed even closer to the hearing. That is why the opportunity for discovery is provided (and that the period for responses to such discovery is shortened after the filing of direct testimony and again shortened after the filing of rebuttal testimony. Order Setting Procedural Schedule and Setting Test Year, p. 4 and Joint Proposed Procedural Schedule, p. 3).

13. As can be seen by Schedule WSK-1 to Mr. Keith’s rebuttal testimony (as described on p. 5 of Mr. Keith’s Rebuttal Testimony), Constellation has already made extensive use of that discovery process. In fact, most of Mr. Keith’s rebuttal testimony was merely providing to the Commission information that had been previously provided to Constellation or was already in Constellation’s possession by other means. It appears Constellation is not so much surprised as it is chagrined that EDG has the opportunity to respond to Constellation’s allegations in rebuttal and surrebuttal testimony.

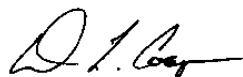
14. Finally, it should be noted that ultimately there should be no harm to Constellation resulting from the testimony provided in EDG’s rebuttal testimony. The parties will file surrebuttal testimony in this case on December 29, 2009. Commission Rule 4 CSR 240-2.130(7)(D) states that “surrebuttal testimony shall be limited to material which is responsive to matters raised in another party’s rebuttal testimony.”

Accordingly, because of the structure of the rate case procedural schedule, Constellation will have the “last word” as to the issues it raised in its prefiled direct testimony.

15. Constellation’s view of the case seems to be that EDG’s opportunity to provide testimony stopped with the filing of its direct testimony. That is simply not the case. The Commission’s rules and the procedural schedule in this case contemplate the filing of direct, rebuttal and surrebuttal by all parties, as well as the opportunity for cross-examination and, ultimately, redirect examination of the witnesses. All of these steps provide the opportunity for the parties to present, and the Commission to accept, evidence that will be considered in regard to the Commission’s decision in this case.

WHEREFORE, EDG respectfully requests that the Commission deny Constellation’s Motion to Strike.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 22nd day of December, 2009, to:

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