BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of its Regulatory Plan	)	Case No. ER-2009-0089
In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service	)	Case No. ER-2009-0090
In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Steam Heating Service	)	Case No. HR-2009-0092

CONCURRING OPINION OF
COMMISSIONER TERRY M. JARRETT

I applaud the parties for negotiating proposed settlements in these cases and saving the time and expense of holding weeks of evidentiary hearings. I also fully support the results reached in the Orders issued by the Commission in these cases. However, I write separately to raise my serious concern regarding the overall structure and content of the Commission Orders themselves.

The Commission's statutory duties are not diminished or mitigated simply because the parties have proposed stipulations and agreements. This includes not only preparing and issuing Orders that are legally sufficient, but also ensuring that the Commission not merely accept settlements for settlements sake. *In the Matter of WPC Sewer Company's Small Company Rate Increase*, File No. SR-2008-0388, I stated the following, which bears repeating here:

> " [...] the United States Supreme Court made clear that the controlling test in determining "just and reasonable" rates is the

> end result[1] and not the method of reaching that result. [...] As regulators, we must not lose sight of our ultimate responsibility, which is determining just and reasonable rates that are in the public interest, while also ensuring safe and reliable service. **Only the Commissioners make that final determination, which is why a *unanimous* stipulation presented to the Commission is nothing more than a "*proposed* resolution."**[2] A stipulation is only a suggestion as to the disposition of some or all of the issues pertaining to the utility's revenue increase request that the Commission considers in determining whether the result is just and reasonable rates.

(Emphasis in the original and added.). The parties to a case have no authority to determine or conclude that just and reasonable rates are achieved through settlement, or that the settlement ensures safe and adequate service. This determination is the Commission's to make and it is the Commission's *choice* as to whether to accept or reject a proposed stipulation and agreement. The Commission has rejected numerous stipulated settlements in the past, and no party, utility, consumer, ratepayer, shareholder or any person with any interest in the outcome of the matters before this regulatory body should ever conclude that this Commission is left with *little or no choice* in the matters that come before it.[3] The viewpoint that because a case is settled - or that a

---

[1] This case established the doctrine of the "end result." The Regulation of Public Utilities, Theory and Practice, 3rd Ed. Charles F. Phillips, Jr., pg. 181, 1993.

[2] 4 CSR 240-3.050(10) (*emphasis added*).

[3] *The Staff of the Missouri Public Service Comm'n v. Lockheed Martin Global Telecommunications Services*, Case No. TC-2004-0415, and, *In the Matter of Lockheed Martin Global Telecommunications Services, Inc.'s 2002 Annual Report to the Commission as an Interexchange Telecommunications Carrier*, Case No. XE-2004-0488, 2004 WL 2016229 (Mo. P.S.C. 2004), Order Rejecting Stipulation and Agreement, issued September 12, 2004 (similar cases pending in the circuit court require rejection); *In re Missouri RSA No. 5 Partnership*, dba Chariton Valley Wireless, Case No. TK-2005-0304, 2005 WL 1719375 (Mo. P.S.C. 2005), Amended Order Rejecting Interconnection Agreement, issued May 19, 2005 (negotiated agreement not in the public interest); *In re Chariton Valley Communications Corporation, Inc.*, Case No. TK-2005-0300, 2005 WL 1719378 (Mo. P.S.C. 2005), Order Rejecting Interconnection Agreement, issued May 19, 2005 (negotiated agreement not in the public interest); *In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, and, *In the Matter of an Amendment Superseding Certain 251/252 Matters between Southwestern Bell Telephone, L.P., and Sage Telecom, Inc.*, Case No. TO-2004-0584, 2004 WL 1824101 (Mo. P.S.C. 2005), Order Consolidating Cases, Rejecting Amendment to Interconnection Agreement, and Denying Intervention, issued July 27, 2004 (the Commission, complying with its statutory mandate under the Telecommunications Act, is unable to determine if the negotiated agreement is discriminatory and must reject it as not being in the public interest); *Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission, v. Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc.*, Case No. MC-2004-0271, 2004 WL 1813292 (Mo. P.S.C. 2004), Order Rejecting Stipulated Agreement and Setting Prehearing Conference, issued July 8, 2004 (negotiated

case has a low appeal probability - diminishes or even relieves the Commission of its duty, is misguided and contrary to current law.

I believe that these Orders do not comply with legal requirements regarding "findings of fact" and as such, the Orders should be withdrawn by the Commission and rewritten to fully comply with the law. The Commission is bound by its statutory obligations, and controlling opinions of the appellate courts. This means that the Commission must ensure that its Orders are not merely recitations of conclusions drawn by the parties, but instead are based on facts which the Commission independently and impartially has found supportive of its conclusions. Orders must provide sufficient analysis so that they provide the Commission's reasoning not only to those that the Commission regulates, but also to reviewing courts, parties, the public, and even individuals that might have a reason to study or review Commission orders.

The recent tendency of this Commission to editorially streamline the Orders it issues in cases where the parties have reached either a unanimous or non-unanimous settlement proposal is unfortunate. This is a trap into which the Commission has fallen before, and I am compelled to reiterate what the appellate courts of this state have repeatedly made clear to the Commission - that is that in all written Commission "reports", inclusion of findings of fact are required. *State ex rel. Rice v. Public Service Comm'n et al.*, 220 S.W.2d 61, 65 (1949). In *State ex rel. Monsanto Company v. Public Service Comm'n*, et al., 716 S.W.2d 791 (Mo. Banc 1986) the Commission staff conceded that this requirement is embodied in Section 386.420(2) RSMo (2000) (formerly, § 5688 RSMo 1939). Any contention that written findings of fact in

---

agreement is not structured in a manner consistent with the public interest); *In re St. Joseph Light and Power Company*, Case No. ER-93-41 and, Case No. EC-93-252, 1993 WL 449447 (Mo. P.S.C. 1993), Report and Order, issued June 25, 1993, (Commission rejected proposed settlement agreement between its Staff and SJLPC on the issue of rate design finding it to be inconsistent with prior Commission Order in Case No. EO-88-158).

Commission Orders are unnecessary is not consistent with statute and flies in the face of the directives of this state's appellate courts.

Even though Section 536.090 RSMo states that every decision and Order in a contested case shall include or be accompanied by findings of fact and conclusions of law which shall be stated separately "except in default cases or cases disposed of by stipulation, consent order or agreed settlement", this *does not* eliminate the obligation of the Commission to make findings, and further, describe those findings in its Orders. This point was announced in *Rice*, and later upheld by *Fischer v. Public Service Comm'n*, 645 S.W. 39 (Mo. App. W.D. 1982). *Fischer*, as a case which was settled by stipulation and agreement, controls this Commission regarding the application of 536.090 RSMo, and the requirements for the Orders in these cases. *Fischer* held that the inclusion of findings of fact in Commission Orders is not a matter of style but is a *legal requirement. Id.* at 44. Missouri Courts interpreting Section 386.420 have held that in contested cases (i.e. proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing), the Commission must include findings of fact in its written reports.[4] Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18. In these cases, this has not occurred.[5]

An Order can be insufficient as to findings of fact in at least two ways: (1) clear omission of findings of fact, and (2) the failure of purported findings of fact to actually constitute

---

[4] Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-796 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The competent and substantial evidence standard of Article V, Section 18, however, does not apply to administrative cases in which a hearing is not required by law. *State ex rel. Public Counsel v. Public Serv. Comm'n*, 210 S.W.3d 344, 354-355 (Mo. App. 2006), abrogating holdings in *State ex rel. Coffman v. Public Serv. Comm'n*, 121 S.W.3d 534 (Mo. App. 2003) and *State ex rel. Acting Pub. Counsel Coffman v. Pub. Serv. Comm'n*, 150 S.W.3d 92, 101 (Mo. App. 2004) where the court of appeals had decided findings of fact were required in non-contested cases.

[5] *Id.*

"findings of fact." In *State of Missouri, ex. rel. Noranda Aluminum, Inc. v. Public Service Comm'n*, 24 S.W.3d 243, 245 (Mo. App. W.D. 2000), a Commission Order that purported to contain "extensive findings of fact", "including more than 27 pages", was found to be nothing more then "a general discussion of the parties' positions and a brief explanation of which position the commission deemed correct." The *Noranda* Court was especially harsh on the Commission's failure to follow the Court's prior directives:

> The Commission apparently ignored our admonition to one [sic] its sister administrative agencies: [M]erely reciting the testimony ... does not establish which of the facts set forth in the [recitation] the [agency] found to be true. [An agency] must make unequivocal, affirmative findings of the facts. *Parrot v. HQ, Inc.*, 907 S.W.2d 236, 244 (Mo. App. 1995). *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655, 661 (Mo. App. 1997). [Mere recitation of testimony] is of no help to us in determining what facts the [agency] found. It provides nothing for a meaningful judicial review. Nor did the Commission seem to note our earlier admonition that, "[w]ithout specific findings of fact ..., it is impossible to determine whether the action of the [agency] was supported by substantial evidence." *Webb v. Board of Police Commissioners of Kansas City*, 694 S.W. 2d 927, 929 (Mo. App. 1985)

State of Missouri, ex rel. v. Noranda Aluminum, Inc., 24 S.W.3d 243, 246 (Mo. App. W.D. 2000). Unfortunately, this Commission continues to ignore the clear directives of the Court of Appeals. It appears to me that the Commission's Orders in these cases rely solely on *legal conclusions* propounded by parties as a way to bootstrap the conclusions reached in the Orders. Accordingly, the Orders include no written factual basis for support.

Neither the Staff of the Commission, or any party appearing before the Commission, possess the statutory authority to make *legal* conclusions regarding "just and reasonable rates". That authority was granted by the legislature to the Commission, and the Commission alone.[6] It

[6] Section 393.130 RSMO.

is well settled that parties may not stipulate to conclusions of law.[7] As in *Noranda*, the absence of "nonconclusory facts" to support the Order was found unacceptable, which is why here in these cases, the Commission should, upon its own motion, withdraw these Orders and have them rewritten to conform to the appropriate legal standard. New Orders must therefore state which facts on which the Commission has based its decisions to approve the agreements, lest this Commission be left to future admonishments by the appellate courts.

In addition to believing that the Commission should, upon its own motion, withdraw the Orders for revision to include findings of fact, I also believe that the Commission should initiate a rulemaking to amend 4 CSR 240-2.115 to: (1) provide clear guidance that findings of fact shall be included in Commission Orders in cases of stipulations and agreements; and (2) require parties to file proposed findings of facts and conclusions of law with any proposed stipulation and agreement they submit to the Commission for approval.

The Commission should not streamline its Orders at the expense of legal sufficiency, but should instead strive to ensure that every Order will pass legal muster specifically as to whether the findings of fact and conclusions of law are sufficient.[8] Because deciding whether rates are just and reasonable is a *conclusion of law*, the Commission must independently and impartially review the facts of any case, including these cases where a proposed stipulation and agreement has been submitted for consideration. Here, I do not believe that the written Orders in these cases adequately detail that the Commission made such an independent and impartial review. I am by no means implying that such an independent and impartial review did not take place; in fact, this Commissioner did perform an independent and impartial review of the facts in these

[7] Litigants cannot stipulate as to questions of law. *State v. Biddler*, 599 S.W.2d 182, 186 and n.4 (Mo. Banc 1980). Further, the Commission must independently and impartially review the facts of any case. *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 457 (Mo. App. E.D. 1988).

[8] *Deaconess Manor Ass'n v. Public Service Comm'n of State of Mo.*, 994 S.W. 2d 602 (Mo. App. W.D. 1999).

cases. Based upon my review of the proposed agreements, relevant testimony in the record, and arguments presented at the June 8, 2009, stipulation hearing, I have made an independent conclusion that the agreements proposed, and in all respects provide, just and reasonable rates that are in the public interest, while ensuring safe and adequate service.

Therefore, despite my concerns about the form of the Orders, I concur.

Respectfully Submitted,

Terry M. Jarrett

Terry M. Jarrett, Commissioner

Dated in Jefferson City, Missouri,
this 19th day of June, 2009.