

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission
held at its office in Jefferson City on
the 29th day of December, 2014.

R & S Home Builders, Inc., and)	
Carol and Arvell Allman,)	
)	
Complainants,)	
)	
vs.)	File No. EC-2014-0343
)	
KCP&L Greater Missouri Operations Company,)	
)	
Respondent.)	

ORDER DENYING MOTIONS FOR RECONSIDERATION AND REHEARING

Issue Date: December 29, 2014

Effective Date: December 29, 2014

The Commission is treating the pending motions (“motions”) as motions for reconsideration, and denying both motions, because neither motion shows that the order subject to both motions is unlawful, unjust, or unreasonable.¹ The Commission is also treating the motion of KCP&L Greater Missouri Operations Company (“GMO”) as a motion for summary determination and setting a date to file a response that addresses GMO’s motion under that standard.

GMO filed its motion.² R & S Home Builders, Inc., and Carol and Arvell Allman (“Complainants”) filed their motion including a response to GMO’s motion.³ GMO also filed a response to the Complainants’ motion.⁴

¹ Commission regulation 4 CSR 240-2.160 (2) sets forth that standard. The motions use the term “rehearing,” but rehearing denotes a procedure that applies only to a final order of the Commission. AG Processing, Inc. v. KCP & L Greater Missouri Operations Co., 432 S.W.3d 226, 230 (Mo. App., W.D. 2014).

² Electronic Filing and Information System (“EFIS”) No. 23, *Verified Application for Rehearing and/or Motion for Reconsideration*, September 26, 2014. Unless otherwise noted, citations to EFIS are for this File No. EC-2014-0343.

³ EFIS No. 24, *Application for Rehearing*, October 3, 2014.

⁴ EFIS No. 25, *GMO's Response in Opposition to Complainants' Application for Rehearing*, October 13, 2014.

The motions and responses (“motions”) address the *Order Granting in Part and Denying in Part Motion to Dismiss and Denying Motion to Amend* (“the Order”).⁵ The Order ruled on GMO’s motion to dismiss for failure to state a claim, for which the standard is as follows.

“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition.” “It assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.” “No attempt is made to weigh any facts alleged as to whether they are credible or persuasive.” [6]

The claim that the complaint must state is a violation of a statute or a Commission regulation, tariff or order.⁷

A. The Order

The Order dismissed in part the complaint based on events in this and two related actions,⁸ one decided in 2014 (“2014 Case”) ⁹ and one started in 2013 (“2013 Case”),¹⁰ The 2013 case started when GMO filed an application¹¹ to cease payment of solar rebates under the Renewable Energy Standard,¹² with an accompanying tariff, and ended when the Commission authorized GMO to file a second application and second tariff.¹³ The second application and second tariff were filed,¹⁴ and the second tariff was approved, in the 2014 case.¹⁵

⁵ EFIS No. 21, September 21, 2014.

⁶ *Id.* (citations omitted).

⁷ Section 386.390.1, RSMo 2000.

⁸ Both actions were styled *In the Matter of [GMO]’s Application For Authorization To Suspend Payment of Certain Solar Rebates*.

⁹ File No. ET-2014-0277.

¹⁰ File No. ET-2014-0059.

¹¹ File No. ET-2014-0059, EFIS No. 1, *Application for Authority to Suspend Payment of Solar Rebates*, September 4, 2013.

¹² Sections 393.1025 to 393.1030, RSMo.

¹³ File No. ET-2014-0059, EFIS No. 50, *Order Approving Stipulation and Agreement*, October 30, 2013, Exhibit A, page 5. Hence the Order’s term “2013 Authorization.”

¹⁴ File No. ET-2014-0277, EFIS No. 1, *Application for Authority to Suspend Payment of Solar Rebates*, April 9, 2014.

The tariff provides that GMO ceases payment as follows.

The Company **will pay** solar rebates for all valid applications **received** by the Company **by November 15, 2013 at 10 AM CST**, which are preapproved by the Company and which result in the installation and operation of a Solar Electric System pursuant to the Company's rules and tariffs. Applications **received after November 15, 2013 at 10 AM CST may receive** a solar rebate payment if the total amount of solar rebates paid by the Company for those applications received on or before November 15, 2013 at 10 AM CST are less than \$50,000,000.^[16]

By approving the tariff that accompanied the application, the Commission authorized the cessation of payments, even without stating, "The application is approved." That order approving the second tariff is final, and was the subject of no application for rehearing.

The orders in the 2013 case and the 2014 case are, by statute, conclusive in any collateral action:

In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive^[17]

An action is collateral if it challenges an order by means other than the exclusive remedy.¹⁸ The exclusive remedy for the Commission's final order is an application for rehearing¹⁹ and notice of appeal.²⁰ Neither filing occurred in either the 2013 or 2014 case, so no action can bring any challenge to any order in those cases.

Nevertheless, a challenge to the orders in the 2013 case is expressly the premise of the complaint. The complaint specifically charges that GMO violated the Renewable Energy Standard

¹⁵ File No. ET-2014-0277, EFIS No. 10, *Order Approving Tariff*, issued on May 28, 2014.

¹⁶ GMO's tariff, P.S.C. MO No. 1, *Rules and Regulations Electric*, 3rd Revised Sheet R-62.19, Section 9.18, *Solar Photovoltaic Rebate Program*, paragraph B, effective June 8, 2014.

¹⁷ Section 386.550, RSMo 2000.

¹⁸ *State v. Kosovitz*, 342 S.W.2d 828, 830, (Mo. 1961).

¹⁹ Section 386.500, RSMo 2000.

²⁰ Section 386.510, RSMo Supp. 2013.

by ceasing payment without carrying its burden of proof ²¹ and without the Commission separately stating a finding of fact ²² in the 2013 case. Against conclusive orders, the 2013 and 2014 cases, the complaint cannot state a claim. Therefore, the Order dismissed the complaint as to any relief contrary to the 2013 case. That ruling is not unlawful, unjust, or unreasonable.

B. The Motions

Complainants argue that the Order is unlawful, unjust, or unreasonable, because they were not parties to, and had no notice of, the 2013 Case or the 2014 Case. In support, Complainants cite the following language from State ex rel. Licata, Inc. v. Pub. Serv. Comm'n of State:

Here, there is no question that the order of the Commission by which Article 10 was approved became final; nor is there any question that Licata had notice of the proceeding in which Article 10 was considered and approved, and failed to participate in that hearing. Thus, Article 10 was approved with full notice to Licata and opportunity to be heard.^[23]

Those words say that the customer had notice and the tariff is effective. They do not condition effectiveness on notice to the customer. And, in that case, the Court of Appeals concluded that the appellant, though not a party to the action, was subject to the resulting order.

Notice to Complainants is irrelevant to the conclusive effect of Commission orders, as discussed in State ex rel. Harline v. Pub. Serv. Comm'n of Mo.:

It is also contended that the Commission's [final order] is void, ab initio, because notice was not given to all interested parties, and that subsequent orders based thereon are likewise void.

Appellants insist that under their right of due process they were entitled to be notified of the hearing, that they were not given notice, and that they were thereby deprived of opportunity to appear and oppose the company's application. They say that as owners of land in the allocated territory, perpetually subjected to the hazard of condemnation, they were entitled to be heard. Appellants point to no

²¹ EFIS No. 1, *Complaint*, filed on May 14, 2014, page 8, Count II.

²² EFIS No. 1, *Complaint*, filed on May 14, 2014, page 5, Count I.

²³ 829 S.W.2d 515, 518 (Mo. App., W.D. 1992).

statute providing or decision holding that they were entitled to personal notice of the proceeding.

There is no evidence to show that, if appellants were residents of the area in 1938, they had any interest in the hearing except as prospective users of electricity, as were all members of the resident public. Such status creates no interest adverse to that of the utility or any direct interest in the proceeding, entitling them to notice.^[24]

By contrast, notice of Commission proceedings is generally due the Office of the Public Counsel,²⁵ which represents the public. Therefore, lack of personal notice to Complainants in the 2013 Case and 2014 case is irrelevant.

Complainants' motion also argues that the complaint does not challenge any order of the Commission, only GMO's practices. On that argument, *Licata* is instructive:

Licata contends that it is not attacking the order which the Commission made in 1985, but is simply attacking a utility rule approved by the Commission. Licata contends that the utility rule, Article 10, is not the order of the Commission but is simply a utility rule. However, Licata fails to note that the only purpose of the order of the Commission in 1985 was the approval of Article 10. Thus, it is impossible to separate Article 10 from the order of the Commission. When Licata attacks Article 10, it must necessarily attack the order which enabled KPL to adopt and enforce Article 10. By § 386.550, Licata cannot collaterally attack the order of the Commission by which Article 10 was adopted. For that reason Licata may not in this proceeding attack Article 10 but is bound by the requirements of Article 10.^[26]

The complaint does not allege that GMO's practices are inconsistent with any Commission order so, when Complainants challenge the practice, Complainants challenge the Commission's orders.

Therefore, the motions have not shown that the Order is unlawful, unjust, or unreasonable, and the Commission will deny the motions.

²⁴ *State ex rel. Harline v. Pub. Serv. Comm'n of Mo.*, 343 S.W.2d 177, 184 (Mo. App., K.C. 1960).

²⁵ Section 386.710.2, RSMo 2000.

²⁶ *State ex rel. Licata, Inc. v. Pub. Serv. Comm'n of State*, 829 S.W.2d 515, 518 (Mo. App., W.D. 1992).

C. Other Matters

Just as the facts have changed since the filing of the complaint, so have the claims and defenses. The motions include matters neither raised in the complaint nor determined in the Order. GMO's motion argues that the amount of solar rebate payments that GMO must pay does not change yearly. GMO also alleges that it has not ceased payments, and alleges that Complainants' applications were too late to be entitled to payment under the second tariff. The Order does not include any ruling on those matters, so those matters are not subject to reconsideration.

Moreover, those allegations do not show whether the complaint states a claim, they go to the merits of the complaint; that is, whether a violation occurred. Whether a violation occurred does not determine whether the complaint states a claim. Therefore, the Commission's ruling on the motion to dismiss cannot determine the complaint's merits.²⁷

The complaint's merits are subject to determination on a motion for summary determination, which the Commission determines under the following standard.

The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.[²⁸]

GMO's motion includes a supporting affidavit. Administrative economy supports addressing the complaint on its merits, so the Commission will treat GMO's motion as a motion for summary determination as to the entire complaint. Fairness requires that the Complainants have an opportunity to address GMO's motion under the summary determination standard, so the Commission will set a new response date.

²⁷ *Chochorowski v. Home Depot U.S.A., Inc.*, 295 S.W.3d 194, 198 (Mo. App. E.D. 2009).

²⁸ 4 CSR 240-2.117(1)(E). That regulation is sufficiently similar to Missouri Supreme Court Rule 74.04 for case law on the rule to help in understanding the regulation.

THE COMMISSION ORDERS THAT:

1. The *Application for Rehearing* is denied.
2. The *Verified Application for Rehearing and/or Motion for Reconsideration* is denied as to a rehearing of the *Order Granting in Part and Denying in Part Motion to Dismiss and Denying Motion to Amend*.
3. No later than January 28, 2015, R & S Home Builders, Inc., and Carol and Arvell Allman may file a response to the *Verified Application for Rehearing and/or Motion for Reconsideration* as described in the body of this order.
4. This order is effective when issued.

BY THE COMMISSION



A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur.

Jordan, Senior Regulatory Law Judge