

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

In the Matter of the Application of Evergy Metro,)
Inc. d/b/a Evergy Missouri Metro and Evergy)
Missouri West, Inc. d/b/a Evergy Missouri West) EU-2020-0350
for an Accounting Authority Order Allowing the)
Companies to Record and Preserve Costs Related)
to COVID-19 Expenses.)

INITIAL BRIEF OF AMEREN MISSOURI

COMES NOW, Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”),
and for its initial brief, states as follows:

The Scope of Ameren Missouri’s Initial Brief

The record in this case establishes beyond any reasonable doubt that Evergy¹ has met its burden to establish that the costs (and savings) enumerated in the Stipulation² among Evergy, the Staff of the Commission, the Midwest Energy Consumers Group (“MECG”), and the Missouri Industrial Energy Consumers (“MIEC”) qualify for deferral pursuant to an Accounting Authority Order (“AAO”). Because others will, without question, address in detail how that burden has clearly been met, Ameren Missouri will confine its initial brief to the question the Commission raised regarding the authority of the Commission to impose conditions in an AAO docket, given the general importance of that question not just to this docket, but to AAO dockets in general.³

¹ References to “Evergy” refer both to Evergy Metro, Inc. and Evergy Missouri West, Inc.

² *Non-Unanimous Stipulation and Agreement* filed by Evergy, the Staff, MIEC, and MECG on October 8, 2020.

³ As conveyed to the parties on-the-record by the Presiding Officer.

Specifically, the Commission asked the parties to brief the following issue:

The issue of the Commission's authority to attach conditions to an accounting authority order specifically in relation to . . . [the conditions recommended by Office of the Public Counsel ("OPC") and the National Housing Trust ("NHT")].⁴

In the Stipulation, Evergy has agreed, after negotiation with the other stipulating parties, to certain reporting and other conditions. Ameren Missouri's initial brief therefore addresses the Commission's authority to impose conditions to which the applicant (Evergy) has not already agreed, or "extra conditions."

Analysis

1. The Commission's Authority is Found Only in its Enabling Statutes.

The question of the Commission's authority to do anything must always start with some basic, well-established and controlling principles, as enunciated on numerous occasions by the courts of this state. The Commission itself recently summarized those principles in *David Apted, Petitioner, v. Spire Missouri, Inc., f/k/a Laclede Gas Co., Respondent.*, File No. GC-2017-0348, 2019 WL 1130249, at 6 (Mo. P.S.C. Mar. 6, 2019):

The Commission is an administrative body of limited jurisdiction, having only the powers expressly granted by statutes and reasonably incidental thereto.^[5] The Commission has no authority to require reparation or refund, cannot declare or enforce any principle of law or equity, and cannot determine damages.^[6] The Commission cannot grant equitable relief or abate a nuisance.^[7]

Or as stated in City of O'Fallon v. Union Elec. Co., 462 S.W.3d 438, 443–44 (Mo. App. W.D. 2015):

⁴ Tr. Vol. II, p. 118, lines 16-24.

⁵ ⁴⁶See, e.g., *State ex. rel. City of St. Louis v. Missouri Public Service Comm'n*, 73 S.W.2d 393, 399 (Mo. banc 1934); *State ex. rel. Kansas City Transit, Inc. v. Public Service Comm'n*, 406 S.W.2d 5, 8 (Mo. 1966).

⁶ See, e.g., *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666,668-669 (Mo. 1950).

⁷ See, e.g., *State ex. rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n*, 116 S.W.3d 680, 695 (Mo. App. 2003); *American Petroleum Exchange v. Public Service Comm'n*, 172 S.W.2d 952, 955 (Mo. 1943).

The Commission's powers are limited to those conferred by statute either expressly “or by clear implication as necessary to carry out the powers specifically granted.” *State ex rel. Office of Pub. Counsel & Mo. Indus. Energy Consumers v. Mo. Pub. Serv. Comm'n*, 331 S.W.3d 677, 682 (Mo.App.2011) (quoting *State ex rel. Util. Consumers' Council of Mo. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979)).

Boiled down to their essence, these statements of law demonstrate that the Commission is not a court, and that if the General Assembly did not expressly give the Commission authority to take an action or unless some clearly implied but not specifically expressed authority must exist (i.e., is necessary) for the Commission to exercise the express authority the General Assembly did choose to give it, the Commission lacks the jurisdiction to act.

The case before the Commission in this docket is an *Accounting Authority Order* case. The Commission’s statutory authority to grant AAOs emanates from § 393.140(4) and/or § 393.140(8).⁸ In its seminal *Sibley* decision,⁹ the Commission rested its authority on subsection (4). In certain other cases, it has rested its authority on subsection (8).¹⁰ The courts have once been called upon to specifically identify which of the two subsections provide the authority but declined, since the only difference between the two as it pertains to AAO requests is whether a hearing must be held.¹¹ Since, in the case then on review by the Court of Appeals, a hearing was held, the question of whether subsection (4) or (8) was the source of the Commission’s authority to grant AAOs was rendered moot.¹² Regardless of which subsection applies, there is no serious debate about whether it is one or both of those two subsections that provide whatever authority the Commission has to approve an AAO.

⁸ All statutory references are to the Revised Statutes of Missouri (2016), unless otherwise noted.

⁹ *Re Missouri Public Service*, EO-91-358, 129 P.U.R.4th 381 (Dec. 20, 1991), affirmed, *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806 (Mo. App. W.D. 1993).

¹⁰ *See, e.g., In the Matter of the Application of Missouri-American Water Company for an Accounting Authority Order Related to Property Taxes in St. Louis County and Platte County*, File No. WU-2017-0351, Report and Order, p. 14.

¹¹ *State ex rel. Mo. Office of Pub. Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806 (Mo. Ct. App. 1993).

¹² *Id.* at 809-10.

Does either subsection grant the Commission the authority to condition the grant of an AAO on the requesting utility changing the manner in which it interacts with its customers, or on donating shareholder dollars to “protect customers”¹³ from the effect of an extraordinary event that justified the requested deferral in the first place? To answer that question, one must first examine the statutes to see if such authority is expressed therein. Obviously, it is not. The question next becomes, is such authority “clearly implied” or somehow “reasonably incidental” to the authority that *is expressed* in those two subsections? The answer to that question is also “no” because it is completely unnecessary for the Commission to impose the extra conditions OPC and NHT propose in order to make a decision respecting whether a deferral (i.e., whether to grant the AAO) should be allowed. And since that is so, the Commission simply lacks the authority – the statutory authority which is the only authority it has – to do so.

That the subject statutes do not provide any such authority is also evidenced by the fact that the General Assembly clearly knew how to – and did – provide such authority (the authority to *impose* conditions) when it determined that such authority was needed and appropriate in other types of matters. *See, e.g.*, § 393.220.6 (granting the Commission the authority to “impose such condition or conditions as it may deem reasonable and necessary” when it is asked to approve utility issuances of stocks and bonds); § 393.250.3 (same authority respecting requests made for approval of utility reorganizations); §393.170.3 (same respecting requests for approval of certificates of convenience and necessity).

The only way then, that the Commission could have the authority to impose the subject extra conditions on the grant of an AAO, would be if some other statute granted the Commission authority to impose conditions in any manner of case that might come before it, including an AAO

¹³ Tr., Vol II, p. 72, lines 14-17 (Counsel for National Housing Trust).

case. But if such a statute existed, then why did the General Assembly give the Commission the express authority to impose conditions in the just-cited statutes? The fact is that if such a statute existed (i.e., if the General Assembly has given the Commission the authority to impose conditions like the extra conditions OPC and NHT seek to have imposed on a grant of an AAO) then the specific grants of authority to do so in the just-cited statutes would be rendered completely *meaningless*. Such a result that would run directly counter to one of the most basic principles of statutory interpretation there is: “[e]very word, clause, sentence, and section of a statute should be given meaning, and under the rules of statutory construction statutes *should not be interpreted in a way that would render some of their phrases to be mere surplusage*” (emphasis added). *See, e.g., State v. Acevedo*, 339 S.W.3d 612 (Mo. Ct. App. 2011). Put another way, if subsection (4) and/or (8) need to contain the authority for the OPC and NHT extra conditions, but that authority exists elsewhere in the Public Service Commission Law (as it must since the only authority the Commission has or can have must come from statute), then there was no need whatsoever for the General Assembly to have included specific authority respecting the imposition of conditions in the just-cited statutes and the clauses in those statutes that do so are nothing more than surplusage.

2. Not only do the OPC/NHT extra conditions not fall within any express statutory authority, they cannot be viewed as falling within any implied authority and are wholly beyond the scope of an AAO case.

Even if it could be concluded that *some* kind of condition might be appropriate in an AAO case, the extra conditions proposed by OPC and NHT would not fall within that group. As noted above, the Commission has express statutory power, and has power that is “reasonably incidental” or “clearly implied” as necessary to the exercise of those express statutory powers. A power is “incidental” if it is “secondary or minor.”¹⁴ As discussed below, the OPC and NHT extra

¹⁴ *Webster’s New World Collegiate Dictionary* (4th ed).

conditions are patently not minor, in consequence or otherwise, as discussed further below. And while powers that are not express can exist if they are clearly implied as necessary to exercise the expressed powers, as also discussed further below, the Commission can clearly grant the AAO (which does nothing more than grant the deferral authority) without imposing the extra conditions OPC and NHT seek to have imposed. Might it be necessary for the Commission to impose some kind of conditions in an AAO case for the Commission to properly grant the AAO in the first place? The answer is likely “yes.” One can easily think of examples, such as a condition that requires the utility to keep its books in such a way so that the Commission can be sure that only sums which the AAO authorized be deferred in fact are deferred. And certainly, the Commission can decide *what* costs may be deferred pursuant to an AAO, and for how long. Both of those decisions can be characterized as “conditions” on the AAO (the Commission approves the AAO so long as only X, Y and Z are deferred and so long as X, Y and Z are only deferred during a defined period). Such decisions go to the heart of the AAO itself, that is, what costs are being caused by the extraordinary event and how long are the extraordinary circumstances persisting?

But OPC and NHT’s extra conditions do not aid the Commission in defining the extent of the deferral authority sought, in ensuring compliance with any AAO it grants, or in defining its scope. To the contrary, the OPC/NHT conditions, if adopted, would amount to the Commission telling/directing/enjoining¹⁵ Evergy as to what programs it should or should not offer to its customers, as what strategies it should or should not use to manage its arrearages, and for some of

¹⁵ To “enjoin” is to “impose with authority; order; enforce” or to “order authoritatively to do something.” *Id.* As outlined early in this brief, the Commission has no power to do equity in this fashion; to enjoin utilities to do something, aside from certain specific authority given it by the General Assembly in, for example, § 393.140(2) (giving the Commission to require system improvements when necessary to the utility’s obligation to provide safe and adequate service).

the extra conditions, how much money Evergy shareholders should make as charitable contributions to its customers.¹⁶

The principal question in this case is whether the “extraordinary” standard the Commission has employed for decades has been met such that the Commission should exercise its statutory authority under § 393.140(4) or § 393.140(8) to allow a *deferral* on Evergy’s books. The Commission will not decide – and is not being asked to decide – whether Evergy prudently took steps to manage arrearages (or whether it would have been prudent to take different steps); is not being asked to decide whether Evergy was prudent when it incurred, for example, cleaning and employee protection related-costs in the face of the pandemic; is not being asked to decide whether Evergy prudently reduced expenses that perhaps the pandemic, someone might argue, would let it avoid, and so on. And given the nature of an AAO, which does not decide the question of ultimate recovery but “simply allows for certain costs to be accounted for separately for *possible* future recovery in a further ratemaking proceeding,”¹⁷ the Commission doesn’t have to make any judgments at all about *how* Evergy has responded, or should have responded, to the pandemic. The question is not whether Evergy has lived up to the standards of corporate citizenship OPC and NHT want it to meet or that in their *opinions* are appropriate. Indeed, even in a general rate proceeding, so long as Evergy meets its service obligation to provide safe and adequate service and does so at just and reasonable rates, the question of how many shareholder dollars Evergy provided to its customers or its communities would be completely irrelevant to the question posed in such a case: what is Evergy’s revenue requirement and what just and reasonable rates should be set.

¹⁶ OPC and NHT are, effectively, asking the Commission to unlawfully take, to confiscate, Evergy’s money.

¹⁷ *Order Approving Amended Unanimous Stipulation and Agreement*, File No. GU-2021-0376 (Oct. 31, 2020) (emphasis in original), citing *State ex rel. Office of Public Counsel v. Pub. Serv. Comm’n*, 301 S.W.3d 556, 570 (Mo. App. W.D. 2009).

None of this is to say that Evergy or utilities in general should not give to their communities. The record in this case shows that they do, and that they have. But it is to say that one cannot find any express, any reasonably incidental, or any necessarily implied *statutory authority* that the Commission can apply in an AAO case to *force* Evergy to operate certain programs or to give its shareholders' money away just because OPC and NHT think they should.

Similarly, even if *arguendo* OPC was right in its theories about arrearage management plans and what OPC would contend would be their positive (i.e., to make lower) impact on bad debt expense that would be eligible for deferral under the requested AAO, the forum in which OPC should be, and must, make that argument is in an upcoming Evergy general rate proceeding where Evergy seeks to reflect the deferred sums in its revenue requirement. In other words, neither OPC nor NHT (or any other party) is barred from arguing in the general rate case where deferred sums are sought for recovery that some or all of the deferrals reflect imprudently-incurred costs and should not be recovered. This again illustrates why the extra conditions NHT and OPC seek are neither reasonably incidental to the Commission's statutory authority to grant AAOs, nor are they reasonably necessary for the Commission to exercise that authority.

3. To impose the OPC/NHT extra conditions would also unlawfully dictate the manner in which Evergy is to conduct its business.

Aside from the total lack of statutory authority to *impose* such conditions is the fact that doing so would also quite clearly cross the line into taking over the general management of the utility. Just as it is well-settled that the Commission only possesses the statutory authority the General Assembly chose to give it, it is equally settled law that the Commission's "authority to regulate does not include the right to dictate the manner in which [a utility] . . . shall conduct its business."¹⁸ Or as is also often stated, the powers of the Commission "do not clothe [it] . . . with

¹⁸ *State ex rel. Kansas City Transit, Inc. v. Pub. Serv. Comm'n*, 406 S.W.2d 5, 11 (Mo. 1966).

the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation, and does not harm to the public welfare.”¹⁹

An examination of OPC’s and NHT’s extra conditions and, just as importantly, their justification for them, demonstrates that they are asking the Commission to wade into managing Evergy’s affairs. So, what are those justifications? With respect to OPC, one need only look at its Position Statement to answer that question.

OPC proposes (as does NHT) arrearage management plans because such plans “would do real good for Missourians struggling during the Covid-19 pandemic, while decreasing overall arrearages for Evergy’s benefit.”²⁰ There is little doubt that Missourians would welcome additional corporate charity from Evergy, and I am sure Evergy appreciates OPC’s paternalism in making a recommendation that OPC claims will be to “Evergy’s benefit.” However, how charitable Evergy should be or what steps it should take for its benefit are matters entrusted to its management.

OPC takes another step toward getting the Commission in the business of managing Evergy’s affairs when it says that while it does not recommend adopting NHT’s recommendation to expand Evergy’s Economic Relief Pilot Program, it would have no problem supporting this extra NHT condition so long as Evergy’s shareholders pay for it.²¹ OPC takes the same tact as to NHT’s extra low-income weatherization condition proposal.²² What those shareholders should pay (i.e., donate) is up to Evergy’s management.

¹⁹ *State ex rel. Harline v. Pub. Serv. Comm'n of Mo.*, 343 S.W.2d 177, 181–82 (Mo. App. K.C. 1960), citing *State ex rel. City of St. Joseph v. Public Service Commission*, 325 Mo. 209, 30 S.W.2d 8 (1930); *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981 (1923).

²⁰ OPC Position Statement, p. 10.

²¹ *Id.*, pp. 10-11.

²² *Id.*, p. 11.

OPC of course favors NHT's ban on credit reporting condition because it makes the same recommendation, indicating that the condition will have "minimal impact on Evergy's financial integrity."²³ Ameren Missouri can't opine on whether OPC is right about the "impact on Evergy's financial integrity," but it is clear that when and whether to report delinquent customers to credit reporting agencies is a management decision.

NHT's justification for its extra conditions is similar, as made clear by its counsel: "A more direct route [to mandating additional charitable contributions by Evergy's shareholders] is to place conditions on the approval of Evergy's AAO in this case in order to protect customers against some of the worst effects of the pandemic on their utility bills."²⁴ Again, how charitable a utility should be is a question for its management, who by law is a steward of the company's shareholders' funds.

Conclusion

This is an AAO case, the scope of which is narrow: have the standards for deferring costs (and savings in this case) been met? The Commission lacks the statutory authority to impose the OPC/NHT extra conditions, and those conditions should be rejected, while granting the an AAO on the terms (all of which are supported by substantial and competent evidence of record) reflected in the Stipulation.

²³ *Jd.*

²⁴ Tr., Vol. II, p. 72, lines 14-17.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Initial Brief of Ameren Missouri was served on all parties of record in this case via electronic mail (e-mail) or via regular mail on this 4th day of December, 2020.

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