

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

In the Matter of Kansas City Power & Light)
Company's Request for Authority to)
Implement a General Rate Increase for)
Electric Service.)
Case No. ER-2012-0174

In the Matter of KCP&L Greater Missouri)
Operations Company's Request for Authority)
to Implement General Rate Increase for)
Electric Service.)
Case No. ER-2012-0175

STAFF'S RESPONSE TO THE MECG'S OBJECTION

COMES NOW the Staff of the Missouri Public Service Commission and for its response to the objection of the entities denominating themselves the Midwest Energy Consumers Group ("MECG") to the affidavit of Thomas Imhoff verifying Staff's recommendations to approve the tariff sheets of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company filed on January 16, 2013, and substituted on January 18, 2013, states:

1. On January 22, 2013, Staff filed verified memoranda recommending the Commission approve the tariff sheets Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company filed on January 16, 2013, and substituted on January 18, 2013, on the basis they comply with the Commission's January 9, 2013, *Report and Order* in these cases, as clarified on January 11, 2013.

2. Shortly thereafter the MECG objected to the affidavit asserting, "At this point, it is without question that this case remains a contested case" and relying on § 536.070(12), RSMo, to the right to cross-examine an affiant in a contested case.

3. Staff disagrees with MCEG that the Commission's actions on these compliance tariff sheets is a "contested case" under the Missouri Administrative Procedures Act.

4. In similar circumstances in a general rate increase case for Kansas City Power & Light Company, Case No. ER-2007-0291, where Praxair, Inc. made the same argument regarding the right to a hearing on Staff's compliance tariff recommendation, in its December 21, 2007, *Order Approving Tariffs in Compliance with Commission Report and Order*, the Commission, in part, stated,

The Commission has reviewed the above-mentioned filings, and determines that the filings comply with the Commission's order. No hearing is required for the Commission to approve the tariffs. In an electric rate increase case, the Supreme Court of Missouri held that under the "file and suspend" method KCPL used in this case, a utility's rates may be increased without the requirement of a public hearing.¹ Thus, Praxair's motion for hearing is denied. Indeed, there is no property interest in a utility rate that requires procedural due process protections.² (Footnotes in original).

5. In that case, before the Commission entered that order, Staff filed a response in which, in part, it stated the following:

The Applicability of Contested Case Procedures

16. Both Praxair and Public Counsel contend that the Commission erred by not applying contested case procedures to its approval of the Compliance Tariffs. Public Counsel asserts, "nothing . . . suggests that the Commission can suddenly treat a contested case in which a hearing has been held as an uncontested case." *Public Counsel's Application for Rehearing*, ¶ 3. Similarly, Praxair states,

While not initiated by the filing of the December 13 and 18 tariff sheets, a contested case was initiated by the suspension of the original tariff sheets. Although those tariff

¹ *State ex. rel. Utility Consumers' Counsel of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d. 41, 49 (Mo. banc. 1979). See also *State ex. rel. Public Counsel v. Public Service Commission*, 121 S.W.3d 534, 539 (Mo. App. 2003).

² *State ex. rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. banc 1975).

sheets were subsequently rejected by the December 6 Report and Order, this case nonetheless remains contested. While KCPL could arguably have initiated a new rate case by the filing of new tariffs in a new proceeding, it chose to submit those tariff sheets in the **current** proceeding asserting that they were tendered as in “compliance” with an earlier order in that proceeding. Were that not enough, by submitting “compliance” tariffs in the ongoing **contested** rate proceeding, KCPL inextricably linked this filing with its “compliance” to the December 6 Report and Order. Given there is no legal basis by which a contested case can be magically transformed from a contested to a non-contested proceeding, such tariff sheets **must** be treated pursuant to the due process requirements of Chapter 536.

Praxair’s Application for Rehearing, ¶ 1. It is noteworthy that neither Praxair nor the Public Counsel cites any authorities in support of their positions.

17. The phrase “contested case” is a term of art in Missouri administrative law. The Missouri Administrative Procedure Act (“MAPA”), codified at Chapter 536, RSMo, provides that a “contested case” is “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing[.]” The hearing requirement may be statutory or a hearing may be required by the nature of the private interests at stake. *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo. banc 1995).

18. Leaving aside until the next section the question of whether the state or federal constitution requires a hearing in this case, it is well-established that state statute does not. The Commission need not hold a hearing in a file-and-suspend rate case unless it exercises its authority to suspend the proposed tariff. *State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979), “Even under the file and suspend method, by which a utility’s rates may be increased without requirement of a public hearing, the commission must of course consider all relevant factors including all operating expenses and the utility’s rate of return, in determining that no hearing is required and that the filed rate should not be suspended.”

19. Praxair contends, correctly in Staff’s view, that the Commission was required to hold a hearing in this case because it exercised its authority to suspend the proposed tariff sheets under § 393.150. *Praxair’s Application for Rehearing*, ¶ 1. Indeed, the Missouri Supreme Court has stated, “If [the proposed tariff is] suspended, the commission must within a specified period hold a hearing concerning

the propriety of the new rate, charge, rule or regulation.” *Utility Consumers’ Council, supra*, 585 S.W.2d at 48. The statute authorizing suspension provides:

1. Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or sewer corporation any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or sewer corporation, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or sewer corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective.

2. If any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation or sewer corporation, and the commission shall give to the hearing and decision of such

questions preference over all other questions pending before it and decide the same as speedily as possible.

20. However, the fact is that the Commission *did* hold a hearing on the propriety of the suspended tariff sheets and that hearing resulted in the Report & Order issued by the Commission on December 6, 2007. The Commission did not suspend the Compliance Tariffs and, therefore, no hearing was required.³ Praxair admits as much: “While **not** initiated by the filing of the December 13 and 18 tariff sheets” *Praxair’s Application for Rehearing*, ¶ 1.

21. Because a hearing was not required, the proceeding on the Compliance Tariffs was not a contested case. The assertion of Public Counsel and Praxair that an administrative proceeding cannot change from a contested case to an uncontested case is nonsensical on its face. After all, as necessarily follows from Praxair’s position that it was the Suspension Order & Notice, issued on February 6, 2007, that initiated a contested case, this matter had already changed character once from an uncontested case to a contested case. Why can it not change back? Public Counsel and Praxair have cited no authority in support of their position because there is none. The fact is that every file-and-suspend case is an uncontested case until the Commission acts to suspend the proposed tariffs. That act by the Commission necessarily converts the case to a contested case because, as the Missouri Supreme Court has pointed out, § 393.150, RSMo 2000, requires a hearing. *Utility Consumers’ Council*, *supra*, 585 S.W.2d at 48.

Did Due Process Require a Hearing on the Compliance Tariffs?

22. As the Commission noted in its Order of December 21, 2007, the Missouri Supreme Court has held that “utility customers have no vested rights in any fixed utility rates[.]” *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. banc 1975).⁴ Consequently, neither the Missouri Due Process Clause nor the federal Due Process Clause required a hearing on the Compliance Tariffs. Mo. Const., art. I, § 10; U.S. Const., Amd. XIV, § 1.

23. With respect to the various contentions of Public Counsel

³ Staff believes that the Commission *could* have suspended the Compliance Tariffs. Since it did not do so, this point requires no further elaboration.

⁴ The utility company, in distinction to the utility customers, does have a fundamental property interest at stake such that the company must be accorded due process protections. *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App., W.D. 1981) (“There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment.”). However, Public Counsel and Praxair are not seeking to enforce any rights of the utility company here.

and Praxair concerning “due process protections” and “procedural due process,” they have evidently forgotten that the determination of just what process is due in any proceeding depends entirely on the nature of the interest at stake. See *Jackson County, supra*, 532 S.W.2d at 31. No authority has ever held that the use of noncontested case administrative procedures in rate setting is not constitutional. In the proceeding on the Compliance Tariffs, the interests represented by Public Counsel and Praxair were entitled only to such protection as the applicable statutes provide and, of course, to the additional protection of judicial review.

24. It is worth addressing Public Counsel’s fatuous suggestion, in its Reply filed on December 20, 2007, that a recent decision of the Missouri Supreme Court in a mandamus action requires a different result here.⁵ The case is *State ex rel. Office of the Public Counsel v. The Public Service Commission of the State of Missouri*, 236 S.W.3d 632 (Mo banc 2007). Public Counsel characterizes that decision as holding “that procedural due process requirements apply throughout the post-Report and Order phase of a rate case.” Actually, the Court did no such thing. The Court’s decision did not turn on either procedural due process or contested case procedures, but on its conclusion that the Commission had violated § 386.490.3, RSMo 2000, by directing that an order become effective unreasonably soon after its issue. The Court stated, “The law specifies 30 days for applying for rehearing but allows the PSC the discretion to set a shorter time as long as the time is reasonable. By issuing the December 29 order with an effective date of January 1, 2007, the PSC abused its discretion to provide public counsel with a reasonable period of time in which to appeal the order.” *Id.*, at 637. The phrases “due process” and “contested case” do not even appear in the Court’s decision.

What are Uncontested Case Procedures?

25. As established above, the proceeding on the Compliance Tariffs was not a contested case because the Commission was not required to hold a hearing. The fact that the proceeding on the Compliance Tariffs was not a contested case, but was a noncontested case, has significant procedural ramifications. The Commission is not required to make findings of fact in a noncontested case, *State ex rel. Public Counsel v. Public Service Commission*, 210 S.W.3d 344, 355 (Mo. App., W.D. 2006), and so was not required to make findings of fact

⁵ The relevant language from Public Counsel’s pleading is set out above at ¶ 12.

with respect to the Compliance Tariffs.⁶ The procedures set out in § 536.070, RSMo 2000, apply by that section's express terms only to "any contested case."⁷ In a noncontested case, the Commission "acts on discretion or on evidence not formally adduced and preserved." *Public Counsel, supra*, 210 S.W.3d at 353, quoting *Phipps v. School District of Kansas City*, 645 S.W.2d 91, 94-95 (Mo. App., W.D. 1982). Thus, there is no evidentiary record for judicial review. *Public Counsel, supra*.

26. In the noncontested proceeding on the Compliance Tariffs, the Commission was required to consider "all relevant factors," *Utility Consumers' Council, supra*, 585 S.W.2d at 49. The Commission did so. Only Staff had filed anything relevant, namely, its Memorandum and Recommendation of December 18, 2007, which advised the Commission to approve the Compliance Tariffs. Public Counsel and Praxair had filed only objections to KCPL's request for expedited treatment and assertions of non-existent statutory or constitutional rights.

27. Section 386.420.2, RSMo 2000, required the commission "to make a report in writing ..., which shall state the conclusions of the commission, together with its decision, order or requirement in the premises." The Commission did so in the form of its Order of December 21, 2007.

Did the Commission Abuse its Discretion by Not Holding a Hearing?

28. The courts will also review whether the Commission abused its discretion by not holding a hearing on the Compliance Tariffs. *Public Counsel, supra*, 210 S.W.3d at 355. Staff suggests that no abuse of discretion occurred in this case given that neither Public Counsel nor Praxair had raised any relevant issue. Public Counsel complained only about KCPL's request for expedited treatment and raised no substantive issue concerning the Compliance Tariffs. See *Public Counsel's Response*, December 19, 2007. Nor did Public Counsel raise any substantive objection in its Reply filed on December 20, 2007. Praxair also opposed KCPL's request for expedited treatment and, in discussing the Commission's responsibility with respect to the Compliance Tariffs,

⁶ The lack of findings of fact does not hamper judicial review because such review is limited to the question of whether the Commission's decision was lawful. *State ex rel. Public Counsel v. Public Service Commission*, 210 S.W.3d 344, 354 (Mo. App., W.D. 2006). "A review of a commission order issued in a contested case, of course, would require a probing of both, but review in a noncontested typically probes only the lawfulness of an agency's order without consideration of its reasonableness and without need for review of competent and substantial evidence." The courts also review whether the Commission abused its discretion by not holding a hearing. *Id.*, at 355.

⁷ The same is true of the pleading provisions at § 536.063; the notice provisions at § 536.067; the discovery provisions at § 536.073, 1-3; the subpoena provisions at § 536.077; the briefing and record-reading provisions at § 536.080; and the written order provisions at § 536.090.

mistakenly asserted that contested case procedures applied. See *Praxair's Response*, December 19, 2007. Praxair also raised no substantive issue relating to the Compliance tariffs. Where no substantive objection had been raised, the Commission was entitled to rely on Staff's Memorandum and Recommendation and act without a hearing.

Conclusion

29. In conclusion, Staff points out that none of the points raised in the Applications for Rehearing filed by Public Counsel and Praxair are meritorious. The proceeding on the Compliance Tariffs was a noncontested case, even though the earlier proceeding under that docket number on the suspended tariffs was indeed a contested case. The docket did, indeed, "magically morph" back and forth. Because the proceeding on the Compliance Tariffs was a noncontested case, contested case procedures did not apply. Neither Public Counsel nor Praxair had an interest at stake such that Due Process required trial-type proceedings. Thus, Praxair had no right to a hearing and no right to cross-examine Mr. Watkins; likewise, the Commission was not required to make findings of fact and was not required to act on the basis of a record containing competent and substantial evidence. The record was not "devoid of any evidence" but included Staff's Memorandum and Recommendation, which is entirely sufficient in a noncontested case. Contrary to Praxair's assertions, the Commission was well-aware that it had authorized a \$35 million revenue increase in its Report & Order because Staff so informed the Commission in its Memorandum and Recommendation. Contrary to Public Counsel's assertions, the Commission certainly was entitled to rely on the Supreme Court's *Jackson County* decision. In Staff's view, the Commission was entirely justified in concluding that KCPL's previously established entitlement to a revenue increase constituted good cause such that it was proper to allow the Compliance Tariffs to become effective on less than 30-days' notice.

6. Staff's view remains the same now as it was then. The MECG's objection has no merit.

7. Further, the Commission need take no evidence to determine whether tariff sheets filed to implement its *Report and Order* comply with that *Report and Order*. Who is in a better position than the Commission itself to make that determination?

WHEREFORE, the Staff of the Missouri Public Service Commission responds to the objection of the Midwest Energy Consumers Group to the affidavits of

Thomas Imhoff filed with *Staff's Recommendations to Approve Tariff Sheets*, and recommends the Commission overrule same.

Respectfully submitted,

/s/ Nathan Williams_____

Nathan Williams
Deputy Staff Counsel
Missouri Bar No. 35512

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-8702 (Telephone)
(573) 751-9285 (Fax)
nathan.williams@psc.mo.gov (e-mail)

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 22nd day of January, 2013.

/s/ Nathan Williams_____