

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public
Service Commission held at its
office in Jefferson City on the
6th day of March, 2019.

The Office of the Public Counsel and)
The Midwest Energy Consumers Group,)
)
Complainants,)
)
v.)
)
KCP&L Greater Missouri Operations)
Company)
)
Respondent.)

File No. EC-2019-0200

ORDER DENYING MOTION TO DISMISS

Issue Date: March 6, 2019

Effective Date: March 6, 2019

On December 28, 2018, the Office of the Public Counsel and the Midwest Energy Consumers Group (MECG) filed what they denominated as a Petition for an Accounting Order. That petition asked the Commission to order KCP&L Greater Missouri Operations Company (GMO) to record as a regulatory liability in Account 254 the revenue and the return on the Sibley unit investments collected in rates for non-fuel operations and maintenance costs, taxes including accumulated deferred income taxes, and all other costs associated with Sibley units 1, 2, 3, and common plant.

The petition explains that GMO would be retiring units 1, 2, and 3 of its Sibley coal-fired electric production facility at the end of 2018. GMO's rates were recently established by the Commission in a general rate case, ER-2018-0146, and the operation and

maintenance costs associated with those units, as well as a return on the company's investment in these units, was included in those newly established rates. The petition contends that the retirement of the units will reduce GMO's costs below the amounts considered when its rates were established, resulting in a windfall for GMO. Thus, the petition asks the Commission to establish an accounting authority order to require GMO to defer that windfall for possible adjustment in the company's next general rate case.

The petitioners filed their Petition for an Accounting Order as a petition, not a complaint, and it was assigned File No. EU-2019-0197 in the Commission's Electronic Filing and Information System (EFIS). The Commission, acting on its own motion, determined that the Petition could best be considered using complaint-type procedures, closed File No. EU-2019-0197, and reassigned the Petition to File No. EC-2019-0200, which is a complaint designation within EFIS. The Commission then issued a Notice of Complaint to provide notice of the filing to GMO. The Commission also directed GMO to file an answer to the "complaint" by February 1, 2019.

GMO filed its answer on February 1, and on February 5, filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Public Counsel and MECG replied to that motion on February 22.

GMO's motion to dismiss asserts three reasons why the "complaint" should be dismissed. First, the motion to dismiss alleges the "complaint" is fatally defective under Section 386.390.1, RSMo, in that it does not allege that GMO is violating its tariff, any Commission order or rule, or any other provision of law. Second, it alleges that GMO's retirement of the Sibley coal-fired units is neither unusual nor extraordinary and thus does not justify the issuance of an accounting order. Finally, it alleges the "complaint" is an

improper collateral attack on the Commission's order approving the stipulation and agreement that resolved GMO's 2018 rate case.

Before addressing those arguments, it is important to note that GMO's motion is a motion to dismiss on the pleadings for failure to state a claim upon which relief can be granted. In considering GMO's challenge to the petition, the Commission is only testing "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."¹ As the movant, GMO has the burden of establishing that the elements pled by Public Counsel and MECG fail to state a cause of action.²

The Requirements of Section 386.390, RSMo

GMO correctly points out that Section 386.390, RSMo, gives the Commission authority to hear complaints regarding alleged violations of law, rule, order, or decision of the Commission. Public Counsel and MECG's petition does not make such an allegation. Indeed, the petition never describes itself as a complaint, and never invokes section 386.390, RSMo, as the basis for its claims against GMO. Instead, the petition asserts that the Commission should exercise the authority it is given under Section 393.140(8), RSMo to "prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited." In fact, Public Counsel and MECG's petition is not a complaint under Section 386.390 and the fact that the Commission chose to assign that petition an EC file designation in EFIS does not transform it into a complaint under that statute.

¹ *City of O'Fallon v. Union Electric Co.* 462 S.W.3d 438, 441 (Mo. App. 2015), quoting *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 392 S.W.3d 24, 28 (Mo. App. 2012).

² *Weicht v. Suburban Newspapers of Greater St. Louis, Inc.*, 32 S.W.3d 592, 598 (Mo. App 2000).

Whether their pleading is called a petition or a complaint does not control the determination of whether Public Counsel and MCEG have stated a cause of action. Instead, the question is whether that pleading has properly invoked the jurisdiction of the Commission.³ Section 386.390, RSMo, gives the Commission jurisdiction to hear complaints about violations of a utility's tariff, any Commission order or rule, or any other provision of law, but that is not the only basis for the Commission's jurisdiction. The Commission is also granted jurisdiction by Section 393.140(8) to "prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited." Whether it is called a complaint or a petition, Public Counsel and MCEG's pleading properly invokes the Commission's statutory jurisdiction and should not be dismissed on that basis.

Unusual or Extraordinary

GMO's second argument asserts that its retirement of the Sibley units is not unusual or extraordinary and thus does not meet the usual qualification for the Commission to issue an accounting authority order. This argument is based on factual contentions and, as previously indicated, in deciding whether a petition states a cause of action, the Commission cannot weigh the facts and must instead assume that the petitioner's factual assertions are true. GMO's argument is, therefore, inappropriate for purposes of this motion.

Collateral Attack

GMO's third argument is that Public Counsel and MCEG's petition for the issuance of an accounting authority order is an improper collateral attack on the Commission's prior

³ *State ex rel. Ozark Border Elec. Co-op v. Public Service Com'n of Mo.* 924 S.W.2d 597 (Mo. App. 1996). See also, *Staff of Mo. Pub. Serv. Com'n v. Consolidated Pub. Water Supply Dist. C-1 of Jefferson Co., Mo.* 474 S.W.3d 643 (Mo. App. 2015).

order approving the stipulation and agreement that resolved GMO's 2018 rate case. GMO contends one of the stipulations approved in the rate case specifically required GMO to "create a regulatory liability to capture the amount of depreciation expense included in the Company's revenue requirement ..." beginning when the Sibley units were retired. The stipulation and agreement also provided that the signatories agreed "that the rates established in this case include O & M (operations and maintenance expenses) associated with the Sibley units." The stipulation and agreement further provided that it did not "preclude any Signatory from proposing an accounting authority order ("AAO"), or any other ratemaking treatment, for the recovery of any other costs associated with the [Sibley unit retirements]". However, the stipulation and agreement did not specifically reserve any rights regarding an AAO related to any revenue and return on investments associated with the Sibley units.

GMO contends the inclusion of these provisions in the approved stipulation and agreement makes Public Counsel and MCEG's request for an AAO an improper collateral attack on the Commission's order that approved the stipulation and agreement. The Commission believes that the provisions of the approved stipulation and agreement, including the acknowledgement of the fact that operations and maintenance expenses associated with the Sibley units are included in the rates established in that case, do not, on their face, preclude Public Counsel and MCEG's petition for an AAO related to the retirement of the Sibley units after the true-up date used for the establishment of those rates and after those rates took effect. GMO may present more facts to support its argument during the hearing process, but its argument does not sufficiently support its motion to dismiss on the pleadings.

Conclusion

The Commission concludes that GMO has not carried its burden of establishing that Public Counsel and MECG have failed to state a claim upon which relief can be granted. This means that this matter will proceed to hearing where Public Counsel and MECG will shoulder the burden of establishing that the Commission should exercise its discretion to establish an AAO.

THE COMMISSION ORDERS THAT:

1. KCP&L Greater Missouri Operations Company's Motion to Dismiss the Complaint of the Office of the Public Counsel and Midwest Energy Consumers Group is denied.
2. This order shall be effective when issued.



BY THE COMMISSION

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

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and
Coleman, CC., concur.

Woodruff, Chief Regulatory Law Judge

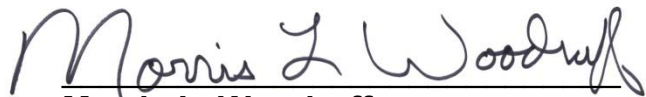
STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 6th day of March 2019.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

March 6, 2019

File/Case No. EC-2019-0200

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.