



The complainant enjoys the benefit of all reasonable inferences.<sup>5</sup> The complaint should not be dismissed unless it shows no set of facts entitling it to relief.<sup>6</sup>

The Missouri Supreme Court has stated that 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>7</sup> That 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. The Eastern District of the Missouri Court of Appeals has said the same thing:

On appeal, petitioner contends that the charges stated for his dismissal . . . 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 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>8</sup>

The Public Service Commission ("PSC" or "Commission") is a creature of statute and "[w]hatever power [it] has must be warranted by the letter of law or such clear implication flowing therefrom as is necessary to render the power conferred effective."<sup>9</sup>

The PSC is specifically and expressly authorized, in § 393.140(5), RSMo, to hear and

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission***, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

<sup>8</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>9</sup> ***State ex rel. City of St. Louis v. Public Service Commission of Missouri***, 335 Mo. 448, 457-58, 73 S.W.2d 393, 399 (banc 1934).

determine complaints concerning tariffs. Staff set out that provision verbatim in its Complaint and sets it out again here:

[w]henver the Commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the Commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulation to be done and observed . . . .

MGE's asserted defense that Staff's complaint fails to state a claim must fail because the authority invoked by Staff's complaint is undeniable, as the statute cited above shows. Staff has pleaded the necessary elements for a § 393.140(5) cause of action, namely, that (1) Respondent is a regulated utility (2) with a tariff (3) that is "unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law" (4) because of matters specified in the complaint. The relief Staff seeks, as well, is specifically authorized in the cited statute.

Staff's complaint also asserts a cause of action under § 386.390.1, namely, that MGE's Sheet R-34 does not comply with the Commission's Natural Gas Safety Rules 4 CSR 240-40.030(10)(J) and 4 CSR 240-40.030(12)(S). That aspect of Staff's complaint must also survive a challenge that it fails to state a claim. Section 386.390.1, RSMo, expressly authorizes the PSC to hear and determine a complaint that a corporation has committed an act, or failed to do an act, in violation of a Commission rule. Staff has adequately pleaded the elements of that cause of action, as well.

**14. Respondent's tariff sheet R-34 enjoys a presumption that it is lawful and reasonable. See, §386.270 RSMo.**

Section 386.270, RSMo, provides:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

This provision is no help to MGE because Staff's complaint is "a suit brought for that purpose – i.e., to determine the lawfulness of MGE's Sheet R-34 -- pursuant to the provisions of this chapter."

**15. Staff's Complaint is an impermissible collateral attack on the Commission's April 3, 2007 Order Regarding Motion for Expedited Consideration and Approval of Tariff Sheets in compliance with the Commission's Report and Order in Case No. GR-2006-0422. See, §386.550 RSMo.**

Section 386.550, RSMo, provides:

In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.

This provision is also of no assistance to MGE. In ***State ex rel. Licata v. Public Service Commission of the State of Missouri***,<sup>10</sup> the Western District of the Missouri Court of Appeals held that § 386.550 barred a complaint challenging as unlawful a utility company rule that had been approved by the Commission. In its transfer application, the Relator complained that the court had deprived it of the right of complaint granted in § 386.390.1. The ***Licata*** Court explained that this contention was erroneous: § 386.390.1 authorizes complaints alleging violations of Commission orders, while § 386.550 bars complaints attacking Commission orders. The court

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<sup>10</sup> 829 S.W.2d 515 (Mo. App., W.D. 1992).

explained, “Section 386.390 and Section 386.550 are not in conflict but address separate problems.”<sup>11</sup> In a second case, ***State ex rel. Ozark Border Electric Cooperative v. Public Service Commission of Missouri***,<sup>12</sup> the Western District held that a complaint brought under § 394.312.6, which authorizes complaints attacking territorial agreements previously approved by the Commission, must include an allegation of a substantial change in circumstances in order to avoid the bar imposed by § 386.550, despite the fact that § 394.312 does not expressly require such an allegation.<sup>13</sup> Reading ***Licata*** and ***Ozark Border*** together, it is clear that 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 bars the complaint.

Turning to Staff’s complaint, Staff points out that ¶ 7 alleges that the PSC in January 2010 rejected liability-limiting tariff provisions proposed by Laclede Gas Company and ¶ 8 alleges that the Commission’s January 2010 decision has become final and is regarded by Staff as a statement of policy. These two paragraphs are exactly the sort of allegations of changed circumstances required under ***Licata*** and ***Ozark Border***. Thus, MGE’s challenge under § 386.550, RSMo, must fail.

Staff points out, further, that neither ***Licata*** nor ***Ozark Border*** considered the interplay of § 386.550 with § 393.140(5), which specifically authorizes an administrative cause of action to determine whether a tariff is just, reasonable and lawful, or § 386.490.3, RSMo, which provides that matters determined by the Commission are

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<sup>11</sup> ***Licata***, *supra*, 829 S.W.2d at 519.

<sup>12</sup> 924 S.W.2d 597 (Mo. App., W.D. 1996).

<sup>13</sup> 924 S.W.2d at 6001-601.

always before it and that the PSC may “change or abrogate” a prior order at any time.<sup>14</sup>

**16. The Complaint is in the nature of an application for rehearing of the Commission’s Report and Order in Case No. GR-2006-0422 and is time-barred. See, §386.480 RSMo.**

Respondent evidently cited § 386.480, RSMo, in error; that provision states:

No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor.

Staff does not know what section Respondent meant to cite, but points out that its complaint is in no way an application for rehearing, but rather a § 393.140(5) cause of action to determine the propriety of a tariff. Staff’s action is also authorized by § 386.490.3, RSMo, which provides:

Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and 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.

Pursuant to § 386.490.3, RSMo, the Commission’s order approving Sheet R-34 is *always* before it and may be changed or abrogated as the Commission in its discretion may determine.

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<sup>14</sup> *Licata, supra*, concerned a complaint brought under § 386.390.1, RSMo; *Ozark Border, supra*, concerned a complaint brought under § 394.312.6, RSMo.

**17. Staff is estopped from making a complaint concerning the lawfulness and reasonableness of Respondent's tariff sheet R-34.**

Respondent has not sufficiently pleaded the affirmative defense of estoppel. It is not sufficient to simply state the word; Respondent must plead *facts* sufficient to show that Staff is estopped. In reply, Staff specifically denies that it is estopped from bringing its complaint. Staff will raise the matter of the sufficiency of Respondent's pleading of this affirmative defense by separate motion.

**WHEREFORE**, having fully replied to Respondent's Answer and Affirmative Defenses, Staff prays the Commission will grant the relief sought in Staff's Complaint; and grant such other and further relief as the Commission deems just in the premises.

Respectfully Submitted,

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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 **17<sup>th</sup> day of November, 2010**, 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