

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

In the Matter of the Tariff Filing of)
The Empire District Electric Company)
to Implement a General Rate Increase)
for Retail Electric Service Provided to)
Customers in its Missouri Service Area.)

Case No. ER-2006-0315

**STAFF'S REPLY TO THE RESPONSES OF PUBLIC COUNSEL
AND PRAXAIR/EXPLORER PIPELINE TO THE ORDER OF
NOVEMBER 20, 2007**

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel, and for its Reply to the Responses of the Public Counsel and Praxair/Explorer Pipeline to the Commission's Order of November 20, 2007, states as follows:

Executive Summary:

1. Contrary to the position taken by Public Counsel and Praxair/Explorer Pipeline, the Supreme Court's writ of mandamus does not create any possibility of any refunds. The writ has no effect whatsoever on Empire's tariffs. Instead, the writ requires the Commission to vacate its *Order Granting Expedited Treatment and Approving Tariffs*, issued on December 29, 2006, and to immediately issue a new *Order Granting Expedited Treatment and Approving Tariffs*, differing from the original only in that it must allow Public Counsel a reasonable interval within which to prepare and file an application for rehearing. The Court has authorized no other action and the Commission may take no other action.

Introduction:

2. The Commission's *Order Shortening Response Time and Setting Filing Deadline* of November 20, 2007, does not authorize nor contemplate this Reply; however, since both Public Counsel and Praxair/Explorer Pipeline have offered counsel to the Commission that is not only wrong, but contrary to the public interest if implemented, Staff cannot in good conscience stand by silently.

3. By the phrase "contrary to the public interest," Staff refers to the obvious goal of both Public Counsel and Praxair/Explorer Pipeline, which is to obtain a refund of amounts paid by Empire's customers on and after January 1, 2007, in excess of the rates in effect prior to January 1, 2007. However, as Staff shall explain, such a refund cannot be had in this case.

The Writ of Mandamus:

4. The Commission issued its Order on November 20, 2007, soliciting guidance from the parties as to how it should proceed pursuant to the peremptory writ of mandamus and mandate of the Missouri Supreme Court, issued in Case No. SC88390 and filed herein on November 20, 2007. The parties are agreed, at least, that the Commission must forthwith vacate its *Order Granting Expedited Treatment and Approving Tariffs*, issued herein on December 29, 2006. The specific direction given by the Court to the Commission is as follows:

This Court makes peremptory its alternative writ of mandamus, requiring the PSC to vacate its order granting expedited treatment and approving tariffs issued on December 29,

2006, and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs.¹

5. The instruction is succinct and two-fold: the Commission must *both* (1) vacate its Order of December 29, 2006, *and* (2) “allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs.” In other words, the Court clearly contemplates a new *Order Granting Expedited Treatment and Approving Tariffs*, differing from the first one only in that it must allow Public Counsel a reasonable interval within which to prepare and file an application for rehearing. That is the relief requested by the Public Counsel from the Court and that is the relief afforded by the Court to the Public Counsel. The Commission’s order, therefore, must be in the nature of an order *nunc pro tunc*.

6. An order *nunc pro tunc* is one having retroactive legal effect.² It is a thing done now that should have been done at the earlier time.³ That is exactly the situation in which the Commission finds itself – it must now afford Public Counsel an opportunity to file an application for rehearing, as it should have done on December 29, 2006. It is true that the purpose of a *nunc pro tunc* amendment is to make the record conform to what was actually done. *Hopkins v. Hopkins*, ___ S.W.3d ___, ___, 2007 WL 4166015, *1 n. 2 (Mo. App., S.D. 2007). A *nunc pro tunc* order may normally be used only to correct a clerical error in entering a rendered judgment, not to alter or amend the rendered judgment. *Pirtle v. Cook*, 956 S.W.2d 235, 241 (Mo. banc 1997). *Nunc pro tunc* does not lie to correct

¹ *State ex rel. Public Counsel v. Public Service Commission of the State of Missouri*, ___ S.W.3d ___, ___, 2007 WL 3147289, *4 (Mo. banc 2007).

² *Black’s Law Dictionary*, 1097 (7th ed. 1999).

³ *Id.*

judicial omission or oversight; to show what the court might or should have done as distinguished from what it actually did; or to conform to what the court intended but did not do. *McMilian v. McMilian*, 215 S.W.3d 313, 320 (Mo. App., S.D. 2007). However, this is not a normal situation. This is, rather, extraordinary relief specifically ordered by the state's highest court.

What is the Effect of the Writ of Mandamus on the Compliance Tariffs?

7. The short answer to the question heading this section is “None.” The writ does not affect the Compliance Tariffs at all, nor does it purport to.⁴ It does not mention them. It does not vacate them, reject them, suspend them, cancel them, nor do anything else to them; neither does it order the Commission to do so. The relief granted by the writ is very narrow and it requires only that the Commission redo its Order of December 29, 2006, this time allowing a reasonable interval within which to prepare and file an application for rehearing. The approval by the Commission of the Compliance Tariffs in a new order is a foregone conclusion – the Court did not, after all, authorize the Commission to take any other action with respect to those tariffs – and that approval must still be effective as of last January.

8. It is for this reason that Staff has advised the Commission to issue a new *Order Granting Expedited Treatment and Approving Tariffs*, effective on the tenth day after issue, but approving the tariffs for service on and after January 1, 2007. That is the day on which the tariffs took effect pursuant to the

⁴ By “Compliance Tariffs,” Staff refers to Empire’s tariff filing of December 28, 2006, designated Tariff File No. YE-2007-0448 by the Commission, issued on December 28, 2006, for service rendered on and after January 27, 2007.

Commission's original Order of December 29, 2006, and the Supreme Court's writ simply does not provide for any change to that aspect of the Commission's original order.

How Have Public Counsel and Praxair/Explorer Pipeline Erred?

9. Public Counsel and Praxair/Explorer Pipeline have utterly misunderstood the relief ordered by the Court. In particular, they fail to appreciate that the relief is a "do-over," an order *nunc pro tunc*. They think, instead, that the Court has put the Commission in the bizarre position of taking action *now* on a tariff filed on December 28, 2006 – almost a year ago! It is easy to understand why they take this position – it is because they see in it a chance for large refunds. But the Court has not ordered any refunds. In fact, the Supreme Court never addressed the issue of refunds in its opinion. That is because there cannot, and will not, be any refunds and Public Counsel never asked the Court for any.

10. In his *Response* filed on November 27, 2007, Public Counsel states:

Empire somehow reads into the Court's explanation of the limitation of its review that the Commission can retroactively reinstate the vacated order and/or have a new order (with a future effective date) approve tariffs to be effective almost a year in the past. Nothing in the statutes or in the Supreme Court's opinion affords the Commission authority to give its orders retroactive effect.

Response, pp. 2-3.

11. Actually, as Staff has pointed out already, the thing that Public Counsel says the Commission cannot do is *exactly* what the Supreme Court writ authorizes and requires the Commission to do. It is true, normally, the Commission cannot give its orders retroactive effect. But the present situation is

far from normal. It is, instead, the extraordinary circumstance of an extraordinary writ issued by the state's highest court and narrowly-tailored to afford the Public Counsel *exactly* the relief he said he wanted, to-wit, a reasonable opportunity to prepare and file an application for rehearing directed at the Commission's Order of December 29, 2006. Only one thing has to change to implement that relief, and that thing is the effective date of the order. Nothing more, nothing less, nothing else.

12. Praxair/Explorer Pipeline relies on the jurisprudence of vacated judgments to argue that the *vacation* of the Commission's Order of December 29, 2006, will return the parties to their previously existing status as though the vacated order had never existed. *Response of Praxair/Explorer Pipeline*, filed on November 27, 2007, at p. 1-2. First, the Commission's order was not a judgment. Second, both Praxair/Explorer Pipeline and Public Counsel leave the Compliance Tariffs out of their calculations. On December 29, 2006, there was pending before the Commission a proposed tariff, Tariff File No. YE-2007-0448, filed by Empire on December 28, 2006. This proposed tariff, referred to here as the "Compliance Tariffs," is the very tariff filing that the Commission's Order of December 29, 2006, approved on an expedited basis. The vacation of that order will not cause that tariff filing to somehow evaporate. As noted previously, the writ issued by the Missouri Supreme Court does not refer to the tariff, does not purport to take any action with respect to the tariff, and cannot have any effect on the Compliance Tariffs.

13. The Compliance Tariffs, issued on December 28, 2006, including the

substitution of one sheet on that day, show an effective date of January 27, 2007. On December 29, 2006, that effective date was 29 days away, as Praxair/Explorer Pipeline admit. *Response*, p. 3.

14. As the Commission itself and all parties hereto are well-aware, the Commission need not affirmatively approve any tariff in order for it to take effect. Instead, a tariff will automatically become effective by operation of law on its designated effective date unless the Commission acts to prevent it from doing so. Therefore, in the absence of the Order of December 29, 2006, the Compliance Tariffs became effective on January 27, 2007, by operation of law.

15. Praxair/Explorer Pipeline take the position that the Compliance Tariffs are still somehow pending and that the operation-of-law effective date is now December 13, 2007. How, one wonders, do they arrive at this novel result? Only by pretending that the Supreme Court's writ has somehow provided relief never contemplated by the Court and never requested by the Public Counsel. The writ does one thing, and one thing only – it requires the Commission to vacate its Order of December 29, 2006.

The Writ Should Not Be Construed to Reach an Absurd Result:

16. It is a rule of construction that statutes should not be read so as to require an absurd result.⁵ That rule applies equally well to the Supreme Court's writ in this case. It is absurd to suppose that the Court, purposefully or otherwise, but certainly without comment or discussion, has thrown the relationship of Empire and its customers into turmoil or that it has authorized

⁵ *Murray v. Missouri Highway and Transportation Commission*, 37 S.W.3d 228, 233 (Mo. banc 2001).

millions of dollars of refunds. Such a result would necessarily involve weighty questions of public policy and constitutionality that the Court has not addressed in the writ proceeding. The Court has not addressed any such questions here, because they have not been raised and are not implicated.

Refunds are Not Available in this Case:

17. There is no lawful possibility of any refund with respect to monies paid under the Compliance Tariffs between January 1, 2007, and November 20, 2007. Although the law provides for the impoundment of disputed funds during the review of a Commission decision, no such impoundment has ever occurred in this case.⁶ For that matter, as already explained, the writ proceeding never involved any review of the rates. The funds in question, duly paid under tariffs approved by the Commission, became the property of Empire when it received them: "When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions."⁷ More recently, the Western District of the Missouri Court of Appeals stated, "[I]f funds paid under those Commission-approved tariffs are not segregated in a court registry pending the final outcome, there is no monetary relief that can be given to the party challenging the rates."⁸

⁶ Section 386.520.2.

⁷ *Straube, et al., v. Bowling Green Gas Company*, 360 Mo. 132, 142, 227 S.W.2d 666, 671 (1950).

⁸ *State ex rel. City of Joplin v. Public Service Commission of the State of Missouri*, 186 S.W.3d 290, 295 (Mo. App., W.D. 2005), citing *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 353-54 (1951).

Thus, even if the Supreme Court's writ *did* make the Compliance Tariffs vanish into thin air – which it did not – the money still belongs to Empire.

18. The Missouri Supreme Court considered this question with respect to a Fuel Adjustment Clause ("FAC") contained in the tariffs of certain electric utilities.⁹ The Court concluded that the FAC was illegal and that the Commission had erred in approving the tariffs containing it.¹⁰ Nonetheless, no refund of the monies paid under the illegal FAC was possible, where the funds were paid directly to the utilities and not into the registry of a court:¹¹

The Commission has the authority to determine the rate *to be charged*, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery[.] It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.

However, the Court reached a different result where money was paid under protest and held in a separate fund by a court pending the resolution of the controversy: "*Lightfoot* does not control the present case because the Industrials did contest the PSC order and they did establish a stay fund. Their money was not unconditionally paid and therefore it did not become the property of [the utility]."¹²

⁹ *St. ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission of Missouri*, 585 S.W.2d 41, 47 (Mo. banc 1979).

¹⁰ *Id.*, at 56-8.

¹¹ *Id.*, at 58 (emphasis in the original; internal citations omitted).

¹² *State ex rel. Monsanto Co. v. Public Service Commission*, 716 S.W.2d 791, 794 (Mo. banc 1986).

19. In the present case, the monies in question were paid by ratepayers directly to Empire, unconditionally, pursuant to the Compliance Tariffs approved by the Commission on December 29, 2006. This revenue became the property of Empire and no part of it can lawfully be refunded or returned to the ratepayers. Therefore, no refund to any ratepayer is possible. General Counsel will go so far as to state that Public Counsel has been irresponsible in suggesting the contrary to the media.

WHEREFORE, on account of all the foregoing, Staff recommends that the Commission (1) vacate its *Order Granting Expedited Treatment and Approving Tariffs*, issued on December 29, 2006, and (2) immediately thereafter issue a new *Order Granting Expedited Treatment and Approving Tariffs*, differing from the original only in that its effective date must be at least ten days after its issue date.

Respectfully submitted,

/s/ Kevin A. Thompson_____

Kevin A. Thompson
General Counsel
Missouri Bar No. 36288

Attorney for the Staff of the
Missouri Public Service Commission

P. O. Box 360
Jefferson City, MO 65102
(573) 751-6514 (Telephone)
(573) 526-6969 (Fax)
kevin.thompson@psc.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record on this **30th day of November, 2007**.

/s/ Kevin A. Thompson