

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

In the Matter of Southern Union Company)
d/b/a Missouri Gas Energy's Tariff Sheets) Case No. GT-2012-0170
Designed to Implement an Experimental) Tariff File No. JG-2012-0211
Pilot Program)

**STAFF RESPONSE TO PUBLIC COUNSEL'S APPLICATION FOR
REHEARING, MOTION FOR RECONSIDERATION,
AND MOTION TO SCHEDULE AN EXPEDITED HEARING**

COMES NOW the Staff of the Commission and for its Response to Public Counsel's Application for Rehearing, Motion for Reconsideration and Motion to Schedule an Expedited Hearing (Application) states: the Commission acted within its Discretion; this is a non-contested case; the court reviews non-contested cases for lawfulness, and does not review for competent and substantial evidence and the Commission need not, but may, order a hearing without transforming this matter into a contested case. Staff neither supports nor opposes the Office of the Public Counsel's (OPC) Application. In support thereof Staff states:

1. The Commission acted within its discretion in not suspending the Missouri Gas Energy's Rebuild Joplin Rebate tariff. The Commission has not acted in an arbitrary, capricious or unreasonable manner in making its decision in this case.

2. The "file and suspend" provisions of the Public Service Commission Law, Sections 393.140(11) and 393.150(1) and (2) RSMo 2000, as currently supplemented, do not require a hearing. In *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 566 (Mo.App. 1976) the Court held that it is within the Commission's discretion to order or to not order tariff suspension:

Simply by non-action, the Commission can permit a requested [tariff] to go into effect. Since no standard is specified to control the Commission in whether or not

to order a suspension, the determination as to whether or not to do so necessarily rests in [the Commission's] sound discretion.

4. OPC suggests the Commission's decision is not based on competent and substantial evidence. The Commission's decision not to suspend a tariff is by law a non-contested case. Non-contested cases have a different standard than review of a contested case, because, by law, no hearing is required. In terms of judicial review, the Court in *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 210 S.W.3d 344 (Mo. Ct. App. 2006) noted that Article V, Section 18 of the Missouri Constitution contemplates a different standard of review in cases where a hearing is not required by law than in cases where a hearing is required by law :

All final decisions findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record . . . [emphasis added.]
210 S.W.3d 344, 354 (Mo. App. 2006).

5. Since MGE's tariff application is an uncontested case, no hearing is required. As noted above it *Office of Public Counsel v. Public Service Com'n*, OPC appealed an order of the Commission in which the Commission approved a tariff application without a hearing. In that case, the court reasoned that judicial review of a non-contested case typically only decides the lawfulness of the administrative order. According to Section 386.510, however, an applicant may apply to the circuit court for a writ of *certiorari* or review "for the purpose of having the reasonableness *or* lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined." The disjunctive "or" usually "marks an alternative 'which generally corresponds to the word "either." ' (citation omitted). Thus, by using "or" in Section 386.510, the General Assembly authorized judicial review of a commission's order that

probes either its lawfulness or reasonableness and not necessarily both. A review of a commission order issued in a contested case, of course, would require a probing of both, but review in a noncontested typically probes only the lawfulness of an agency's order without consideration of its reasonableness and without need for review of competent and substantial evidence. Thus, as is the case in [MO. CONST. art. V, Section 18](#), the "competent and substantial evidence" would not apply to the commission's cases in which a hearing was not required by law. 210 S.W.3d 344, 354 (Mo. Ct. App. 2006)(emphasis added)

7. In further affirming the Commission's discretion in a case such as this, the Court affirmed that no hearing is required in finding that all arguments were fully considered by the Commission and found to be insufficient to require a hearing. The Appellate Court affirmed the Commission's discretion in this matter. They also noted that the Court could "determine whether or not the commission abused its discretion in denying a hearing and whether or not the commission's order was lawful without findings of fact." 210 S.W.3d 344 at 353.

8. When, as in this case, a hearing is not required by law, the Commission's action is subject to review only as to whether it is authorized by law and is not subject to review as to whether they are supported by competent and substantial evidence upon the whole record. *Id.* The Court reviews only for lawfulness.

9. In further support of the lawfulness of the Commission's decision, Staff notes that contrary to OPC's assertions the Rebuild Joplin tariff conflicts with the Commission's *Promotional Practices* rule, section 4 of the rule, 4 CSR 240-14(4), which allows for implementation of pilot programs: "Nothing contained in this chapter shall be construed to prohibit market research studies, pilot programs, test marketing programs or other activities to evaluate the cost-effectiveness of potential demand-side resources" (4 CSR 240.010(4)).

10. In addition to its argument the tariff violates Commission rules, OPC also claims deprivation of due process but does not identify any protected property interest. Where no protected property interest is at stake no hearing is required. “To invoke the mandates of procedural due process, one must have been deprived of a property interest recognized and protected by the Due Process Clause.” *Moore v. Fulton Board of Ed.*, 836 S.W.2d 943, 947 (Mo. banc 1992).

11. OPC seems to recognize it is asking for a hearing that is not required by law when it “requests the Commission take an unconventional approach in this case by scheduling an expedited evidentiary hearing while still allowing the Rebuild Joplin Program to go into effect. (OPC Application para. 1)

12. In conclusion, in the case of the file and suspend procedure, the Commission is not required to hold a hearing, and the court will review only to determine whether the Commission’s order is lawful. The court is unlikely to find the Commission has abused its discretion so long as the Commission has given full consideration of all arguments.

13. Further review of case law indicates a non-contested case is not transformed into a contested case if the Commission grants OPC’s request. The relevant issue under the contested case definition is whether the agency was required by statute, ordinance, or constitutional provision to hold a hearing . See also *Armstrong*, 273 S.W.3d at 507. “The question ‘is not whether a hearing was actually conducted, but whether one was required by law. *Painter v. Mo. Comm’n on Human Rights*, 251 S.W.3d 408, 410 (Mo.App. W.D. 2008).

WHEREFORE Staff states the Commission’s decision was lawful and was not arbitrary, capricious, unreasonable or a deprivation of any protected property interest. The case law noted above, however, indicates the Commission may grant OPC’s request for hearing without

transforming this non-contested case into a contested case. Staff neither supports nor opposes OPC's request for a hearing.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 17th day of December, 2011.