

PUBLIC UTILITIES COMMISSION)	Motion of Electricity Maine, LLC to
Commission Initiated Investigation)	Dismiss or, in the Alternative, For
Pertaining to Electricity Maine, LLC)	an Order Requiring the CASD to
)	Re-File Direct Testimony, and For
)	Temporary Suspension of the Case
)	Schedule

On September 26, 2023, the Consumer and Safety Division (“CASD”) and the Office of the Public Advocate (“OPA”) each filed Direct Testimony in the above-referenced proceeding. Pursuant to Chapter 110,¹ Section 10(G)(1) and (2), “the petitioner shall file the direct testimony and exhibits of each witness which it proposes to present in support of its direct case” and “[i]f the prefiled testimony standing alone does not satisfy the party's evidentiary burden, that party's case may be dismissed upon motion of a party.”

The CASD’s Direct Testimony, which is only three pages in length, fails to meet the Commission’s Chapter 110 Rules because, standing alone, it does not satisfy the CASD’s evidentiary burden. This deficiency warrants dismissal of its this proceeding, which was opened at the request of the CASD. As an alternative to dismissal, the CASD should be ordered to file Direct Testimony that specifies all applicable Maine laws that the CASD alleges Electricity Maine, LLC (“EME” or the “Company”) violated and identifies all conduct of EME that allegedly failed to meet the identified legal standards.² Finally, EME respectfully requests that the procedural schedule be temporarily suspended while the Commission addresses the sufficiency of the CASD’s Direct Testimony.

¹ 65-407 C.M.R. Ch. 110 (Rules of Practice and Procedure) (“Chapter 110”).

² As discussed below, the OPA filed substantive Direct Testimony that is 29 pages in length and references 58 OPA Exhibits.

BACKGROUND

On February 9, 2023, the CASD filed a Request for Formal Investigation with the Commission, requesting the opening of a formal investigation of EME pursuant to 35-A M.R.S. §§ 1303(2) and 3203(13-A) to review whether the Company “renewed small customers’ terms of service without providing the renewal notices required by Title 35-A and Chapter 305, and to further investigate whether Electricity Maine, as a licensed CEP in Maine, is in full compliance with all applicable statutory and regulatory requirements.” (Advocacy Staff’s Request for Formal Investigation at 1, 3.) Later that same day, on February 9, the Commissioners deliberated the CASD’s filing and voted to open the investigation that CASD requested.

The following day, on February 10, 2023, the Commission issued a Notice of Investigation granting the CASD’s Request filed on the previous day.

During remainder of February of 2023, the Commission accepted petitions to intervene and the Hearing Examiners conducted an in initial case conference. During March of 2023, the CASD collected and provided to the parties its investigation files related to EME and the CASD and the OPA filed Complaints on March 23, 2023 and March 24, 2023, respectively. On April 12, EME filed Comments on the CASD and OPA Complaints, and a case conference was held on April 15. On May 5, the Hearing Examiners issued a Procedural Order related to issues discussed during the April 15 case conference. On May 26, the CASD filed an Amended Complaint to which EME responded on June 16.

On July 6, 2023, the Hearing Examiners issued a Scheduling Order that established an overall framework for the processing of discovery and testimony in this proceeding. Although that Scheduling Order has since been superseded, the overall procedural

framework was: (1) initial discovery propounded upon EME (both data requests and technical conference); (2) Direct Testimony filed by the CASD and intervenors; (3) discovery on the Direct Testimony of CASD and intervenors (both data requests and technical conference); (4) Direct Testimony filed by EME; and (5) discovery upon the Direct Testimony of EME (both data requests and technical conference).

Consistent with the case structure, during July and August, the CASD and OPA conducted both written discovery upon EME and the CASD and intervenors were provided the opportunity to examine EME witnesses during two technical conferences. As that discovery upon EME was concluding in August, the Hearing Examiners issued a Scheduling Order on August 22, 2023 that superseded the July 6, 2023 Scheduling Order. Among other things, the August 22 Scheduling Order set September 26, 2023 as the deadline for Direct Testimony by the CASD and intervenors.

On September 26, the OPA and CASD filed Direct Testimony. The OPA's testimony is 29 pages long and cites 58 OPA Exhibits. The OPA's testimony alleges that EME violated certain applicable legal standards based on references to specific EME alleged conduct and provisions of Maine law that the OPA asserts were not met by EME's referenced conduct. The CASD's testimony, excluding the cover page and table of contents, is three pages long and attaches the CASD's "Complaint Decision Tree." The CASD's Direct Testimony identifies no EME conduct, and fails to assert that any EME conduct violated any applicable provision of Maine law.

ARGUMENT

A. **The CASD's Direct Testimony Fails to Support its Evidentiary Burden of Any Alleged Violations by EME.**

Section 10 of the Commission's Chapter 110 Rules govern Adjudicatory Proceedings.

Section 10(G), which addresses Prefiled Testimony and Exhibits, states:

G. **Prefiled Testimony and Exhibits.**

Unless the presiding officer specifies that testimony shall be taken orally, **the direct and rebuttal cases of all parties shall be presented in accordance with this subpart.**

1. **Direct Case of Petitioner**

Unless the presiding officer orders another date, **the petitioner shall file the direct testimony and exhibits of each witness which it proposes to present in support of its direct case** no later than 14 days prior to the first hearing. A utility filing a general rate case shall include the testimony and exhibits at the time of filing its case.

2. **Form of Testimony**

Prefiled testimony shall be in writing, double spaced with each line numbered on each page and indicate the sponsoring witness. **If the prefiled testimony standing alone does not satisfy the party's evidentiary burden, that party's case may be dismissed upon motion of a party.** . . .

(Bold and underlined emphasis added.)

The CASD's Direct Testimony does not comply with the requirements of the Commission's Rules and this proceeding should be dismissed. As noted above, the CASD's Direct Testimony is three pages in length. The sole purpose of the testimony appears to be the laying of foundation for the allowance of the CASD's files into evidence. The CASD's Direct Testimony does not include any substantive discussion of EME's conduct or how that conduct allegedly violates any applicable legal standard. Instead, the CASD appears to be arguing that, within the thousands of pages of documents for which it seeks to lay foundation, there lurks a violation (or violations) of applicable Maine law by EME. The testimony makes no attempt, however, to identify which of the thousands of pages of

documents it relies upon as evidence of an EME violation, let alone any applicable law that has been allegedly violated. As such, the CASD's prefiled Direct Testimony, standing alone, does not satisfy CASD's burden as the party that is prosecuting alleged violations.

Although EME strongly disagrees with the allegations in the OPA's Direct Testimony, the OPA's testimony identifies specific EME conduct and attempts to apply it to a legal standard.³ There is no reason the CASD cannot do the same. It is important to recall that the CASD petitioned the Commission to open this enforcement investigation. The Commission did so, and the CASD is prosecuting the alleged violations against EME with the assistance of assigned Advocacy Staff lawyers. Under the Commission's own procedural rules governing adjudicatory proceedings, the CASD was obligated to file substantive Direct Testimony on September 26. It failed to do so.

Moreover, the Commission should apply the same procedural rules, standards and expectations to its own divisions when they appear as parties before the Commission as the Commission applies to the public utilities it regulates. The OPA and, presumably, the Commission's advisory staff, would not look favorably upon a public utility filing new proposed rate schedules for a rate increase that are accompanied by several hundred pages of the utility's work papers and three pages of Direct Testimony attempting to lay an evidentiary foundation for the work papers. Such Direct Testimony would not facially meet the utility's evidentiary burden and would be subject to dismissal under Chapter 110,

³ The OPA's Direct Testimony cannot serve as a substitute for the CASD's Direct Testimony. Enforcement authority lies exclusively with the Commission and the OPA's role is that of an intervenor in this proceeding. See May 4, 2023 Procedural Order at 4 (concluding that the OPA's legislative authority granted in 35-A M.R.S. § 1702(1) "does not afford the OPA separate enforcement or prosecutorial status"). To be clear, EME vehemently disputes, and looks forward to responding to, the factual and legal allegations in the OPA's Direct Testimony. EME reserves all rights with regard to the allegations in the OPA's Direct Testimony.

Section 10(G)(2). Aside from the fact that the filing would not meet the requirements of the Commission's rules, the case would be nearly impossible to process efficiently or in a manner that is fair to the parties. It would be impractical to take months of discovery to sort through and understand the utility's direct case when the utility should have, in the first instance, explained in its Direct Testimony why it was entitled to the relief it was requesting from the Commission.

The Commission's CASD should be held to the same rules, standards and expectations as public utilities when the CASD is appearing before the Commission as a party. This is particularly appropriate here, given that the CASD petitioned the Commission for the opening of this investigation, the CASD has been appointed as staff advocates to prosecute any claims against EME, and the CASD has asserted on the record that it will seek the imposition of significant penalties against EME (and the OPA seeks to advocate for license revocation). The CASD's Direct Testimony, standing alone, fails to support a conclusion that any specific EME conduct has violated any applicable Maine law. As such, the CASD's Direct Testimony fails to meet the CASD's evidentiary burden and does not comply with Chapter 110, Section 10(G).

B. The Commission Should Dismiss the Investigation Requested by the CASD or, Alternatively, Require the CASD to Re-File Direct Testimony in Compliance with the Commission's Rules.

Pursuant to Chapter 110, Section 10(G)(2) of the Commission's Rules, the CASD's requested investigation should be dismissed on the basis that its prefiled Direct Testimony, standing alone, does not satisfy its evidentiary burden. *See Bangor Hydro-Electric Company, Proposed Schedule to Provide for Residential Heat Pump Service Rate, 1992-255, Order of*

Dismissal (March 26, 1993) (dismissing public utility's residential heat pump proposal without prejudice for failure to file direct testimony that met its burden of proof).

In the alternative, the CASD should be required to re-file Direct Testimony that complies with Section 10(G), including the explicit identification of the applicable legal standards that EME allegedly violated, and all EME conduct upon which the CASD relies to support its allegations. *See Stage Neck Colony, et. al, Request for Commission Investigation into York Water District's Failure to Maintain and Replace Water Valves and Water Lines*, Docket No. 2012-00344 (Commission affords petitioners opportunity to submit additional evidence instead of granting requested dismissal or grant of summary judgement).

C. The Case Schedule Should be Temporarily Suspended While the Sufficiency of the CASD's Direct Testimony is Addressed by the Commission.

Under the current case schedule, discovery is due on the CASD's and the OPA's Direct Testimony on October 10, 2023. Given that the CASD's Direct Testimony does not meet the standard of the Commission's Rules, EME respectfully requests that the case schedule be temporarily suspended while the sufficiency of the CASD's Direct Testimony is addressed by the Commission. Although EME is reluctant to request the Hearing Examiners to pause the procedural schedule, there is no other reasonable option while the sufficiency of the Advocacy Staff's Direct Testimony is assessed.

CONCLUSION

For all of the reasons stated above, the CASD's Direct Testimony, standing alone, does not satisfy the CASD's evidentiary burden and EME respectfully requests that the Commission dismiss the CASD's requested proceeding pursuant to Section 10(G)(2) of Chapter 110 of the Commission's Rules. If the Commission is not inclined to dismiss the CASD's requested investigation, then EME respectfully requests in the alternative that the Commission order the CASD to re-file substantive Direct Testimony in compliance with the Commission's Rules. Finally, EME respectfully requests that the case schedule be temporarily suspended while the sufficiency of the CASD's Direct Testimony is addressed by the Commission.

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