

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

The Staff of the Missouri Public Service )  
Commission, )

Complainant, )

vs. )

KCP&L Greater Missouri Operations )  
Company, )

Respondent. )

**Case No. EC-2011-0250**

**Staff's Response to Order Directing Filing**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its Response to the Commission's *Order Directing Filing*, issued on March 15, 2011, states as follows:

***Procedural Background***

1. Staff filed its *Complaint* on February 8, 2011, alleging that Respondent KCP&L Greater Missouri Operations Company ("GMO") violated certain Commission rules and orders by filing a deficient Integrated Resource Plan ("IRP").

2. On March 11, 2011, following due notice of Staff's *Complaint* by the Commission, Respondent filed its *Answer*, including three affirmative defenses and a prayer that the Commission dismiss the complaint.

3. The Commission's *Order* directs Staff to respond to GMO's *Motion to Dismiss* not later than March 31, 2011. On March 29, 2011, with the consent of

Respondent and no objection from the Public Counsel, Staff sought and obtained an extension of time until April 7, 2011.

### ***GMO's First Affirmative Defense***

4. For its first affirmative defense, GMO asserts that Staff's *Complaint* fails to state a claim upon which relief may be granted. A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint.<sup>1</sup> All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.<sup>2</sup> Complainants enjoy the benefit of all reasonable inferences.<sup>3</sup> The complaint should not be dismissed unless it shows no set of facts entitling it to relief.<sup>4</sup> A complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.<sup>5</sup> This means that the factual allegations of an administrative complaint are generally to be judged against the standard of notice-pleading rather than the stricter standard of fact-pleading, as the Missouri Court of Appeals has held:

On appeal, petitioner contends that the charges stated for his dismissal in the letter from Chief Heberer were vague and indefinite. In support of this argument, however, he relies upon cases pertaining to criminal indictments and civil pleadings. These cases obviously deal with judicial proceedings, and they are not controlling in administrative proceedings. The charges made

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<sup>1</sup> For this discussion, see J.R. Devine, ***Missouri Civil Pleading and Practice***, § 20-3 (1986).

<sup>2</sup> ***Nazeri v. Missouri Valley College***, 860 S.W.2d 303, 306 (Mo. banc 1993).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission***, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.<sup>6</sup>

5. Staff's *Complaint* is brought under § 386.390.1, RSMo, the Commission's general complaint power. A complaint brought under this authority necessarily must include an allegation of a violation of a law or of a Commission rule, order or decision.<sup>7</sup> A complaint seeking to re-examine any matter already determined by the Commission must include an allegation of a substantial change of circumstances; otherwise, § 386.550, RSMo, bars the complaint.<sup>8</sup>

6. Staff's *Complaint* meets all of the requirements of an action under § 386.390.1, RSMo, because it charges in Paragraph 18 that Respondent violated Commission Rules 4 CSR 240-22.070, (10) and (11), 4 CSR 240-22.080, (1)(A)-(D) and (7), and 4 CSR 240-22.010(2). No allegation of a change of circumstances is required.

7. Staff's *Complaint* further meets all of the requirements of an action under § 386.390.1, RSMo, because it charges in Paragraphs 19 and 20 that Respondent violated the *Nonunanimous Stipulation and Agreement* of April 12, 2010, approved by the Commission on June 2, 2010, and the Commission's specific order of June 2, 2010, as extended by its order of December 28, 2010,

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<sup>6</sup> **Sorbello v. City of Maplewood**, 610 S.W.2d 375, 376 (Mo. App., E.D. 1980); **Schrewe v. Sanders**, 498 S.W.2d 775, 777 (Mo. 1973); and see **Giessow v. Litz**, 558 S.W.2d 742, 749 (Mo. App.1977).

<sup>7</sup> **State ex rel. Ozark Border Electric Cooperative v. Public Service Commission**, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

<sup>8</sup> *Id.*; **State ex rel. Licata v. Public Service Commission**, 829 S.W.2d 515 (Mo. App., W.D. 1992).

that GMO file a revised Integrated Resource Plan not later than January 18, 2011.

8. The facts alleged by Staff in its *Complaint* sufficiently state a cause of action under § 386.390.1, RSMo, for violation by Respondent of Commission rules and Commission orders, and those facts must be taken as true for the purposes of determining Respondent's motion.

9. Staff seeks relief in its *Complaint* in the form of (1) a determination that Respondent has violated Commission rules and orders as charged by Staff; (2) an order that Respondent "file a fully compliant and sufficient revised Integrated Resource Plan not later than the 60<sup>th</sup> day following its order herein"; and (3) authority for the Commission's General Counsel to seek monetary penalties in Circuit Court. All of these things are well within the authority of the Commission and it cannot be said that there is no relief available for Staff on its *Complaint*.

10. For these reasons, Respondent's *Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted* must fail.

#### ***GMO's Second Affirmative Defense***

11. For its second affirmative defense, GMO asserts that it "has performed its obligations under the Nonunanimous Stipulation and Agreement and it is in compliance with the Commission's Order of June 2, 2010, as extended by its Order of December 28, 2010, in Case No. EE-2009-0237."

12. Respondent's second affirmative defense is a defense of fact. Respondent necessarily bears the burden of proof as to these assertions that it has raised as a defense. None of these asserted facts have yet been tried and

this defense, consequently, is not ripe for determination via a pre-trial motion to dismiss.

13. For these reasons, Respondent's second affirmative defense must fail insofar as it is construed to be a pre-trial motion to dismiss.

### ***GMO's Third Affirmative Defense***

14. For its third affirmative defense, Respondent asserts that it "has complied with the requirements set forth in Chapter 22 of the Commission's Rules. In addition, Commission Rule 4 CSR 240-22.080(1) provides:

If the utility determines that circumstances have changed so that the preferred resource plan is no longer appropriate, either due to the limits identified pursuant to 4 CSR 240-22.070(10)(C) being exceeded or for other reasons, the utility, in writing, shall notify the commission within sixty (60) days of the utility's determination. If the utility decides to implement any of the contingency options identified pursuant to 4 CSR 240-22.070(10)(D), the utility shall file for review in advance of its next regularly scheduled compliance filing a revised implementation plan."

15. Respondent's third affirmative defense has two parts. The first part is its assertion that it "has complied with the requirements set forth in Chapter 22 of the Commission's Rules." That is a defense of fact and must fail, insofar as it is construed as a pre-trial motion to dismiss, for the same reasons as Respondent's second affirmative defense, because Respondent has not yet established the facts asserted.

16. The second part of Respondent's third affirmative defense is a mixed defense of law and fact. Respondent points to a provision of the Commission's rules that it argues excuses the non-performance that is the basis of Staff's *Complaint*. That's the law part. The fact part is that the provision on which

Respondent relies only applies, by its specific terms, if “the utility, in writing, shall notify the commission within sixty (60) days of the utility’s determination.” Respondent points to Paragraph 6 of its deficient submission and claims that paragraph to be the very written notification that the rule demands.

17. This part of Respondent’s affirmative defense must fail as well, and for the same reasons already propounded. The factual part of Respondent’s defense is not self-proving and remains to be established at hearing. Even if the paragraph Respondent points to is accepted as the required written notification, Respondent has not established that it was delivered within the 60-day interval required by the rule. That, too, is a fact that Respondent must establish.

18. Additionally, the provision relied on by Respondent does not excuse Respondent’s failure to comply with the *Nonunanimous Stipulation and Agreement* of April 12, 2010, approved by the Commission on June 2, 2010, or the Commission’s specific order of June 2, 2010, as extended by its order of December 28, 2010, that GMO file a revised Integrated Resource Plan not later than January 18, 2011.

19. Finally, there is the additional factual context for the Commission to weigh, that GMO had already submitted a deficient Integrated Resource Plan once and that the filing due on January 18, 2011, was required to correct those deficiencies.

20. In response to all of Respondent’s purported affirmative defenses, Staff states that, to the extent that Respondent’s affirmative defenses require that facts be established, Staff denies those facts and advises the Commission that it

stands ready, upon due notice as required by law, to enter into an evidentiary hearing at which it will prove the violations charged against Respondent and establish additional facts contrary to those upon which the asserted affirmative defenses are founded.

**WHEREFORE**, by reason of all the foregoing, Staff prays that the Commission will deny Respondent's *Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted* and Respondent's other *Motions to Dismiss*, to the extent that Respondent's second and third affirmative defenses are construed to state such motions; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

s/ Kevin A. Thompson  
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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **7<sup>th</sup> day of April, 2011**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson