

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

In the Matter of Union Electric Company)
d/b/a AmerenUE for Authority to File)
Tariffs Increasing Rates for Electric) Case No. ER-2010-0036
Service Provided to Customers in the)
Company’s Missouri Service Area.)

**UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI’S SUR-REPLY TO
PUBLIC COUNSEL’S REPLY TO AMEREN MISSOURI’S RESPONSE TO PUBLIC
COUNSEL’S MOTION**

COMES NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), by and through counsel, and files this sur-reply to Public Counsel’s reply filed March 7, 2011. In this regard, Ameren Missouri states as follows:

PUBLIC COUNSEL’S MOTION SHOULD BE DENIED

A. The Commission lacks jurisdiction to grant Public Counsel’s motion, as demonstrated by the unrefuted case law cited by the Company in its February 25 Response, and as tacitly conceded by Public Counsel given his total failure to address the issue in his Reply.

1. Public Counsel has twice now had the opportunity to provide the Commission with whatever support he could muster for his unprecedented and unsupported motion that seeks to have the Commission deprive Ameren Missouri of approximately \$230 million of annual revenue it is collecting under tariffs that remain on review in a case that is under the exclusive jurisdiction of the Circuit Court of Cole County. Indeed, Missouri’s statutes and all Missouri precedents recognize that those tariffs remain valid pending judicial review. And twice now, Public Counsel has failed to cite to the Commission *a single case or prior Commission order* showing that the Commission has jurisdiction to do what Public Counsel asks.

2. Under the circumstances, one can only conclude that Public Counsel cannot find a case or Commission order that would support the proposition that the Commission has

jurisdiction over this matter while its 2010 rate order and the tariffs it authorized are under review in the circuit court. There could be no mistake that Ameren Missouri's Response put the Commission's lack of jurisdiction squarely in issue. The very first – and dispositive – argument that Ameren Missouri made in its Response was that exclusive jurisdiction was transferred from the Commission to the circuit court during the pendency of the writ of review case. See Ameren Missouri's Response pp. 3-5, citing *State ex rel. Missouri Cable Telecommunications Ass'n v. Pub. Serv. Comm'n*, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996), *State ex rel. City of Joplin v. Pub. Serv. Comm'n*, 186 S.W.3d 290, 293 (Mo. App. S.D. 2005), & *In re: Atmos Energy Corporation*, Notice and Order Finding Atmos Energy Corporation's Annual Report to be in Compliance, and Denying Public Counsel's Requests for Clarification and to Open an Investigation, 2009 WL 362181 (Mo.P.S.C.) (Feb. 11, 2009).

3. Public Counsel's Reply not only did not attempt to distinguish these cases, and he skipped over the question of the Commission's jurisdiction entirely – a tacit concession that the above cases and the Commission itself in *In re: Atmos Energy Corporation* correctly stated that once a writ of review has issued, exclusive jurisdiction over the subject matter of the order under review is transferred to the courts of this state. Those cases are clear that once jurisdiction has been transferred, the Commission cannot do anything with respect to the subject matter of the order under review until a final mandate has been issued by the courts at the conclusion of the appellate process.

4. No mandate has been issued here – the appellate process has only just begun. There is only an interlocutory order by the circuit court that is subject to change at any time. Furthermore, in that interlocutory order, as even Public Counsel concedes, “the Court did not include specific instructions to the Commission” to do anything. Public Counsel's Reply p. 7.

How can Public Counsel argue that the Commission has a ministerial duty to change its tariffs when even under Public Counsel's reading of the stay order, Judge Wilson did not order the Commission to do anything? The argument simply makes no sense.

5. Similarly absent from Public Counsel's pleadings is a single historical example of the Commission canceling tariffs during the pendency of a writ of review case. How many times has the Commission entered rate orders in its nearly century-long existence? And how many times has a circuit court stayed the effect of those orders? Many times. If the Commission in fact had a ministerial duty to cancel its tariffs whenever a circuit court stayed a rate order, Public Counsel could surely point the Commission to examples of the Commission performing this so-called ministerial duty. But Public Counsel has not – and apparently cannot – provide the Commission with one example – not one. Most recently, the Commission did not cancel tariffs when a stay was granted by the Pemiscot County Circuit Court in the appeal of Case No. ER-2008-0318. The deafening silence in Public Counsel's Reply on the above issues is more than adequate reason to deny Public Counsel's motion. That being said, however, a few other points raised in Public Counsel's Reply warrant further comment.

B. Public Counsel remains mistaken about the scope of the stay order.

6. Public Counsel has stooped to the level of baseless *ad hominem* attacks in suggesting that Ameren Missouri has “deliberately calculated to mislead” the Commission about the scope of the Judge Wilson's stay order. Public Counsel's Reply p. 2. In fact, the relief granted in the stay order can only be read to apply to the four appellants who requested the stay, as Ameren Missouri explained in its Response. As a matter of long-established judicial practice, the operative portion of an order is stated at the end of the order, typically with the operative language capitalized, as Judge Wilson did under the “Conclusion” heading of his order. There,

Judge Wilson unambiguously stated that the Court “GRANTS *Movants’ request* to stay or suspend the operation of the PSC’s order authorizing an approving AmerenUE’s 2010 Rates.” (Emphasis added). As noted in Ameren Missouri’s Response, *Movants’ request* was simply to pay the difference between *their* base rate billings at the 2010 rates set in Case No. ER-2010-0036 and what their billings would be under the 2007 rates set in Case No. ER-2010-0036. The *Movants* did not make any request whatsoever concerning the rates of other customers.

7. While Public Counsel seeks to direct the Commission to portions of the effusive *dicta* in Judge Wilson’s order, the Conclusion portion of the stay order on which Ameren Missouri relies is the same portion of the order that is included in the court’s official docket entry for the order. See Ex. 1 attached hereto.

8. Public Counsel seeks to argue that *Page v. Page*, 516 S.W.2d 537 (Mo. App. 1974), and *State ex rel. Missouri Highway Transportation Comm’n v. Westgrove Corp.*, 306 S.W.3d 618 (Mo. App. E.D. 2010), are distinguishable and that Judge Wilson’s order should be read in its entirety, with all doubts in favor of a broad reading of the stay. Public Counsel’s Reply p. 4-6. But neither *Page* nor *Westgrove* support reinterpreting the clear, and limited language, of the decretal portions of the stay order so that they take on the inconsistent meaning that Public Counsel finds in Judge Wilson’s 49 pages of musings about the a circuit court’s authority to enter stays under Section 386.520, RSMo.

9. In *Page*, the Court of Appeals disregarded portions of a trial court’s opinion that preceded the final decretal portions of an order. The mere fact that Judge Wilson’s order does not have headings for recitals and judgments does not distinguish *Page* for purposes of the application of well-established rules pertaining to interpretation of court orders.

10. *Harris v. Desisto*, 932 S.W.2d 435 (Mo. App. W.D. 1996), cited in Ameren Missouri's Response, also did not involve a formulaic order with a separate recital portion as was involved in *Page*, and the same rule applied. In *Harris*, the question was whether a trial court had entered judgment for damages or a judgment rescinding a contract. The trial court stated on the record immediately before entering judgment that it was entering a judgment for damages, but the actual language of the judgment stated that rescission was entered. *Id.* at 442. The Court of Appeals found the operative language of the judgment controlling and disregarded the judge's inconsistent prior statements. *Id.* at 443. *Foraker v. Foraker*, 133 S.W.3d 84, 102 n.5 (Mo. App. W.D. 1996), is similar in that the Court of Appeals disregarded inconsistent language in the findings section of an order and found the operative language of the judgment that ordered distribution of property controlling.

11. Public Counsel's arguments based on *Westgrove* also do not withstand scrutiny. *Westgrove* presents a different set of circumstances than those presented by the stay order in this case. In *Westgrove*, the circuit court had "ostensibly ruled" on two separate counts of one party's counterclaim. But the judgments on the two counts – both of which were decretal because they both constituted a judgment on separate counts - were inconsistent with each other in that the party could not have logically received the relief ordered in count I and count II at the same time. *Id.* at 623. In that unusual set of circumstances, the Court of Appeals held that it could (indeed it had to) look to the rest of the trial court's order to ascertain what the trial court actually intended in the decretal part of its order.

12. There is no such ambiguity in the decretal portions of Judge Wilson's order. As noted above, he clearly granted the Movants' request. Nothing more. Nothing less. Public Counsel also fails to note that if there were any ambiguity in an order, construction of the order

would be a question of law “for the independent judgment of [a] reviewing court” – *i.e.*, the Court of Appeals, and not the Commission. *State ex rel. Missouri Highway Transportation Comm’n v. Westgrove Corp.*, 306 S.W.3d at 623. And in construing the order, the Court of Appeals would apply “general rules of construction.” *Id.*

13. One important rule of construction is the avoidance of constitutional questions. In other words, if there are two potential interpretations of a particular phrase or statement, only one of which is constitutional, a court will select the interpretation that is constitutional or the interpretation that avoids the constitutional issue. *See, e.g., State ex rel. Union Elec. Co. v. Public Service Comm’n*, 687 S.W.3d 162, 165 & 165 n.4-n.5 (Mo. banc 1985).

14. Public Counsel’s argument that Judge Wilson’s stay order should be interpreted to stay all rates as to all customers – a \$230 million effect – raises grave constitutional questions. Under this reading of the Order, Ameren Missouri would be deprived of \$217.7 million in rates that the Commission found are just and reasonable, solely on the strength of a few industrial customers posting a \$430,000 bond (securing damages associated with just \$12.3 million of the rate increase¹), where the appeal of the rate increase implicates only a tiny fraction of the \$230 increase. As discussed in Ameren Missouri’s Response, the Company would be unable to recover these \$217.7 million from its 1.2 million customers and absent a sufficient bond to cover damages associated with the \$217.7 million, the Company would be effectively deprived of its constitutionally mandated just and reasonable compensation. *See, e.g., Dusquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (“the Constitution protects [a public utility] from being limited to a charge for [its] property serving the public which is so ‘unjust’ as to be confiscatory.”) (quoting *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578,

¹ The fact that the amount of the bond was calculated based on the revenues paid by the four industrial customers provides additional evidence that the stay order does not apply beyond the scope of the motion filed by the four appellants.

597 (1896)). An appellate court would never interpret Judge Wilson's order to produce such a confiscatory result or otherwise allow such a confiscatory result to occur. The Commission likewise should not entertain the idea of precipitously taking the unprecedented step of cancelling its tariffs based on Public Counsel's flawed reading of Judge Wilson's order particularly where it has no jurisdiction to do anything at this point.

15. Finally, the provision of Judge Wilson's order that acknowledges that the the order "may not have immediate effect outside the parties before it..." simply cannot be reconciled with the Public Counsel's broad reading of the scope of the stay. Under Public Counsel's reading, the order would have an immediate effect on the bills of 1.2 million of Ameren Missouri's customers – every industrial customer, every commercial customer, and every residential customer – none of whom (other than Movants and Public Counsel himself) are parties to the Cole County case.

C. Public Counsel is wrong about the directive nature of the stay order and the procedural steps that might flow from action that the Commission might take on its motion.

16. Public Counsel last argues that the Commission has no choice but to issue an order responding to the stay order and that this order will not be subject to rehearing. Public Counsel is wrong on both points.

17. First, it is astounding that Public Counsel would even argue that the current procedural circumstances are "most analogous to a remand under Section 386.510 with instructions to receive specific testimony." Public Counsel's Reply, p. 7. The circumstances could not be more different. Here there is no final judgment from the circuit court--only an interlocutory stay order. There is also, as Public Counsel concedes (Reply p. 7), no "specific instructions to the Commission" in the stay order. Indeed, the stay order does not order or even request or even imply that the Commission to do *anything*.

18. In fact, the circuit court cannot order the Commission to do anything specific. Under section 386.510 a circuit court has no jurisdiction to enjoin, restrain, or interfere with the Commission or its Staff in the performance of their duties. *State ex rel. Amega Sales, Inc. v. Pub. Serv. Comm'n*, 186 S.W.3d 771, (Mo. App. W.D. 2006); *State ex rel. A&G Commercial Trucking, Inc. v. Director, Man. Housing & Modular Units Program of Pub. Serv. Comm'n*, 168 S.W.3d 680 (Mo. App. W.D. 2005). The circuit court cannot order the Commission to suspend any tariffs. Rather, under the plain terms of Section 386.510, as applied repeatedly by the courts, a circuit court can, in a writ of review case, affirm or reverse a final Commission order and remand “for further action” – it cannot tell the Commission what that action should be. There is but one exception: failure to receive evidence – in that case the Court can order the Commission to receive the evidence. The Court cannot issue directives to the Commission to do anything beyond this.

19. Public Counsel does not contest that cases such as *GTE North*, for example, clearly hold that even after reversal *on the merits* by the circuit court, a utility’s tariffs remain presumptively valid and in effect. Yet Public Counsel argues that, somehow, an interlocutory stay order entered *without an order on the merits* in the review proceeding renders those tariffs ineffective. The only way to reconcile *GTE North* and others in its line with the statute is to recognize, as the operative parts of the stay order did, that the tariffs remain in effect – indeed Movants are being charged under them, with Movants diverting a portion of those charges to the circuit court’s registry, as Movants requested, and as the stay order allows.

20. Public Counsel also suggests that granting the relief he seeks would not lead to multiple appeals of the same rate order, arguing that rehearing would not lie if the Commission granted the relief he seeks. However, all the cases Public Counsel cites for the proposition that

“not every order of the Commission subject [sic] to an application for rehearing” all involve *interlocutory* orders of the Commission, such as denial of motion to dismiss and a discovery order while the merits of the case are still pending. The cases are clear that as to final orders of the Commission, rehearing is a prerequisite to judicial review. Moreover, the Missouri Constitution guarantees the right to judicial review of final orders of administrative agencies, including the Commission. Mo. Const. Art. V, § 18 (“All final decisions, findings, rules and orders of 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.”). If the Commission grants the relief that Public Counsel seeks – there is nothing more for it to do – its suspension would be complete; final. In contrast, when a motion to dismiss is denied; when a discovery order is entered – the Commission still has action to take in the case. But here, it wouldn’t and an opportunity for rehearing must be given. Otherwise, Ameren Missouri would be deprived of constitutional right to seek judicial review.

21. That the Court of Appeals *might* issue a *discretionary* writ does not change the rehearing request requirement of Section 386.510 – otherwise, the Commission would have issued a final order and the only remedy would be a discretionary one in the courts. The Constitution does not say that parties *might* have the opportunity for judicial review. As for the *Empire* case Public Counsel cites, mandamus lay when the Supreme Court had issued its mandate to the Commission and the issue was whether the Commission had complied with the Supreme Court’s mandate. No court has issued any mandate to the Commission here, and *Empire* is thus inapposite.

CONCLUSION

For the reasons stated above and in Ameren Missouri's Response, the Commission must DENY Public Counsel's request.

Dated: March 8, 2011.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Sur-Reply of Union Electric Company d/b/a Ameren Missouri was served via e-mail, to the following parties on the 8th day of March, 2011.

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Exhibit 1

Report: CZR0026

19TH JUDICIAL CIRCUIT
COLE CIRCUIT
CIRCUIT COURT DOCKET SHEET

Date: 08-Mar-2011
Time: 1:46:39PM
Page: 4

Case continued from previous page.

10AC-CC00411 UNION ELECTRIC CO V PUBLIC SERVICE COMMISSION

Security Level: 1 Public

20-Dec-2010

Order

For the reasons stated above, the Court GRANTS Movants' request to stay or suspend the operation of the PSC's order authorizing and approving AmerenUE's 2010 Rates. This stay or suspension will not take effect until the Movants post a bond in an amount equal to 3.5% of \$12.3 million, and such higher amounts as this Court may subsequently order under Section 386.502.4. Finally, this Court GRANTS Movants' request that they be ordered to pay into the Court's registry certain amounts each month each and every month until this case is finally disposed of, which payments are to be calculated as set forth above and are estimated to amount to \$12.3 million by the end of December 2011. Accordingly, Movants are hereby ORDERED to make such payments into the Court's registry beginning with the payment to be calculated according to amounts owed to AmerenUE on or by December 21, 2010, and Movants are further ORDERED to file with the Court (with copies to all counsel of record) proof of each such deposit and the manner in which it was calculated ./s/PCW/rd

Filed By: PAUL C WILSON

21-Dec-2010

Motion Granted/Sustained

Motion to extend briefing schedule sustained ./s/PCW/rd

Filed By: PAUL C WILSON

28-Dec-2010

Request for Records Filed

29-Dec-2010

Request for Records Filed

30-Dec-2010

Judge/Clerk - Note

Copy request completed and sent to Smith Lewis LLP, Attn: [redacted] as fully as the same remains of record in my said office.

Judge/Clerk - Note

Copy request completed and sent to Stinson, Morrison, Heisterkamp & Associates, P.C., Attn: Angela Schulte. kv

Motion Filed

Motion to Extend Briefing Schedule, filed.rd

Filed By: EDWARD F DOWNEY

Order

Order Extending Briefing Schedule/s/PCW/rd

Filed By: PAUL C WILSON

Judge Assigned

Case assigned to Judge Daniel R. Green by Presiding Judge.

04-Jan-2011

Request for Records Filed

Judge/Clerk - Note

Copy request completed and faxed to Julien Dumoulin-Smith, with Electric Utilities & IPPs group. kv

Request for Records Filed

Judge/Clerk - Note

Copy request completed and sent to Sandberg Phoenix and Von Gontard, P.C., attn: Lisa Langeneckert. kv

13-Jan-2011

Motion Filed

Motion to Extend Briefing Schedule, filed.rd

Filed By: EDWARD F DOWNEY

14-Jan-2011 **Motion Granted/Sustained**

14-Jan-2011

Motion Granted/Sustained

STATE OF MISSOURI }
COUNTY OF COLE } SS

I, BRENDA A. UMSTATTD, Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of

ORDER / Docket Entries

as fully as the same remains of record in my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my said office this 8th day of March, 2011

BRENDA A. UMSTATTD, Clerk

Deputy Clerk
Circuit Court of Cole County, Missouri