

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

In the Matter of the Determination of Carrying)
Costs for the Phase-In Tariffs of KCP&L Greater) Case No. ER-2012-0024
Missouri Operations Company)

**REPLY OF KCP&L GREATER MISSOURI OPERATIONS COMPANY TO
AG PROCESSING INC.’S RESPONSE AND OBJECTION TO MOTION**

COMES NOW KCP&L Greater Missouri Operations Company (“GMO” or “Company”), pursuant to 4 CSR 240-2.080 and 4 CSR 240-2.160, and for its reply to the Response and Objection to Motion (“Response”) of AG Processing Inc., a Cooperative (“AGP”), states as follows:

I. The Commission Has Jurisdiction in This Case.

1. Pursuant to Missouri statute, all orders of the Missouri Public Service Commission (“Commission” or “PSC”) shall be in force and shall be prima facie lawful and reasonable until found otherwise. See Section 386.270.¹ Orders of the Commission remain in force until changed by the Commission or found to be unlawful:

Every order or decision of the commission . . . shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States. [Section 386.490.3]

2. A party’s dissatisfaction with a Commission order and the pendency of any appeal of that order has no bearing on its effect. Commission orders remain in effect despite a pending application for rehearing. See Section 386.500.3. The Commission’s orders also remain in effect despite a pending writ of review. See Section 386.520.1. “Unquestionably, the orders of the Commission were presumptively valid under the provisions of § 386.270 prior to the ruling

¹ Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2000), as amended.

of the circuit court.” State ex rel. GTE North, Inc. v. PSC, 835 S.W.2d 356, 366 (Mo. App. W.D. 1992). Indeed, the statute is clear:

The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ, the circuit court in its discretion may stay or suspend, in whole or in part, the operation of the commission’s order or decision. [386.520.1]

3. Accordingly, orders of the Commission enjoy a presumption of validity throughout their review. See State ex rel. Kansas City Power & Light Co. v. PSC, 76 S.W.2d 343, 350 (Mo. 1934); State ex rel. Midwest Gas Users’ Assoc. v. PSC, 976 S.W.2d 470, 476 (Mo. App. W.D. 1998). Even an adverse ruling on a Commission order by the circuit court does not invalidate that order while the appeal continues. Id. at 368.

4. A party aggrieved by a Commission decision has the right to protect its interests by applying to the circuit court for a stay of enforcement of the Commission’s order pursuant to Section 386.520. State ex rel. GTE North, Inc. v. PSC, 835 S.W.2d 356, 366-67 (Mo. App. W.D. 1992). “This section provides the opportunity to stay the Commission’s order upon issuance of a stay order by the circuit court and the filing of a bond.” Id. at 367.

5. No stay has issued in this case. Thus, the Commission’s May 4, 2011 Report and Order (“Report and Order”) and May 27, 2011 Order of Clarification and Modification (“Order of Clarification and Modification”) in Case No. ER-2010-0356 remain effective and valid.

6. What’s more, the Commission has express statutory authority under Section 393.155 to direct a utility to file tariffs reflecting the phase-in of rates authorized in a rate case after the conclusion of the rate case hearing:

If, after hearing, the commission determines that any electrical corporation should be allowed a total increase in revenue that is primarily due to an unusually large increase in the corporation’s rate base, the commission, in its discretion, need not allow the full amount of such increase to take effect at one time, but may instead phase in such increase over a reasonable number of years. Any such phase-in shall allow the electrical corporation to recover the revenue which would have

been allowed in the absence of a phase-in and shall make a just and reasonable adjustment thereto to reflect the fact that recovery of a part of such revenue is deferred to future years. In order to implement the phase-in, the commission may, in its discretion, approve tariff schedules which will take effect from time to time after the phase-in is initially approved. [Section 393.155.1].

7. Indeed, the Commission has acted upon this statutory authority in previous rate cases. See Report and Order, In re Determination of In-Service Criteria for the Union Electric Co.'s Callaway Nuclear Plant and Callaway Rate Base, Case Nos. EO-85-17, ER-85-160, 27 Mo. P.S.C. (N.S.) 183, *318 (Mar. 29, 1985); Report and Order, In re Kansas City Power & Light Co. for Authority to file Tariffs increasing Rates for Electric Service and the Determination of In-Service Criteria for Kansas City Power & Light Co.'s Wolf Creek Generating Station and Wolf Creek Rate Base, Case Nos. ER-85-128, EO-85-185, EO-85-224, 28 Mo. P.S.C. (N.S.) 228, *424 (Apr. 23, 1986).

8. Importantly, the Commission does not lose its jurisdiction to exercise such ministerial functions after the filing of the notice of appeal. In Union Electric Company's 1984 rate case, the Commission issued its report and order by which it phased-in the utility's increased rates over a period of eight years. See Report and Order, In re Determination of In-Service Criteria for the Union Electric Co.'s Callaway Nuclear Plant and Callaway Rate Base, Case Nos. EO-85-17, ER-85-160, 27 Mo. P.S.C. (N.S.) 183, *3271-72 (Mar. 29, 1985). Several industrial users intervened in the rate proceeding. After the Commission issued its report and order, those industrial users filed a petition for writ of review in the Circuit Court of Cole County. Nevertheless, the Commission continued to implement its report and order, phasing-in the utility's rates until it issued a report and order in 1987 in which it determined that the phase-in should be ended. See Report and Order, Staff v. Union Electric Co., Case No. EC-87-114 (Dec. 21, 1987).

9. The Commission's actions in this docket are also ministerial acts, implementing its orders issued in Case No. ER-2010-0356. The Commission here is not modifying or changing the order now before the Circuit Court.

10. In addition, it is very common for the Commission to spin-off dockets from rate cases in order to examine additional issues. For example, the Commission has ordered the creation of new dockets to review rate design, tree trimming policies, and other issues related to previously decided rate cases and other proceedings. See Order Regarding Consolidation and Procedural Schedule, In re Class Cost of Service and Rate Design of Aquila, Inc., Case No. ER-2005-0436 (Aug. 23, 2005); Order Regarding Union Electric's Tree Trimming Policies and Closing Case, In re Investigation into the Tree Trimming Policies of Union Electric Co., Case No. EW-2004-0583 (Mar. 31, 2005); Report and Order, In re Consideration of an Accounting Authority Order Designed to Accrue Infrastructure Replacement Costs for St. Louis County Water Co., Case No. WO-98-223 (Feb. 13, 2001); Report and Order, In re Kansas City Power & Light Co.'s Tariffs for Standby Service and Special Contracts, Case No. ET-97-113 (June 13, 1997).

11. In its May 27, 2011 Order of Clarification and Modification in Case No. ER-2010-0356, the Commission determined that:

Because of the magnitude of the rate increase and the effects on the ratepayers in the L&P service area, the Commission determines in its discretion that a just and reasonable method of implementing this large increase is by phasing it in over a reasonable number of years. The Commission further concludes that rates for L&P service area should initially be set at an amount equal to the \$22.1 million originally proposed by GMO with the remaining increase plus carrying costs being phased-in in equal parts over a two year period. [Order of Clarification and Modification at 7].

12. Following that order, GMO filed tariffs (Tariff File Nos. YE-2011-0608, YE-2011-0609, and YE-2011-0610) to implement the phase-in, including carrying costs. On June

25, 2011, the Commission issued its Order Approving Tariff Sheets and Setting Procedural Conference, stating that additional evidence was needed to determine appropriate carrying costs. A writ of review of Case No. ER-2010-0356 was issued in Cole County Circuit Court on June 29, 2011 upon application of GMO, and on July 5, 2011 upon application of AGP.

13. To determine the carrying costs for the phase-in and approval of GMO's related tariffs -- that is, to implement under Section 393.155.1 the phase-in ordered in its valid and effective Order of Clarification and Modification in Case No. ER-2010-0356 -- the Commission opened File No. ET-2012-0017. The Commission later classified this matter as a rate case rather than a tariff case, and opened ER-2012-0024.

14. The filing of writs by GMO and AGP does not freeze the Commission from implementing its Report and Order or its Order of Clarification and Modification. As these orders remain valid and effective during their appeal, the Commission may continue to exercise the ministerial function of determining the carrying costs associated with the phase-in of rates authorized by its Order of Clarification and Modification.

II. The Commission Has Not Violated Statutory Law or Its Own Rules.

15. AGP places much importance on the designation of this case as an "ER." Obviously, the current proceeding is not a rate case under Chapter 393.

16. As discussed above, GMO is not filing tariffs to set a new rate that would trigger Section 393.150 rate case requirements. This proceeding is merely implementing tariff schedules, as directed by the Order of Clarification and Modification and as authorized by statute. Indeed, Section 393.155.1 explicitly permits the Commission to approve tariffs implementing a phase-in *after* a rate case.

17. Based on the foregoing, GMO suggests that the PSC's initial designation of this proceeding as a tariff case was proper.

18. Even if the Commission properly designated this proceeding as a rate case, the Commission already considered all relevant facts bearing upon this matter in Case No. ER-2010-0356, pursuant to Section 393.270.4. AGP's assertion that the Commission is "simply ignoring" the relevant facts is inaccurate.

19. The Commission previously heard evidence on the effect that a large rate increase would have on GMO's customers. See Order of Clarification and Modification at 5; Report and Order, Finding of Fact 546. "In fact, the Commission has already taken that effect into consideration in deciding how much of Iatan 2 to allocate between the MPS and L&P service territories." See Order of Clarification and Modification at 5; Report and Order, Finding of Facts 546-557. What's more, the "phase-in option was argued in-depth during the on-the-record session on May 26, 2011." See Order of Clarification and Modification at 5.

20. During the May 26, 2011 oral argument, counsel for AGP specifically recommended that the Commission "do the right thing" and adopt a phase-in plan that would recover more revenues than the Company originally proposed from the L&P district:

Commissioner Davis: ... Mr. Woodsmall, I mean, you've got people on both sides of this. What would be your recommended resolution on this issue? We've heard Mr. Mills.

Mr. Woodsmall: I'll tread lightly. I see the logic of the Commission's decision. I could see the logic of a Commission decision going several ways, but certainly on a long-term basis I understand the Commission's logic saying that we believe Light and Power needed more baseload than GMO initially wanted to give them, so I understand that.

Given that, I don't believe that the Commission should back away from what it thinks is doing the right thing or the logical thing based simply upon GMO filing tariffs at a certain amount. Do what's right, not based upon what that number is somewhere.

So if you believe that that's a right decision, stick with it and phase in the remaining amount. Recognize that customers have made budgeting decisions. Put in that first amount and then tell KCP&L, File the remaining tariffs in "X"

period of time, and calculate capital costs at that time. That's done all the time. ...

I don't think you need to grant rehearing to tell them, calculate the carrying costs. So do what you think is right. I understand the logic of the Commission's decision, but recognize the budgeting decisions that customers have made and phase in. [Tr. 4982-83 (emphasis added)].

Mr. Woodsmall: Well, and again, I said before, don't let this number that was filed a year ago get in the way of doing the right thing. You made the decision that you need to rebase fuel in the FAC because of cost signals.

People make decisions based upon the energy cost for each avoided kilowatt hour. If you don't rebase the FAC, they're not getting the proper price signals, so rebasing the FAC was the right thing.

Don't back away from that simply because you're shooting at an artificial target that the Company set a year ago. Just do the right thing and phase in the additional amount. [Tr. 4986 (emphasis added)].

Mr. Woodsmall: I think what you're talking about is what happens after today. If you're talking about granting them the increase for the 13.78 percent and order a phase-in, certainly you could tell them, This is all you're getting today; meet with the parties to discuss carrying costs and the second part of the phase-in. We're not bumping up against the tariff [sic] effective date then, so you could order to us [sic] talk about how we do the second part of the phase-in, absolutely.

Commissioner Davis: ... I understand -- well, total increases would be -- I'm just trying to figure out -- I mean, I don't think we would need the five-year phase-in that Callaway required.

Mr. Woodsmall: I think you're right.

Commissioner Davis: And so, I mean, I guess it would be my impression that this could be accomplished in a year or two, I mean. Does that -- do you think that's fair?

Mr. Woodsmall: I think that's fair ... [Tr. 4992-93 (emphasis added)].

21. Having adopted the recommendation of AGP to phase-in the amount above the Company's original request for the L&P district, the Commission should not permit AGP to

complain now that the approach it recommended is unlawful and argue that the Commission is committing error if it proceeds to implement the phase-in approach in this proceeding.

22. GMO clearly does not believe that the Commission's ordering of a phase-in and calculating carrying costs is error. However, the general rule of law is that "a party may not invite error and then complain on appeal that the error invited was in fact made." Rosencrans v. Rosencrans, 87 S.W.3d 429, 432 (Mo. App. S.D. 2002); State ex rel. American Standard Ins. Co. v. Clark, 243 S.W.3d 526, 531-32 (Mo. App. W.D. 2008); Lindahl v. State of Missouri, 2011 WL 3273469 at *4 - *7 (Mo. App. W.D. Aug. 2, 2011) (noting doctrine of judicial estoppel, as well). See Gambrell v. Kansas City Chiefs Football Club, 621 S.W.2d 382, 386 (Mo. App. W.D. 1981) ("A party may not complain of alleged error which his own conduct creates.").

23. After consideration of the effect of the large rate increase and the allocation of rates, and after the parties had an opportunity to present argument on the phase-in option, the Commission determined that a just and reasonable alternative is to phase in the rate increase for the L&P customers pursuant to Section 393.155.1, and modified its Report and Order to reflect such a phase-in of rates. See Order of Clarification and Modification at 6-7. The Commission clearly made its decision after consideration of "all facts which in its judgment have any bearing upon a proper determination," pursuant to Section 393.270.

24. Because this proceeding is merely implementing phase-in tariff schedules, as directed by the valid and effective Order of Clarification and Modification and as specifically authorized by Section 393.155.1, and because the Commission already has considered all relevant facts bearing upon this matter, as required by Section 393.270.4, the Commission's actions in this case are not unlawful.

WHEREFORE KCP&L Greater Missouri Operations Company respectfully requests that the Commission deny the request of AGP that it set aside its August 17, 2011 Order

Granting Motion to Set Aside Procedural Schedule and that it discontinue further proceedings on this matter.

Respectfully submitted,

/s/ Karl Zobrist

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing was served upon counsel of record on this 6th day of September, 2011.

/s/ Lisa A. Gilbreath
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Company