

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of the Complaint Against City of)
Garden City, Kansas, Respondent, for an Order)
Declaring that Garden City is Illegally Servicing)
Conestoga Energy Partners, LLC, in Wheatland) Docket No. 17-GDCE-370-COM
Electric Cooperative, Inc.'s Certified Service)
Territory, and an Order to Cease, by Wheatland)
Electric Cooperative, Inc., Complainant.)

**REPLY OF THE CITY OF GARDEN CITY TO THE MOTION TO TAKE
DEPOSITION OF WHEATLAND ELECTRIC COOPERATIVE, INC.**

COMES NOW, the City of Garden City, Kansas (“Garden City”) and, pursuant to K.A.R. 82-1-218, files a reply to the Motion to Take a Deposition of Wheatland Electric Cooperative, Inc. (“Wheatland”).

I. Background

1. On February 9, 2017, Wheatland filed a complaint against Garden City alleging that Garden City is serving a retail electric customer, Conestoga Energy Partners, LLC (“Conestoga”), in Wheatland’s certified territory (the “Complaint”).

2. On February 20, 2017, the Staff of the Kansas Corporation Commission (“Staff” and “Commission,” respectively) filed its Legal Memorandum, which found that the Complaint complied with the procedural requirements and established a *prima facie* case for Commission action, and recommended that the Complaint be served upon Garden City for an Answer.

3. On March 14, 2017, the Commission issued its Order Accepting Formal Complaint and Adopting Staff’s Memorandum, which found that the Complaint should be served on Garden City.

4. Garden City answered the Complaint on March 28, 2017 (the “Answer”). The Answer explained that Wheatland ceded the territory at issue to Garden City eleven years ago,

with the knowledge and consent of the customer, pursuant to an unconditional oral agreement and that Garden City has incurred substantial costs over the past eleven years in reliance upon its agreement with Wheatland. Garden City asked the Commission to dismiss the Complaint and approve and enforce the transfer of territory necessary to serve Conestoga from Wheatland to Garden City.

5. On April 27, 2017, the Commission issued its Order Designating Prehearing Officer, Protective Order and Discovery Order (“Discovery Order”). Among other things, the Discovery Order formalized discovery procedures and clarified the obligations of the parties to “help ensure a full and efficient investigation of the issues in this docket.” Discovery Order at ¶ 17. The Discovery Order provides for written data requests and sets forth time limits for objections and responses to such data requests. The Discovery Order does not provide for depositions. Further, the Discovery Order states:

The Commission may limit discovery to protect a party against unreasonable, cumulative, or duplicative discovery requests; to prevent undue delay in the proceeding; to avoid unnecessary burden, expense, or harassment, or to otherwise maintain the orderly and efficient progress of the proceeding.

Discovery Order at ¶ 21.

6. Throughout the months of April-July, 2017, the parties have issued a total of 46 data requests. Thirty-six of the 46 data requests were directed to Garden City and the City has responded timely to all 36. In each of the seven instances where Garden City preserved an objection to a data request, it still provided a substantive answer. At no time has Wheatland informed Garden City that its responses are in any way incomplete or inadequate, and there has been no limitation on Wheatland’s ability to follow-up with additional data requests.

7. On July 26, 2017, Wheatland filed its Motion to Take Deposition (“Motion”), by which it seeks to depose the following three individuals on a wide range of issues:

- a. Mike Muirhead on the use of the substation serving Conestoga and PetroSantander (USA) Inc. (“PetroSantander”) as well as “all issues wherein he has signed and answered data requests, and he is an employee of the City.”
- b. Cliff Sonnenberg on the understanding between the parties that allows the City to serve Conestoga.
- c. An unnamed City employee that has the most knowledge of the use of the substation serving Conestoga and “on the factual issues raised by the City in its answer.”

The Motion does not explain why the standard practice of issuing written data requests, submitting pre-filed testimony, and cross-examination at an evidentiary hearing is inadequate for Wheatland to obtain the information it seeks.

II. Reply: Wheatland’s Motion Fails To Address The Commission’s High Standard For Permitting Depositions And Should Be Denied

8. Wheatland’s Motion fails to address the Commission’s high standard for permitting depositions and should be denied. The Motion cites to a single instance in which the Commission granted an unopposed request for a deposition in a transportation case with no discovery order, while wholly ignoring the unambiguous Commission precedent directly applicable to this case.¹ In Docket Nos. 04-SWBT-544-COM, 04-AQLE-1065-RTS, and 10-KCPE-415-RTS the Commission set forth the high standard that must be satisfied before depositions will be allowed. Specifically, the Commission has found that depositions are “not encouraged in the normal course of a proceeding,” that depositions are only used for “extraordinary matters,” and that “to entitle a party to take a deposition, there must be some reasonable ground for believing that actual necessity requires it.”²

¹ See Motion at ¶ 9 (citing Docket No. 11-GIMM-538-KHP).

² *Order No. 13, Order Denying Motion to Take Depositions*, Docket No. 04-AQLE-1065-RTS at ¶¶ 4-5 (Nov. 1, 2004); *see also, Order: A) Denying KCPL’s Motion to Take Deposition; B) Directing Staff to File a Reply to KCPL’s Response to Staff’s Motion to Lift Confidential Designation; & C) Setting Time Frames for Prehearing Motions*, Docket No. 10-KCPE-415-RTS at ¶¶ 2-3 (July 7, 2010); *Order Denying Request for Order Requiring SBC to Make Its Witnesses Available for Deposition*, Docket No. 04-SWBT-544-COM at ¶¶ 7-8 (June 7, 2005).

9. In Docket No. 04-AQLE-1065-RTS, Aquila, Inc., d/b/a Aquila Networks – WPK (“Aquila”) filed a motion to take depositions of several Staff witnesses. Staff objected to the depositions, arguing that Aquila made no showing that routine discovery methods contemplated by the Commission’s statutes, regulations, and discovery order are insufficient to obtain the information it sought. Staff also asserted that pre-filed testimony accomplishes the primary objective of depositions, which is to discover what matters to which a witness will be testifying. The Commission denied Aquila’s motion, noting that “while depositions are not prohibited, they are also not encouraged in the normal course of a proceeding.”³ The Commission noted that it will order depositions in “extraordinary circumstances,” but that “there must be some reasonable ground for believing that actual necessity requires it.”⁴

10. In Docket No. 04-SWBT-544-COM, South Central Wireless, Inc. d/b/a SC Telecom (“SC Telecom”) filed a request for an order requiring Southwestern Bell Telephone, L.P. d/b/a SBC Kansas (“SWBT”) to make its witnesses available for deposition. SWBT objected to the request, pointing out that Commission procedures include pre-filed testimony, which is “unlike a typical civil case in which the potential testimony of a witness may not be known in any detail.”⁵ Thus, SWBT argued, there is no need for depositions, as the pre-filed testimony sets forth the substance of the witnesses’ anticipated testimony.⁶ The Commission denied SC Telecom’s request for depositions, noting that “depositions are, indeed, an extraordinary measure not normally utilized or allowed during the course of normal Commission proceedings.”⁷ The Commission found that there is no compelling reason for depositions when a

³ *Order No. 13, Order Denying Motion to Take Depositions*, Docket No. 04-AQLE-1065-RTS at ¶ 4.

⁴ *Id.* at ¶¶ 4-5 (citing *Long v. Prairie Oil & Gas Co.*, 135 Kan. 440, 10 P.2d 894 (1932)).

⁵ *Order Denying Request for Order Requiring SBC to Make Its Witnesses Available for Deposition*, Docket No. 04-SWBT-544-COM at ¶ 4 (citing SWBT’s Motion to Strike Notices of Deposition at ¶ 3).

⁶ SWBT’s Motion to Strike Notices of Deposition, Docket No. 04-SWBT-544-COM at ¶ 3 (June 2, 2005).

⁷ *Order Denying Request for Order Requiring SBC to Make Its Witnesses Available for Deposition*, Docket No. 04-SWBT-544-COM at ¶ 7.

standard discovery order is in place, pre-filed testimony is submitted, and the witnesses are available for cross-examination at hearing.⁸

11. In Docket No. 10-KCPE-415-RTS, Kansas City Power & Light Company (KCPL) filed a motion to depose a Staff witness, which was denied. The Commission's order denying KCPL's motion relied upon the precedent set in Docket No. 04-AQLE-1065-RTS, discussed above. The Commission found that "necessity is not demonstrated when 'Staff witnesses [are] available for cross-examination at the hearing on the content of their prefiled testimony.'"⁹

12. Garden City is aware of only two instances in which depositions were permitted by the Commission. First, there is the aforementioned transportation case, which is distinguishable based on the lack of discovery order, lack of opposition to the deposition request, and lack of pre-filed testimony from the witness.¹⁰ Second, there is a 2001 case involving the restructuring of Western Resources, Inc. ("WRI"). The 2001 case is readily distinguishable from the current proceeding due to the extraordinary circumstances of the 2001 case, which included: (a) a highly complex subject matter involving the fundamental restructuring of Kansas' largest electric utility, (b) changing facts in close proximity to the evidentiary hearing, including an announcement that WRI would sell ONEOK, Inc. stock, and (c) an acrimonious discovery process in which "the Commission receives, almost daily, if not semi-daily, more pleadings reflecting less cooperation."¹¹ Unlike the 2001 case, the issues in the current proceeding are

⁸ *Id.* at ¶ 8.

⁹ *Order: A) Denying KCPL's Motion to Take Deposition; B) Directing Staff to File a Reply to KCPL's Response to Staff's Motion to Lift Confidential Designation; & C) Setting Time Frames for Prehearing Motions*, Docket No. 10-KCPE-415-RTS at ¶ 3 (quoting *Order No. 13, Order Denying Motion to Take Depositions*, Docket No. 04-AQLE-1065-RTS at ¶ 5).

¹⁰ *See generally*, Docket No. 11-GIMM-548-KHP. The record in that case does not include a single filing or appearance from the Respondent, whose deposition Staff sought to take, other than his original request for hearing.

¹¹ *Order No. 38, Order Denying Reconsideration and Denying Application for Stay*, Docket No. 01-WSRE-949-GIE at ¶¶ 5-7 (June 19, 2002).

fairly straightforward, discovery has in no way been limited, and the parties have cooperated on the standard discovery process as evidenced by Garden City's timely responses to all 36 data requests it has received.

13. The current case is much more analogous to the circumstances in the Aquila, SWBT and KCPL cases, in which data requests were issued and responded to pursuant to a standard discovery order, pre-filed testimony was submitted, and witnesses were available for cross-examination at an evidentiary hearing. Although there is currently no procedural schedule in place in this docket, it is well understood that there will be pre-filed testimony and an opportunity to cross-examine witnesses at an evidentiary hearing. In the meantime, there will be ample opportunity for Wheatland to issue additional data requests on any relevant subject matter.

14. The Commission's standard procedures for written data requests and responses, pre-filed testimony, and cross-examination at an evidentiary hearing are adequate for ensuring a full and efficient investigation of the issues in this proceeding. Wheatland's motion makes no attempt to explain why the standard procedures are inadequate. With no such explanation, Wheatland's Motion fails to establish any reasonable ground for believing that actual necessity requires depositions, and therefore fails to meet the Commission's standard for granting depositions.

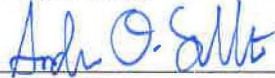
15. Moreover, the Commission should use its authority to protect Garden City from unreasonable, cumulative and duplicative discovery requests and to prevent undue delay and unnecessary burden, expense and harassment. *See* Discovery Order at ¶ 21. Wheatland desires to depose Mr. Muirhead and an unnamed City employee on the use of the substation serving Conestoga and PetroSantander, but Garden City has already fully responded to written data requests on that subject. Likewise, Wheatland desires to depose Mr. Sonnenberg on the

understanding between the parties that allows the City to serve Conestoga, but that understanding is explained in Wheatland's Complaint, Garden City's Answer thereto, and written data requests between the parties. Depositions would be unreasonable, cumulative and duplicative. Additionally, depositions would create unnecessary burdens and expenses for Garden City. Finally, if the Commission does not maintain its high standard for allowing depositions—as set forth in the cases discussed above—it could create unnecessary delay, expense and burden in nearly all contested Commission proceedings, at great cost to the efficient and orderly operation of the Commission.

III. Conclusion

16. For the foregoing reasons, Garden City respectfully requests that the Commission deny Wheatland's Motion to Take Depositions.

Respectfully Submitted,



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ATTORNEYS FOR THE CITY OF GARDEN
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VERIFICATION

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

Andrew O. Schulte, being first duly sworn upon his oath, deposes and states that he is Counsel for The City of Garden City, Kansas, that he has read and is familiar with the foregoing and that the statements therein are true to the best of his knowledge, information and belief.



Andrew O. Schulte

Subscribed and sworn to before me this 4th day of August, 2017.

BRENDA L. LEE
NOTARY PUBLIC-NOTARY SEAL
STATE OF MISSOURI
CLAY COUNTY
MY COMMISSION EXPIRES 9/29/2018
COMMISSION # 14428629



CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and forgoing was emailed, this 4th day of August, 2017, to:

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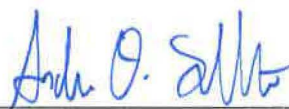
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