

R & S HOME BUILDERS, INC., AND
CAROL AND ARVEL ALLMAN

V.

RESPONDENT.

**RESPONSE TO KCP&L GREATER MISSOURI
OPERATIONS COMPANY’S MOTION TO DISMISS**

BACKGROUND

ARGUMENT

2. Respondent alleges in its Motion to Dismiss that the Complaint is an unlawful collateral attack on final orders of the Commission, which include the Stipulations approved in File Nos. ET-2014-0059 and ET-2014-0071, as well as the Commission's Order approving

Respondents' Tariff Sheet No. R-62.19 in File No. ET-2014-0277. At paragraph 12 of the its Motion, Respondent states:

[The] claim is barred by Section 386.550 because to entertain such a claim is to unlawfully allow the Complainants to collaterally attack the Commission's prior orders which are final and effective. In particular, the Complaint is an unlawful collateral attack upon the Commission's *Stipulation Order* issued on October 30, 2013 and effective on November 10, 2013 in File Nos. ET-2014-0059 and ET-2014-0071. Secondly, the Complaint is also a collateral attack upon the Commission's *Tariff Order* in File No. EO-2014-0277. Finally, it is also a collateral attack on the GMO's 3rd Revised Tariff Sheet No. R-62.19 which became effective on June 8, 2014.

3. Section 386.550 states: "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Further, KCP&L cites the cases of *Tari Christ v. Southwestern Bell Tele. Co. et al.*, which held that attempts to "re-examine any matter already determined by the [Public Service] Commission must include an allegation of a substantial change of circumstance; otherwise Section 386.550 bars the complaint." Case No. TC-2003-0066, (issued Jan. 9, 2003), citing *State ex rel. Licata v. Pub. Serv. Comm'n*, 829 S.W.2d 515 (Mo. App. W.D. 1992) and *State ex rel. Ozark Border Elect. Coop. v. Pub. Serv. Comm'n*, 924 S.W.2d 597 (Mo. App. W.D. 1996).

4. Because Respondent raises three different final orders of the Commission with respect to the claim of collateral attack, we will address all three in turn.

5. First, file No. ET-2014-0071 pertains only to a utility not implicated in this case, and is thus irrelevant to this case.

6. The Complaint in this case does not constitute a collateral attack on File No. ET-2014-0059 or the Commission's Order approving the Non-Unanimous Stipulation and Agreement in that case. . This Complaint makes no allegations or claims whatsoever as to the

unlawfulness of that Stipulation or the Commission's approval of it. That Stipulation is not mentioned in any of the counts brought in this Complaint. Complainants are not seeking any relief regarding that Stipulation. That Stipulation is not mentioned except to point out that Complainants were not parties to that stipulation.

7. Complainants have not disputed Respondents' ability to cease paying rebates after reaching the agreed upon "stipulated amount" in the Stipulation. However, the Stipulation does not relieve Respondent or the Commission from observing the procedural requirements for discontinuing solar rebate payments. Those procedural requirements – laid out in Section 393.1030.3, RSMo – include the requirement that the Commission making a determination that the utility's one percent maximum average retail rate impact will be reached within the 60 days, among others (see ¶ 3 of The Complaint). In arguing that Complainants and similarly-situated solar rebate applicants should receive rebates, the Complaint alleges that Complainants were denied rebates even though the Commission did not follow the procedures set forth by Missouri statutes to grant KCP&L-GMO authority to cease paying rebates.

8. In other words, despite the Stipulation, utilities must still file for authorization to cease payment of solar rebates 60 days before they will reach their one percent limit, and the Commission must then review the filing and make a determination. Respondent has implicitly agreed with the position of Complainants to the extent that it recently applied for authority to cease paying rebates, asserting it would reach its one percent limit within 60 days (see File No. ET-2014-0277). If one concedes that this step was necessary in order for Respondent to be authorized to cease paying rebates, then it follows that Respondent did not have authority to cease paying rebates prior to that. For this reason alone, Complainants have stated a cause of action in this action and are entitled to receive the rebates for which they applied.

9. Complainants agree that “[t]he Commission is purely a creature of statute, and its powers are limited to those conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted.” *Public Serv. Comm’n v. Bonacker*, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995). Because the Commission is limited to those powers specifically conferred by statute, the Commission may not legally grant KCP&L-GMO authority without completing the procedures of Section 393.1030.3, RSMo. And the law expressly provides that utilities shall continue to process and pay rebates until a final Commission ruling. This “argument” is simply a repetition of the pertinent Missouri statute, and in no way constitutes an attack on the Commission’s Order approving the Stipulation in File No. ET-2014-0059.

10. With respect to Tariff Sheet No. R-62.19, recently approved in File No. ET-2014-0277, the Complaint cannot possibly constitute a collateral attack because this Order was entered after the filing of the Complaint. Clearly, the Complaint did not contemplate this future Order of the Commission, but if it had, Complainants would still be entitled to rebates because they applied for and were denied rebates before Respondent was granted authority to cease paying rebates.

11. The Complaint does not challenge the Commission’s ability to grant Respondent authority to cease rebates by virtue of reaching the agreed upon “the stipulated amount.” The Complaint merely recognizes that the Commission hadn’t granted such authority at the time that Respondent denied Complainants’ applications. If the Commission had granted such authority, it would not have been necessary to grant the same authority again in its May 28, 2014 Order in File No. ET-2014-0277. Given that Respondent did not possess the authority to cease paying rebates until at least May 28, 2014 (or June 8, the effective date of the tariff), Complainants ask

that they and all similarly-denied solar rebate applicants be given the rebates to which the law entitles them.

12. In sum, Respondents' collateral attack argument fails to establish how the Complaint challenges any Commission order, and thus fails to provide justification for granting a Motion to Dismiss.

B. Complaint Does Not Violate GMO's Approved Tariffs

13. Respondents' Motion claims that "[t]he Complaint requests relief that would violate GMO's approved tariffs, and is therefore relief that the Commission may not lawfully grant."

14. As noted above, with respect to Tariff Sheet No. R-62.19, which was recently approved in File No. ET-2014-0277, this Order was entered after the filing of the Complaint. Clearly, the Complaint did not contemplate this future Order of the Commission, but if it had, Complainants would still be entitled to rebates because they applied for and were denied rebates before Respondent was granted authority to cease paying rebates.

C. The Complaint Does Not Request Relief In Violation of Section 393.130(3)

15. Respondent's Motion claims that "[t]he Complaint requests relief that the Commission sanction the granting of an undue or unreasonable preference or advantage to Complainants in violation of Section 393.130(3)."

16. Complainants have requested no special advantage or preference. They simply ask that their validly applied for rebates be paid because at the time of their denial, the utility was not lawfully authorized to deny the rebate applications.

D. The Complaint Does Not Request Relief In Violation of Section 393.130(2)

17. Respondent's Motion claims that "[t]he Complaint requests relief that the Commission sanction undue discrimination against other similarly situated GMO customers in violation of Section 386.130(2)."

18. Complainants specifically request that all "similarly situated" GMO customers be given the same relief. Therefore, there cannot be any undue discrimination since all similarly situated GMO customers will receive the same relief.

E. The Complaint Alleges a Violation of Law

19. Respondent's Motion claims that "[t]he Complaint should be dismissed since it fails to allege a "violation of any provision of law, or of any rule or order or decision of the commission" by GMO, in violation of Sections 386.390."

20. Paragraph 4 of the Complaint clearly states "Complainants are aggrieved in that Respondent has denied Complainants' rebate applications in violation of Section 393.1030.3, RSMo."

**IN THE ALTERNATIVE, MOTION FOR
LEAVE TO FILE AMENDED PETITION**

21. In the event that the Commission finds the Complaint to be a collateral attack on a final order of the Commission, Complainants ask that they be granted leave to file an Amended Petition to address the issue of a substantial change in circumstances.

Respectfully Submitted,

GHIO & DESILETS LLP

/s/_____
Matthew J. Ghio #44799
3115 S. Grand., Suite 300
St. Louis, Missouri 63118
Tel: 314-266-1873
Fax: 314-732-1404
Email: matt@ghioemploymentlaw.com

CAMPBELL LAW LLC

/s/_____
Erich Vieth
1500 Washington Ave., Suite 100
St. Louis, Missouri 63103
Phone: (314)588-8101
Fax: (314)588-9188
erich@campbelllawllc.com

ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was delivered via EFIS on this 16th day of July, 2014 to all counsel of record in this case.

/s/_____
Matthew J. Ghio, #44799