

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

In the Matter of the Empire District Electric)	
Company of Joplin, Missouri for Authority)	
to File Tariffs Increasing Rates for Electric)	<u>Case No. ER-2006-0315</u>
Service Provided to Customers in the)	
Missouri Service Area of the Company)	

**RESPONSE TO “NOTICE OF FILING OF PROPOSED ORDER BY THE EMPIRE
DISTRICT ELECTRIC COMPANY,” SUGGESTIONS REGARDING STATUS,
AND PROPOSED ORDER**

COMES NOW the Office of the Public Counsel and for its Response to “Notice of Filing of Proposed Order by The Empire District Electric Company” and Proposed Order states as follows:

I. Procedural Background

1. On December 21, 2006, the Commission issued its Report and Order in Case No. ER-2006-0315 in which it rejected tariffs that The Empire District Electric Company had filed to initiate that case, but authorized Empire to file tariffs that would implement a smaller increase.

2. Over the course of the ensuing week, Empire filed a number of sets of tariff sheets in an effort to comply with the Commission’s Report and Order.¹ In an order issued on December 29, 2006, the Commission purported to approve the last of these tariff filings (Tariff File No. YE-2007-0448) to be effective for service on and after January 1, 2007.

3. On January 4, 2007 Public Counsel filed a Petition for Writ of Mandamus with the Western District Court, seeking to have the Commission's December 29, 2006 order vacated. The Western District Court denied the petition without opinion on March 9, 2007. On March 19,

¹ Because each of these tariff filings either expressly or necessarily superseded the previous filing, only the last one made on December 28, 2006 is relevant here.

2007 Public Counsel filed a similar petition with the Missouri Supreme Court. The Court issued its peremptory writ of mandamus, “requiring the PSC to vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006....” The Supreme Court’s mandate was issued to the Commission on November 15, 2007.

4. On November 19, 2007 Empire filed a pleading entitled “Notice of Filing of Proposed Order by The Empire District Electric Company.”

5. On November 20, 2007 the Commission issued an order setting a deadline of November 27, 2007 at 8:30 a.m. for responses to Empire’s November 19, 2007 pleading and “[a]ny other proposed orders or motions regarding the procedural posture of this case following the Missouri Supreme Court’s mandate.”

6. Public Counsel timely submits this response to Empire’s November 19, 2007 pleading, suggestions concerning the posture of this case, and the attached proposed order in response to the Commission’s November 20, 2007 order.

II. Response to Empire’s November 19, 2007 Pleading

7. Empire suggests in its cover pleading and its proposed order that the Commission can vacate its December 29, 2006 order approving tariffs and then **retroactively approve** those same tariffs to be effective January 1, 2007.²

8. In its pleading, Empire latches onto a footnote in which the Court explains that it is not deciding the merits of a Writ of Review proceeding according to the two-pronged UCCM³ standard, but rather simply finding that the December 29, 2006 order was unlawful and must be vacated. Empire somehow reads into the Court’s explanation of the limitation of its review that

² Empire asserts that the December 29, 2006 order approved the tariffs to be effective on December 31, 2006, but the order itself states that: “the Commission concludes that the proposed tariff sheets are consistent with the Commission’s Report and Order and should be approved to become effective for service rendered on and after January 1, 2007.”

³ State ex rel. Utility Consumers Council of Missouri, 585 SW2d 41.

the Commission can retroactively reinstate the vacated order and/or have a new order (with a future effective date) approve tariffs to be effective almost a year in the past. Nothing in the statutes or in the Supreme Court's opinion affords the Commission authority to give its orders retroactive effect.

9. In its proposed order, in the first paragraph, Empire would have the Commission find that the tariffs which were never lawfully approved should "continue in force and in effect." Because they were never lawfully approved, they cannot "continue" in effect; once the Commission complies with the Supreme Court's mandate and vacates the December 29, 2006 order, those tariffs will stand as never having been approved.

10. Because the Commission is without authority to grant the relief Empire seeks (retroactive approval of the tariffs filed as Tariff File No. YE-2007-0448), the Commission should decline to issue Empire's proposed order or any order which seeks to retroactively approve tariffs.

III. Suggestions Regarding the Status of this Case and the Status of Empire's Tariffs

11. Only one set of tariffs can be in effect at any one time. Under the particular set of circumstances here, there are three different sets of tariffs that could be the ones in effect as of January 1, 2007 and still in effect today. The first of these are the tariffs that were lawfully approved by the Commission at the close of Case No. ER-2004-0570 and that were in effect at the beginning of Case No ER-2006-0315. The second possibility is the set of tariffs that Empire filed on February 1, 2006 to initiate Case No. ER-2006-0315. The third is the set that Empire filed on December 28, 2006 and that the Commission attempted to approve in its order issued December 29, 2006. Public Counsel will address each of these in reverse order.

12. This third set was – allegedly – approved by an order of the Commission issued

on December 29, 2006, but that order will be vacated when the Commission complies with the mandate of the Supreme Court in Case No. SC88390. When an order is “vacated” it is annulled and rendered void.⁴ Thus, once the Commission complies with the Supreme Court’s mandate, there will have been no approval of those tariffs, and so they cannot have been in effect on January 1, 2006.

13. The second set, the ones Empire filed to initiate Case No ER-2006-0315, were explicitly rejected in the Commission’s Report and Order issued on December 21, 2006. The very first Ordered Paragraph of that Report and Order states: “That the proposed electric service tariff sheets submitted under Tariff File No. YE-2006-0597 on February 1, 2006, by Empire District Electric Company for the purpose of increasing rates for retail electric service to customers are hereby rejected.” Because these tariffs were rejected, they cannot have been in effect on January 1, 2007.

14. The conclusion follows that only the first set of tariffs – the ones approved in Case No. ER-2005-0570 – have been validly approved by the Commission. In an order issued on March 21, 2005 in Case No. ER-2005-0570, the Commission stated: “That the proposed electric service tariff sheets filed by The Empire District Electric Company on March 17, 2005, and assigned Tariff File Nos. YE-2005-0730 and YE 2005-0731, are approved for service rendered on and after March 27, 2005.” That order was never challenged, and is now immune to

⁴ Black’s Law Dictionary (Fifth Edition, 1979) defines “vacate” as:

To annul; to set aside; to cancel or rescind. To render an act void; as to vacate an entry of record, or a judgment. As applied to a judgment or decree it is not synonymous with “suspend” which means to stay enforcement of judgment or decree.

Black’s defines “annul” as:

To reduce to nothing; annihilate; obliterate; to make void or of no effect; to nullify; to abolish; to do away with. To cancel; destroy; abrogate. To annul a judgment or judicial proceeding is to deprive it of all force and operation, either *ab initio* or prospectively as to future transactions.

collateral attack. There have been no subsequent orders invalidating those tariffs, and there have been no subsequent (lawful) orders approving different tariffs. The only tariffs under which Empire could lawfully bill its customers are those approved in Case No ER-2004-0570. In its November 19 pleading, Empire states (at paragraph 4) that the “existing filed and approved tariffs should continue in force and effect.” Public Counsel completely agrees with this statement (although from the rest of the pleading, it appears that Empire is referring to the tariffs that were filed on December 29 and **never lawfully approved**). The only filed and approved tariffs are those approved in Case No ER-2004-0570, and those should continue in force and effect.

15. Any amounts collected from customers in excess of the rates approved in Case No ER-2004-0570 were not collected pursuant to lawfully approved tariffs and must be refunded. Although the Commission does not have authority to order a refund, the Commission has the particular and unique expertise to calculate such a refund. And indeed, matters within the jurisdiction must be determined by it in the first instance:

When a utility has two approved rates of service and renders service to a consumer charging the higher rate, the consumer may file a complaint before the Public Service Commission to determine the proper classification. State ex rel. Kansas City Power & Light Co. v. Buzard, 350 Mo. 763, 168 S.W.2d 1044 (banc 1943). A circuit court has no jurisdiction to consider the plaintiff's action for recovery until the Commission makes its decision regarding the rates and classification. Matters within the jurisdiction of the Public Service Commission must first be determined by it in every instance before the courts have jurisdiction to make judgments in the controversy. State ex rel. Hoffman v. Public Serv. Com'n, 530 S.W.2d 434 (Mo.App. 1975); Katz Drug v. Kansas City Power and Light Co., 303 S.W.2d 672, 679 (Mo.App. 1957). In the present case, plaintiffs filed the proper complaint to the Commission pursuant to the provisions of § 386.390 RSMo. Supp. 1977, and the Commission concluded that Fee Fee's tariff classification of condominium service was unjust, unreasonable and unduly discriminatory. Yet, only the courts can enforce a Public Service Commission decision. The Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund. Wilshire Const. Co. v. Union Elec. Co., 463 S.W.2d 903 (Mo. 1971); State v. Buzard, *supra*; State ex rel. Laundry, Inc. v.

Public Service Commission, 327 Mo. 93, 34 S.W.2d 37 (1931). And in order to recover by appropriate action in the circuit court, the plaintiffs must plead and prove facts which demonstrate: (1) the lawfully established rate applicable to their classification of service; and (2) that more than the lawful rate has been collected. May Department Stores Co. v. Union Electric L. & P. Co., 341 Mo. 299, 107 S.W.2d 41 (1937).

De Maranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674, 676 (Mo. Ct. App. 1978)

In this case, Public Counsel seeks a Commission determination of the lawfully established rate, and a calculation of the amount by which the amount collected exceeds what would have been collected under the lawful rate.

16. The two relevant statutes are Section 386.270, RSMo 2000 which says:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be *prima facie* lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie* lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter

and Section 393.130.1 RSMo 2000 which says:

All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

Reading these two sections together, the rates fixed by the Commission in Case No. ER-2004-0570 are in force and *prima facie* lawful and reasonable because they have never been replaced by new rates that were lawfully approved by the Commission, and thus any charges in excess of those authorized by the Commission in Case No. ER-2004-0570 are prohibited.

17. Empire will no doubt claim that refunding 11 months (or more) of overcharges will be a financial hardship, but Empire cannot claim to be a victim here. Empire has supported

the Commission's unlawful approval of the December 28, 2006 tariffs at every opportunity, beginning with its Suggestions in Opposition filed with the Western District Court just a few days after Public Counsel filed its Petition for Writ of Mandamus on January 4, 2007. Empire even filed the Respondent's Brief in the Supreme Court on behalf of the Commission. In short, it has done everything in its power to defend the Commission's unlawful December 29, 2006 order and keep its unlawfully-approved tariffs in effect.

18. The actions which the Commission should take in response to the Supreme Court's mandate are:

- A) vacate its December 29, 2006 order approving tariffs;
- B) direct the Data Center to designate the tariffs approved in Case No ER-2004-0570 as the only tariffs approved for service;
- C) order Empire to immediately begin billing customers pursuant to the tariffs lawfully approved in Case No. ER-2004-0570; and
- D) order Empire to calculate the amounts billed to customers since January 1, 2007 in excess of the amounts authorized by the tariffs lawfully approved in Case No. ER-2004-0570.

19. In accordance with the Commission's November 20, 2007 order, Public Counsel has attached a draft order that would accomplish the actions necessary to comply with the Supreme Court's mandate and the steps that logically follow.

WHEREFORE, Public Counsel respectfully requests that the Commission allow parties until April 17, 2006, to respond to Empire's Motion of Clarification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 27th day of November 2007.

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By:_____

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**ORDER VACATING TARIFF APPROVAL ORDER,
RE-DESIGNATING TARIFFS, AND DIRECTING FILING**

Issue Date: November 29, 2007

Effective Date: December 9, 2007

On [approximately November 19], the Commission received the mandate and final opinion issued by the Missouri Supreme Court in Case No. SC88390.

Pursuant to that mandate, the Commission must vacate the order approving tariffs issued in this case on December 29, 2006. Because of that vacation, the tariffs that will be in effect will be those approved in Case No. ER-2004-0570. Since no valid order of the Commission approved subsequently-filed tariffs, the tariffs approved in Case No. ER-2004-0570 set the maximum amount that The Empire District Electric Company was lawfully permitted to charge its customers. Any amounts in excess of those specified in the tariffs approved in Case No. ER-2004-0570 are subject to refund. Although the Commission itself cannot order such a refund, it will order Empire to calculate and file the amounts that should be refunded to customers.

IT IS ORDERED THAT:

1. That the Order Granting Expedited Treatment and Approving Tariffs issued on December 29, 2006 is vacated.

2. The Data Center shall designate the tariffs filed on December 28, 2006 (Tariff File No. YE-2007-0448) as vacated, unlawful and no longer in effect.

3. The Data Center shall designate the tariffs that were in effect on December 31, 2006 as the tariffs that are currently in effect, and that have been in effect since their approval by the Commission.

4. That The Empire District Electric Company shall, as of the effective date of this order, begin billing customers pursuant to the tariffs approved in Case No. ER-2004-0570.

5. That The Empire District Electric Company shall calculate, for each account number, for the period between January 1, 2007 and the date for which the most current data is available, the difference between the amount each account has been billed under the tariffs unlawfully approved by the Commission in its December 29, 2006 order and the amount that each account would have been billed under the tariffs in effect on December 31, 2006.

6. That The Empire District Electric Company shall file the information described in Ordered Paragraph 4 no later than December 10, 2007. The information shall be verified and accompanied with an affidavit attesting to its accuracy.

7. That this order shall become effective on [10 days].

BY THE COMMISSION