

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

In the Matter of Proposed Rules)	
4 CSR 240-3.162 and)	<u>Case No. EX-2009-0252</u>
4 CSR 240-20.091, Environmental)	
Cost Recovery Mechanisms)	

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states as follows:

1. On April 23, 2009 the Commission issued two final orders of rulemaking. Those orders are unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons.

2. The Commission lacked the statutory authority to adopt the proposed rules. The Truly Agreed and Finally Passed version of Senate Bill 179, passed in 2005, stated that:

Prior to the effective date of this section, the commission shall have the authority to promulgate rules under the provisions of chapter 536, RSMo, as it deems necessary, to govern the structure, content and operation of such rate adjustments, and the procedure for the submission, frequency, examination, hearing and approval of such rate adjustments.

...

The provisions of this section shall take effect on January 1, 2006....

As codified, the statute replaces the phrase “”Prior to the effective date of this section” with “Prior to August 28, 2005.” In any event, the Commission did not promulgate rules until more than three years after either of these dates. When the Commission finally issued its Final Orders of Rulemaking on April 23, 2009, the authority to issue rules had long since expired.

Furthermore, Section 386.266.9 requires that “Such rules shall be promulgated no later than one hundred fifty days after the initiation of such rulemaking proceeding.” This rulemaking

proceeding was initiated several years ago when the Commission first convened roundtable discussions, many times over 150 days before any rules were promulgated. One could argue that it was initiated later, on October 15, 2007 when the Commission issued a Notice Opening Case in Case No. EX-2008-0105¹, meaning rules will be promulgated well beyond 150 days after the initiation of such rulemaking proceeding. Even if one were to take the unreasonable view that the rulemaking proceeding was initiated only when the Commission issued yet another “notice of necessity” and created a new file number on December 17, 2008, no rules were promulgated² prior to May 16, 2009 (150 days after December 17, 2008). No matter which of these dates one considers to be the date of the initiation of such rulemaking proceeding, no rules were promulgated within 150 days as required by statute.

3. The rules as adopted by the Commission do not comply with the requirement of Section 386.266.4 that:

The Commission may approve such rate schedules after considering all relevant factors which may affect the costs or overall charges of the corporation, provided that it finds that the adjustment mechanism set forth in the schedules:

(1) Is reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity....

Nothing in the Commission’s rules as adopted would require a utility’s rate schedules to ensure that they are reasonably designed to provide the utility with a sufficient opportunity to earn a “fair return on equity.” Indeed, nothing in the Commission’s rules as adopted would prevent a

¹ The Commission, after realizing the plethora of procedural pratfalls plaguing its earlier attempts at promulgating ECRM rules, assigned a new file number to the proceeding. Even though it changed the file number, the Commission kept the same case style and record. Despite the new file number, it is evident that EX-2009-0252 is simply a continuation of EX-2008-0105.

² “Promulgate,” according to Black’s Law Dictionary (5th Edition, 1979), means “To publish; to announce officially, to make public as important or obligatory. The formal act of announcing a statute or rule of court.” As of the date hereof, no order of rulemaking has been published, and thus no rule has been promulgated.

utility from increasing rates through an adjustment mechanism when the utility is already earning a fair return. More specifically:

- (a) The Rules conflict with section 386.266.4 in that they allow a rate increase outside of a rate case based solely on increased environmental costs without any consideration at the time of the approval of the rate increase generally of all relevant factors affecting overall rates and charges, and specifically whether other costs are lower than anticipated and/or revenues are higher than anticipated;
- (b) The Rules conflict with section 386.266.4 in that they allow a rate increase outside of a rate case without determining whether the utility granted the rate increase will earn or is earning more than a fair return on equity;
- (c) The Rules conflict with section 386.266.4 in that they allow a rate increase outside of a rate case, without providing for an annual true-up that shall accurately and appropriately remedy any “over or under-collection of revenues” from consumers in that the Rules’ true-up provisions address only over and under-collections of revenue attributable to recovery of environmental costs; and
- (d) The Rules are unreasonable in that they will allow utilities to collect millions of dollars annually in additional revenue at a time when they are already receiving more revenue than required to meet their authorized rate of return and such windfall to the utilities will be at the expense of consumers.

4. Section 386.490 requires that “Every order of the Commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof....” Section 386.710.2 provides that “The public counsel shall be served...with a copy of all orders of the commission.” Public Counsel

has never been served with a copy of either Final Order of Rulemaking, either by mail or by personal delivery.

5. Section 536.021.2(2) RSMo 2000 requires that any notice of proposed rulemaking shall contain the legal authority upon which the proposed rule is based. In both proposed orders of rulemaking, the Commission cites as its Statutory Authority: Sections 209.251, 209.253, 209.255, 209.577, 209.258, 209.259, 386.040, 386.250 and 393.140 RSMo 2000 and 386.266 RSMo 2007. Nothing in any of the cited sections of Chapter 209 confers any authority to the Commission for the instant rulemakings, and so the Commission has failed to comply with the requirement of Section 536.021.2(2). Furthermore, the ECRM rules were not authorized by Sections 386.250(6) or 393.140(11). Section 386.250(6) grants rulemaking authority relating to conditions of rendering public utility service, disconnection of that service, and billing for such service. The ECRM rules do not address those topics. Section 393.140(11) empowers the Commission to adopt regulations concerning the conduct of rate cases. That statute did not empower the Commission to adopt regulations implementing a surcharge. As noted above, any authority conferred by Section 386.266 has lapsed, so none of the sections cited provide authority to promulgate the ECRM rules. Section 536.021.7 provides that any rule that is not made in accordance with the provisions of Section 536.021 shall be null, void and unenforceable. Thus the rules are invalid both because the Commission failed to identify the authority under which they were promulgated and because there is no authority.

6. Section 386.266 explicitly limits an increase in any year to 2.5% of revenue. The Commission's ECRM rules permit an annual increase greater than that amount by carrying amounts in excess of the annual limit on to subsequent years. Thus the Commission's rules only

limit the increase to 2.5% in the first year of an ECRM; in subsequent years, the increase can be much greater.

7. The Commission never authorized the issuance of final orders of rulemaking. The April 22, 2009 memoranda signed by the Commissioners³ shows that the Commission authorized “the Secretary of the Missouri Public Service Commission to file the following **Proposed Rules** with the Office of the Secretary of State, to wit: **Proposed Rule 4 CSR 240-20.091**” and “to file the following **Proposed Rule** with the Office of the Secretary of State, to wit: **Proposed Rule 4 CSR 240-3.162.**” [Emphasis added.]

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its April 23, 2009 Final Orders of Rulemaking.

Respectfully submitted,

OFFICE OF THE Public Counsel

/s/ **Lewis R. Mills, Jr.**

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the Commission’s service lists for file numbers EX-2008-0105 and EX-2009-0252 this 22nd day of May 2009.

³ Chairman Clayton’s signature bears the notation “NO” indicating that the Chairman voted against the majority’s action.

/s/ Lewis R. Mills, Jr.
