

convened among KCP&L, Staff, and interested parties who chose to dial-in (all parties were invited) on September 4, 8, 11, and 14, 2015, to discuss the compliance tariffs.

3. On September 8, 2015, KCP&L filed with the Commission its compliance tariff sheets as authorized by the Report and Order to effectuate the decisions made by the Commission in the Report and Order.¹ On September 11, 2015, KCP&L filed substitute tariffs to correct and address certain items requested by the Commission Staff.

4. On September 14, 2015, the Staff filed its timely recommendation, which concluded the compliance tariff sheets did not comply with the Commission's Report and Order concerning two provisions of the fuel adjustment clause ("FAC") and advised the Commission to reject or suspend those tariff sheets. The Office of the Public Counsel ("OPC") concurred with Staff's recommendation. No other party filed a response or objection to the compliance tariff sheets.

5. After further discussions among the parties, on September 15, 2015, and approximately 90 minutes after emailing additional tariff sheet revisions to the parties, KCP&L and Staff filed their Joint Motion For Approval Of Compliance Tariff Sheets ("Joint Motion") supported by the Affidavits of Dana Eaves, Thomas M. Imhoff, and Michael S. Scheperle who determined that the compliance tariffs (as substituted and revised) were in compliance with the Commission's Report and Order, and recommended that the Commission approve the compliance tariff sheets filed by KCP&L on September 8, 2015, as substituted with certain tariff sheets filed on September 11, 2015, and revised on September 15, 2015.

6. On September 16, 2015, the Commission approved the compliance tariff sheets, as requested in the Joint Motion. See Order Regarding Compliance Tariff Sheets, File No. ER-2014-0370 (issued on September 16, 2015, and effective on September 29, 2015).

¹ KCP&L also filed a motion for clarification or reconsideration of the definition of "Off-system Sales Revenues" ("OSSR") and the "J Component" of the FAC on September 8, 2015.

Response to MECG Motion

7. On September 15, 2015 at 9:30 PM, the MECG filed its Motion which requested that the Commission schedule a hearing regarding the compliance tariffs. The pretext for the motion for hearing was the Affidavits of Dana Eaves, Thomas Imhoff and Michael Scheperle. For the reasons stated herein, MECG's motion should be denied and its objection dismissed. Simply stated, the Motion is moot since the Commission has already approved the compliance tariffs. In addition, the legal authority upon which MECG relies is not applicable in the circumstances and a hearing is otherwise not required by law.

8. MECG's reliance on Section 536.070(12) is not applicable to the filing of the Staff's Recommendation related to the compliance tariffs. This provision of the Missouri Administrative Procedure Act ("APA") is a provision relevant to the adjudication of a "contested case." As the Commission has already held, the filing of compliance tariffs to implement a rate increase does not constitute a "contested case" as the term is defined in the Missouri Administrative Procedures Act.

9. In its *Order Granting Expedited Treatment, Approving Certain Tariff Sheets And Rejecting Certain Tariff Sheets, Re Aquila, Inc.*, Case No. ER-2007-0004 (issued on May 25, 2007), the Commission addressed similar issues raised by MECG in this proceeding. In that case, certain industrial intervenors requested a hearing and filed an objection to an affidavit filed in support of the Staff Recommendation to approve compliance tariffs filed to comply with the Commission's Report And Order. The Commission rejected the motion and the objection to the affidavit, stating:

On May 23, 2007, the Office of the Public Counsel, Sedalia Industrial Energy Users Association (SIEUA) and AG Procession, Inc., (AGP) objected to Aquila's Motion for Expedited Treatment of the tariff filings as it does not provide parties an opportunity to review the revised tariffs. Also, on May 23, 2007, SIEUA and AGP filed a Motion for Scheduling of a Hearing and an objection to the filing of Staff's Recommendation and Memorandum under the

Affidavit of James Watkins. Both filings were based upon SIEU and AGP's inaccurate impression that Aquila's May 18 tariff filings constitutes a contested case.

SIEUA, AGP and Public Counsel fail to recognize the different posture of the tariffs that initiate rate cases, and the compliance tariffs following the Commission's Report and Order. The Commission's Report and Order, after full evidentiary process pursuant to Chapters 386, 393, and 536, does four things pertinent to the pending motions. First, it finds that Aquila's current tariffs and rates are not just and reasonable; second, it finds that Aquila's proposed tariffs and rates are not just and reasonable; third, it prescribes the terms upon which Aquila's service will be just and reasonable; and, finally, it directs Aquila to file tariffs and rates that comply with the terms prescribed in the Report and Order.

The inquiry conducted on the tariffs that initiated Case No. ER-2007-0004 is conducted pursuant to section 393.150, and provided all parties the full panoply of due process to permit the Commission to determine just and reasonable rates. The inquiry to determine whether Aquila's compliance tariffs comport with the Commission's Report and Order is much more limited.

Aquila's May 18 tariff filing did not initiate a contested case under Section 537.070 RSMo 2000. The Commission has decided the contested issues before it in this case and its decisions on those issues are set out in the Report and Order. The only question before the Commission regarding the compliance tariff filing is whether that filing actually complies with the Report and Order and Order Approving Stipulation. In reaching a decision regarding the tariff filing, the Commission reviews the tariff filing and makes its determination. The Commission is entitled to interpret its own order and ascribe to that order a proper meaning. . . [emphasis added]

See also Order Approving Tariffs in Compliance with Commission Report and Order, Re Kansas City Power & Light Company, Case No. ER-2007-0291 (issued December 21, 2007). The Commission should follow this same analysis in this case. It is clear the Commission may permit new rates to take effect based on a mere tariff filing by a utility and without a hearing. See Section 393.140(11), RSMo.

The "file and suspend" provisions of the statutory sections quoted above lead in inexorably to the conclusion that the Commission does have discretionary power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing as to what will constitute a fair and reasonable permanent rate. This indeed is the intended purpose of the file and suspend procedure. Simply by non-action, the Commission can permit a requested rate 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 its sound discretion.

State ex rel. Laclede Gas Company v. Public Service Commission, 535 S.W.2d 561, 566 (Mo.App. 1976). This principle was affirmed by the Missouri Supreme Court in State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. banc 1979).

10. Furthermore, the Commission has the authority to approve a tariff without a hearing or any other procedure, under Section 393.150.1. This statute, as well as Section 393.140(11), grants the Commission the discretion to choose whether to approve a tariff without a formal hearing. Here, the Commission ordered KCP&L to file tariffs that complied with its Report and Order which determined rates after a full evidentiary hearing in a contested case. No hearing was required to be held on those compliance tariffs, as both sections grant the Commission authority to approve tariffs without a hearing.

11. Missouri courts have also recognized that the APA does not apply in all instances to PSC proceedings because of the specialized nature of its hearings. See Southwestern Bell Tel. Co. v. PSC, 645 S.W.2d 44, 50 (Mo. App. W.D. 1982) (holding that PSC proceedings are “considerably different from and vastly more complicated than” other APA-type proceedings). “The legislature has recognized these differences by creating the special and quite detailed statutes mentioned pertaining to proceedings conducted by the Commission.” Id.

12. Section 386.240 is one of these specialized statutes, permitting the PSC to “authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized by this chapter to do or perform.” The Commission traditionally has relied on its Staff to review the tariffs that a utility files to make certain they reflect the Commission’s orders or opinions. After the Staff and the other parties review tariff filings, it is typical that substantive objections and other technical points are raised. Once these matters are

resolved in the Staff's opinion, it files its recommendation with the Commission and the Commission may then approve the tariff. See, e.g., Staff's Recommendation To Approve Compliance Tariffs, Re: Union Electric Company d/b/a Ameren Missouri, File No. ER-2014-0258 (May 14, 2015); Staff Recommendation To Approve Tariff Sheets, Re: Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company, File Nos. ER-2012-0174 and ER-2012-0175 (January 22, 2013); Staff's Recommendation To Approve Tariff Sheets, Re: Kansas City Power & Light Company, File No. ER-2010-0355(April 22, 2011).

13. In addition to the APA's inapplicability to these matters, the section on which MECG relies does not allow cross-examination here. The first sentence of Section 536.070(12) states: "Any party or the agency desiring to introduce an affidavit in evidence at a hearing in a contested case may serve on all other parties (including, in a proper case, the agency) copies of such affidavit in the manner hereinafter provided, at any time before the hearing, or at such later time as may be stipulated." This subsection affords the right to cross-examination only when an affidavit is offered into evidence. It does not, however, require that a hearing be convened simply because an affidavit is filed as an attachment to a pleading.

14. It must also be recognized that Subsection 12 of Section 536.070 states: "Nothing in this subdivision shall prevent any use of affidavits that would be proper in the absence of this subdivision." Id. One such use of an affidavit is in support of a motion under Missouri Rule of Civil Procedure 55.28, where the decision to allow cross-examination of an affiant is discretionary. This rule has been applied to distinguish affidavits in this context from those used as substantive evidence in a contested case hearing. "It is clear that the consideration of affidavits with motions is well established in custom and usage and does not deprive a defendant of any rights guaranteed by the Missouri Constitution. Defendant has mistaken the law regarding use of an affidavit supporting a motion with its use as evidence at trial." Senn v.

Manchester Bank, 583 S.W.2d 119, 134 (Mo. en banc 1979), overruled on other grounds, Haarman v. Davis, 651 S.W.2d 134, 136-137 (Mo. en banc 1983). The Supreme Court further noted: “Although affidavits may not ordinarily be used as primary evidence against the defendant, they may be used in connection with preliminary, collateral and interlocutory matters.” Senn, 583 S.W.2d at 134. Here, whether KCP&L’s proposed tariffs complied with the Report and Order was clearly a matter collateral to the underlying proceedings because it did not deal with any substantive question of law or fact.

15. Accordingly, KCP&L’s request to expedite the approval of its compliance tariffs does not run afoul of any statutory right to notice and publication, as MECG alleges. Indeed, compliance tariffs are limited in scope -- they merely comply with the “mandates and substantive standards adopted by the Commission in its Report and Order.” State ex rel. Aquila, Inc. v. PSC, 326 S.W.3d 20, 25 (Mo. App. W.D. 2010). In other words, compliance tariffs simply implement the substantive findings that are made in an earlier Report and Order. Ag Processing Inc. v. PSC, 408 S.W.3d 175, 185 (Mo. App. W.D. 2013). The Commission and any reviewing court may look to the voluminous amounts of pre-filed testimony, hearing transcripts, and other documentary evidence on which the Commission relied in issuing its Report and Order, as well as to the Report an Order itself, in determining whether compliance tariffs are supported by competent and substantial evidence upon the record. See State ex rel. Midwest Gas Users’ Ass’n v. PSC, 976 S.W.2d 470, 496 (Mo. App. W.D. 1998); State ex rel. Ozark Electric Co-op. v. PSC, 527 S.W.2d 390, 392 (Mo. App. K.C. 1975). Accord State ex rel. Associated Natural Gas Co. v. PSC, 37 S.W.3d 287 (Mo. App. W.D. 2000). Consequently, a shortened review period of compliance tariffs had no negative effect here, as the substance of these tariffs had already been fully litigated and set forth in the Report and Order. MECG’s attempt to conflate the statutory notice and publication requirements with compliance tariff filings is clearly incorrect.

16. Nor is MECG's objection to KCP&L's compliance tariffs based on specific issues relating to individual tariff sheets. Rather, MECG demands that the Commission hold additional hearings to determine if KCP&L's tariffs comply with the Report and Order. Notably, MECG failed to raise any substantive objections to the compliance tariffs by September 14, 2015, as required by the Commission's Report and Order. The Staff has already determined, after the opportunity for comment by all the parties, including MECG, that the tariffs were in compliance with the Report and Order. More importantly, the Commission in its September 16, 2015 *Order Regarding Compliance Tariff Sheets*, stated at page 3: "The Commission independently finds and concludes that the substituted compliance tariff sheets, as revised on September 15, 2015, are consistent with the Commission's report and order as modified in this order, so the Commission will approve KCPL's substituted and revised tariff sheets."

17. MECG's backdoor attempt to extend the adversarial process of this rate case beyond the final Report and Order by cross-examining members of the Staff who signed Affidavits concerning KCP&L's compliance tariffs is clearly inappropriate. The Report and Order is the Commission's final determination on the merits of a rate case. Subsequent proceedings relating to compliance tariffs simply carry out that decision. Because the contested phase of the rate case had been completed, the Commission is under no obligation to conduct a hearing or suspend the tariffs under Section 393.140(11) once they were filed by KCP&L. Staff agrees with this point. See *Staff Response To MECG Objection* (filed September 23, 2015).

18. Additionally, MECG requests that the Commission delay KCP&L's fuel adjustment clause tariff for two days so that the tariff becomes effective on October 1. The Commission has already decided to allow the FAC tariffs to go into effect by September 29, 2015. See *Order Regarding Compliance Tariff Sheets* (issued September 16, 2015). Pursuant to 4 CSR 240-20.090(1)(I), the accumulation period will begin on October 1, 2015. (i.e. "the first

day of the first calendar month following the effective date of the commission order approving a RAM...”) It is therefore unnecessary to delay KCP&L’s fuel adjustment clause tariff for two days, as requested by MECG.

19. In summary, MECG’s motion appears to be an effort to delay the effective date of the new rates beyond the statutory operation of law deadline, and should for the reasons stated herein be denied.

WHEREFORE, for the foregoing reasons, KCP&L respectfully requests that the Commission deny MECG’s Objection To Tariffs, Objection To Affidavits And Request For Hearing filed on September 15, 2015.

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 24th day of September, 2015.

/s/ Roger W. Steiner

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