

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission
held at its office in Jefferson City on the
24th day of September, 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 GRANTING IN PART MOTION TO DISMISS
AND DENYING MOTION TO AMEND**

Issue Date: September 24, 2014

Effective Date: September 24, 2014

The Commission is dismissing the complaint as to calendar year 2013. The Commission is also denying the motion to amend the complaint. As to the allegation of unauthorized cessation of solar rebate payments, the Commission is denying dismissal.

A. Filings

This action addresses conduct governed by the Renewable Energy Standard.¹ R & S Home Builders, Inc., and Carol and Arvell Allman (“complainants”) filed the complaint.² KCP&L Greater Missouri Operations Company (“GMO”) filed an answer.³ GMO filed *KCP&L Greater Missouri Operations Company’s Motion to Dismiss* (“motion to dismiss”).⁴ Complainants filed a response that included a motion to amend the complaint (“motion to amend”).⁵ GMO filed a reply.⁶ The

¹ Sections 393.1025 to 393.1030, RSMo.

² Electronic Filing and Information System (“EFIS”) No. 1, *Complaint*, filed on May 14, 2014. Unless otherwise noted, citations to EFIS are for this File No. EC-2014-0343.

³ EFIS No. 9, *Answer*, filed on June 16, 2014.

⁴ EFIS No. 10, *KCP&L Greater Missouri Operations Company’s Motion to Dismiss*, filed on June 16, 2014.

⁵ EFIS No. 15, *Complaints Response to KCP&L GMO Motion to Dismiss*, filed on July 16, 2014.

Commission's staff filed a recommendation,⁷ which it later updated, joining in GMO's arguments.⁸ A preliminary order in prohibition,⁹ barring the Commission from making a determination on the motion to dismiss, was only recently vacated.

B. Failure to State a Claim

On the motion to dismiss,¹⁰ GMO has the burden¹¹ of showing that the complaint does not describe a violation of a statute or Commission regulation, order, or tariff ("violation").¹² The test is whether the complaint's allegations, if they prove true, describe a violation.¹³

1. Law

The complaint alleges facts governed by the Renewable Energy Standard. The Renewable Energy Standard requires GMO to pay rebates for new or expanded solar electric systems¹⁴ up to a statutorily-described limit each year ("the maximum").¹⁵ As GMO's payments near the maximum, GMO may cease payment under the following procedure.

Each calendar year, GMO may file to suspend its tariff governing solar rebate payment ("application").¹⁶ While the application is pending, GMO must continue to pay rebates.¹⁷ Whether

⁶ EFIS No. 16, *KCP&L Greater Missouri Operations Company's Reply to Complainants' Response to Motion to Dismiss*, filed on July 28, 2014.

⁷ EFIS No. 13, *Staff Recommendation to Deny Complaint*, filed on June 30, 2014.

⁸ EFIS No. 14, *Staff Update to Report and Recommendation*, filed on July 16, 2014.

⁹ *Save our Lawfully Authorized Rebates, LLC, Missouri Coalition for the Environment v. Mo. Public Service Commission*, Case No. 14AC-CC00316 (Cir. Ct. Cole County), Preliminary Order in Prohibition issued on June 23, 2014.

¹⁰ 4 CSR 240-2.070(7). Emphasis added.

¹¹ *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 504 (Mo.App. 1999).

¹² Section 386.390.1, RSMo 2000. Emphasis added.

¹³ *Hamdan v. Bd. of Police Comm'rs for City of St. Louis*, 37 S.W.3d 397, 399 (Mo. App., E.D. 2001).

¹⁴ "As provided for in this section, [GMO] shall make available to its retail customers a solar rebate for new or expanded solar electric systems sited on customers' premises [.]" Section 393.1030.3, RSMo Supp. 2013, first sentence. That subsection appears at full length in the Appendix.

¹⁵ The Renewable Energy Standard names the amount "maximum retail rate increase" and relates the amount to the cost of GMO's compliance with the Renewable Energy Standard. Section 393.1030.2(1), RSMo Supp. 2013. The Commission's regulations further describe the maximum at 4 CSR 240-20.100(5).

¹⁶ "If [GMO] determines the [maximum] will be reached in any calendar year, [GMO] shall be entitled to cease paying rebates to the extent necessary to avoid exceeding the [maximum] if [GMO] files with the commission to suspend its rebate tariff for the remainder of that calendar year at least sixty days prior to the change taking effect. [.]" Section 393.1030.3, RSMo Supp. 2013, fifth sentence.

¹⁷ "[GMO] shall continue to process and pay applicable solar rebates until a final commission ruling [.]" Section 393.1030.3, RSMo Supp. 2013, ninth sentence.

the Commission grants the application depends on whether GMO shows that it will pay out the maximum.¹⁸ If GMO shows that it will pay out the maximum, the Commission must grant the application and suspend the rebate payment tariff (“authorization”).¹⁹

If the Commission issues the authorization, GMO must still pay rebates up to the maximum.²⁰

2. Allegations

The complaint alleges that GMO ceased paying rebates (a) for 2013 under inadequate authorization and (b) for 2014 under no authorization.

(a) Authorization for 2013 and the Motion to Amend

The complaint alleges that GMO ceased payment under the authorization for 2013 (“2013 authorization”)²¹ but that the 2013 authorization was inadequate in two ways. Complainants allege that the Commission issued the 2013 authorization without (i) GMO having carried its burden of proof on the application and (ii) a separately stated finding of fact on an element of that burden. Those allegations, GMO argues, cannot state a claim.

In support, GMO cites the statute that makes the 2013 authorization conclusive:

In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive[.²²]

Whether an order is final, and whether an action constitutes a collateral attack, both depend on the existence of an exclusive remedy. The exclusive remedy for an authorization is an application for

¹⁸ “The filing with the commission to suspend [GMO’s] rebate tariff shall include the calculation reflecting that the [maximum] will be reached and supporting documentation reflecting that the [maximum] will be reached.” Section 393.1030.3, RSMo Supp. 2013, sixth sentence.

¹⁹ “If the commission determines that the [maximum] will be reached, the commission shall approve the tariff suspension.” Section 393.1030.3, RSMo Supp. 2013, eighth sentence.

²⁰ “[GMO] shall be entitled to cease paying rebates to the extent necessary to avoid exceeding the [maximum.]” Section 393.1030.3, RSMo Supp. 2013, fifth sentence.

²¹ File No. ET-2014-0059, *In the Matter of KCP&L Greater Missouri Operations Company’s Application For Authorization To Suspend Payment of Certain Solar Rebates*, EFIS No. 50, Order Approving Stipulation and Agreement, issued on October 30, 2013.

²² Section 386.550, RSMo 2000.

rehearing²³ and notice of appeal.²⁴ Those filings did not occur as to the 2013 authorization, so that authorization is final, which makes it conclusive for any collateral action. A collateral action is an action attempted in lieu of the exclusive remedy.²⁵ That describes the allegations of inadequate authorization for 2013. Therefore, the allegations of inadequate authorization constitute a collateral action as to which 2013 authorization is thus conclusive as to this action, so allegations of inadequacy cannot state a claim.²⁶

On such ruling, complainants' motion to amend asks to leave to add allegations of a substantial change in circumstances. Complainants cite that standard in response to GMO's citation of case law stating that a substantial change in circumstances supports a modification of a Commission order. But that case law addresses a different kind of complaint: a complaint to amend the territorial agreement of a rural electrical co-operative.²⁷ That action is not a collateral attack, but an original action,²⁸ in which a violation is not an element. No change in circumstances can make a violation out of past conduct that did not constitute a violation when the conduct occurred. Therefore, the Commission will also deny the motion to amend.

GMO also cites the statutes that bar any special rebate, and any undue or unreasonable preference or advantage. Relief contrary to an authorization and approved tariff would be contrary

²³ Section 386.500, RSMo 2000.

²⁴ Section 386.510, RSMo Supp. 2013.

²⁵ *State v. Kosovitz*, 342 S.W.2d 828, 830, (Mo. 1961).

²⁶ Even if the law allowed complainants' challenge to the authorizations, the law and the facts defeat those challenges. (i) Separately stated findings of fact are required only in a contested case. Section 536.090, RSMo 2000. Neither action was a contested case. File No. ET-2014-0059, EFIS No. 50, *Order Approving Stipulation and Agreement*, issued on October 30, 2013, page 2, third paragraph. File No. ET-2014-0277, EFIS No. 10, *Order Approving Tariff*, issued on May 10, 2014, page 3-4. Outside a contested case, the Commission need only state its conclusions. Section 386.420.2, RSMo Supp. 2013. (ii) The Commission concluded, in each authorization, that GMO had shown the amount. File No. ET-2014-0059, EFIS No. 50, *Order Approving Stipulation and Agreement*, issued on October 30, 2013, page 2, first paragraph. ET-2014-0277, EFIS No. 10, page 5, first full paragraph.

²⁷ Section 394.312.6, RSMo Supp. 2013.

²⁸ *State ex rel. Ozark Border Elec. Co-op. v. Pub. Serv. Comm'n of Missouri*, 924 S.W.2d 597, 601 (Mo. App., W.D. 1996).

to those provisions. Therefore, as to any relief contrary to the 2013 authorization, the Commission will also grant the motion to dismiss.²⁹

Those rulings will dispose of the complaint as to 2013.

(b) No Authorization for 2014

For 2014, the complaint specifically alleges that GMO ceased paying rebates before the Commission issued authorization.³⁰ That allegation, if true, constitutes a violation of the following provisions in the Renewable Energy:

As provided for in this section, [GMO] **shall make available** to its retail customers a solar rebate [. GMO] shall be entitled to cease paying rebates to the extent necessary to avoid exceeding the maximum . . . if [GMO] files with the commission to suspend [GMO]'s rebate tariff for the remainder of that calendar year [. GMO] **shall continue to process and pay** applicable solar rebates until a final commission ruling [;³¹]

GMO cites the complaint's allegation that an application was pending,³² and also cites the resulting authorization,³³ but neither argument negates the allegations of unauthorized cessation. Therefore, as to the claim that GMO ceased payment before the 2014 authorization issued, the Commission will deny the motion to dismiss.

THE COMMISSION ORDERS THAT:

1. On *KCP&L Greater Missouri Operations Company's Motion to Dismiss* ("motion to dismiss"), the Commission's rulings are, as described in the body of this order:

- a. As to the claim that solar rebate payments ceased for calendar year 2014 before the 2014 authorization issued, the motion to dismiss is denied.
- b. As to calendar year 2013:
 - i. The motion to dismiss is granted;

²⁹ Section 393.130, RSMo Supp. 2013.

³⁰ EFIS No. 1, *Complaint*, filed on May 14, 2014, page 9, paragraph 25.

³¹ Section 393.1030.3, RSMo Supp. 2013. Emphasis added.

³² File No. ET-2014-0277, *In the Matter of KCP&L Greater Missouri Operations Company's Application For Authorization To Suspend Payment of Certain Solar Rebates*.

³³ File No. ET-2014-0277, EFIS No. 10, *Order Approving Tariff*, issued on May 10, 2014.

- ii. Allegations based on 2013 are dismissed; and
 - iii. Any relief contrary to the 2013 authorization is denied.
- 2. The motion to amend, described in the body of this order, is denied.
 - 3. This order is effective immediately upon issuance.

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

Appendix

Section 393.1030.3. As provided for in this section, except for those electrical corporations that qualify for an exemption under section 393.1050, each electric utility shall make available to its retail customers a solar rebate for new or expanded solar electric systems sited on customers' premises, up to a maximum of twenty-five kilowatts per system, measured in direct current that were confirmed by the electric utility to have become operational in compliance with the provisions of section 386.890. The solar rebates shall be two dollars per watt for systems becoming operational on or before June 30, 2014; one dollar and fifty cents per watt for systems becoming operational between July 1, 2014, and June 30, 2015; one dollar per watt for systems becoming operational between July 1, 2015, and June 30, 2016; fifty cents per watt for systems becoming operational between July 1, 2016, and June 30, 2017; fifty cents per watt for systems becoming operational between July 1, 2017, and June 30, 2019; twenty-five cents per watt for systems becoming operational between July 1, 2019, and June 30, 2020; and zero cents per watt for systems becoming operational after June 30, 2020. An electric utility may, through its tariffs, require applications for rebates to be submitted up to one hundred eighty-two days prior to the June thirtieth operational date. Nothing in this section shall prevent an electrical corporation from offering rebates after July 1, 2020, through an approved tariff. If the electric utility determines the maximum average retail rate increase provided for in subdivision (1) of subsection 2 of this section will be reached in any calendar year, the electric utility shall be entitled to cease paying rebates to the extent necessary to avoid exceeding the maximum average retail rate increase if the electrical corporation files with the commission to suspend its rebate tariff for the remainder of that calendar year at least sixty days prior to the change taking effect. The filing with the commission to suspend the electrical corporation's rebate tariff shall include the calculation reflecting that the maximum average retail rate increase will be reached and supporting documentation reflecting that the maximum average retail rate increase will be reached. The commission shall rule on the suspension filing within sixty days of the date it is filed. If the commission determines that the maximum average retail rate increase will be reached, the commission shall approve the tariff suspension. The electric utility shall continue to process and pay applicable solar rebates until a final commission ruling; however, if the continued payment causes the electric utility to pay rebates that cause it to exceed the maximum average retail rate increase, the expenditures shall be considered prudently incurred costs as contemplated by subdivision (4) of subsection 2 of this section and shall be recoverable as such by the electric utility. As a condition of receiving a rebate, customers shall transfer to the electric utility all right, title, and interest in and to the renewable energy credits associated with the new or expanded solar electric system that qualified the customer for the solar rebate for a period of ten years from the date the electric utility confirmed that the solar electric system was installed and operational.