BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Clarification of PPA Replacement Values for The Empire District Electric Company's d/b/a Liberty's Market Price Protection Mechanism	))))	Case No. EO-2026-0101

PUBLIC COUNSEL'S SUGGESTIONS IN SUPPORT OF OBJECTIONS

COMES NOW the Office of Public Counsel (Public Counsel) and, for its suggestions in support of its objections to the Commission taking administrative notice of certain documents, states:

The Missouri Public Service Commission's powers are police powers that, through statute, the Legislature has conferred upon the Commission. The Commission cannot contract those police powers away. The Commission cannot limit its powers to adapt to changing conditions. The Commission does not have the power to construe contracts. The Commission cannot enforce its powers directly; the Commission must resort to the courts to enforce its powers. By statute the Commission can empower any person employed by it to exercise any power the Commission has;[1] therefore, the powers of the Commission's Staff[2] are no more than those of the Commission. Except to the extent the Commission is aware of parties' understandings of what they intend by their stipulations and agreements,

[1] The commission may 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; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission. § 386.240, RSMo.

[2] Commission staff means all personnel employed by the commission whether on a permanent or contractual basis except commissioners; commissioner support staff, including technical advisory staff; personnel in the secretary's office; and personnel in the general counsel's office, including personnel in the adjudication department. Employees in the staff counsel's office are members of the commission staff. 20 CSR 4240-2.010(5).
Party includes any applicant, complainant, petitioner, respondent, intervenor, or public utility in proceedings before the commission. Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate within the time established for interventions by commission rule or order. 20 CSR 4240-2.010(10).

those parties' understandings are irrelevant to what the Commission intends when it exercises its police powers to adopt the language of those agreements and order the parties to comply with them.

The Missouri Public Service Commission's powers are police powers.

In its 1914 *en banc* opinion in *State ex rel. Barker v. Kan. City Gas Co*., 254 Mo. 515, 163 S.W. 854 (1914) the Missouri Supreme Court recognized the Commission's powers are police powers. There it said:

> [The Public Service Commission Act] is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility-owner, must be in the name of the overlord, the State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock or bond or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust *willy nilly*.
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> That there had been a vast increase in such utilities in the last decade or two and that evils have grown up crying out lustily for a cure by the lawmaker, is writ large in current history. The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view and retarding the mischiefs struck at -- all *pro bono publico*. Besides all which, the lawmaker himself has prescribed it "shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." [Sec. 127.]
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> Its constitutionality is not assailed in whole or part, and, observe, the law (Sec. 137) self-guarded itself so far as it could from such attack by piecemeal by making any "section, subsection, sentence, clause, or phrase" not an inducement or consideration for or interdependent with any other -- a novel and ingenious expedient, the success of which will be watched with benevolent, but by no means languid, interest.

The Missouri Supreme Court has continuously recognized the Commission's powers are police powers since 1914. In 1922 again sitting *en banc*, the Court described the Commission's power to set rates irrespective of any contract to be "well settled by this court and … no longer debatable." *State ex rel. Harrisonville v. Pub. Serv. Com.*, 291 Mo. 432, 236 S.W. 852 (*en banc* 1922).

As recently as 2021, the Missouri Supreme Court expressly reaffirmed the Commission's powers are police powers. It did so when providing background when reviewing the Commission's rulemakings for certificates of necessity and convenience for generating facilities. *Amendment of the Comm'ns Rule Regarding Applications for Certificates of Convenience & Necessity v. Mo. Pub. Serv. Comm'n*, 618 S.W.3d 520 (Mo. 2021) (citing to *State ex rel. Barker v. Kan. City Gas Co.*, 254 Mo. 515, 163 S.W. 854 (1914).

The Commission cannot contract its police powers away.

As the Missouri Supreme Court said in *State ex rel. Harrisonville v. Pub. Serv. Com.*, 291 Mo. 432, 236 S.W. 852 (*en banc* 1922), "It is, however, clear that under our Section 5 of Article 12 of the Constitution of 1875 (a section not theretofore found in our Constitution) the Legislature itself cannot abridge the police power of the State. Nor can it authorize a municipal corporation to make a contract abridging or limiting such police power." With the exception of the addition of the word "abridged," Article XI, § 3 of Missouri's current constitution has that same constitutional language—"The exercise of the police power of the state shall never be surrendered, abridged, or construed to permit corporations to infringe the equal rights of individuals, or the general well-being of the state." Mo. Const. Art. XI, § 3. Like the Legislature the Commission cannot make a

contract which abridges or limits its police power. See *Pub. Mut. Cas. v. Scharz*, 422 S.W.2d 301 (Mo. 1967) (The police power of the State is reserved to the State.).

The Commission cannot limit its powers to adapt to changing conditions.

In *State ex rel. Jackson Cty. v. Pub. Serv. Com.*, 532 S.W.2d 20, 23 (Mo. 1975), Jackson County and Kansas City, Missouri, both appealed a Commission decision increasing the electric rates of Missouri Public Service on multiple grounds. One of those grounds (Point l) was that "[t]the Commission did not have authority to 'change or abrogate' the moratorium of two years previously ordered (referred to by some of the parties as a 'period of repose')." The Commission had previously ordered that maximum rates would not change for at least two years from the effective date of an order it issued on December 14, 1973, but on June 13, 1975, the Commission issued a report and order authorizing Missouri Public Service to increase its electric rates on July 1, 1975, less than two years later. With regard to that issue, the Court said:[3]

> Point 1: The Consumers contend that the Commission, once having declared a two-year moratorium on further rate increases as authorized by § 393.270(3), cannot change or abrogate that order.
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> The parties have not called to our attention, nor have we found, any case in Missouri where the question was considered. The reason perhaps is obvious, because it has been suggested that this case constitutes the first time the Commission has made such an order of repose. In any event, we find no statute specifically resolving the issue. Section 393.230(4) states that the Commission ". . . may examine into all matters which may change, modify or affect any finding of fact previously made . . ." but that section, generally, applies to "reevaluations" of property. Section 386.500 contemplates changes but only in rehearing proceedings. Section 386.490(3), arguably, could authorize such a change in that it provides:
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> > Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or *until changed or abrogated by the commission*, unless such order be unauthorized by this law or any other law

[3] *State ex rel. Jackson Cty.*, 532 S.W.2d at 29-30.

> or be in violation of a provision of the constitution of the state or of the United States.
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> Outstate cases cited are not too persuasive or controlling. *Trustees of Saratoga Springs v. Saratoga Gas, Electric, Light & Power Co.*, 191 N.Y. 123, 83 N.E. 693 (1908); *Brooklyn Union Gas Co. v. Prendergast*, 7 F.2d 628 (E.D.N.Y. 1925); *Permian Basin Area Rate Cases*, 390 U.S. 747, 20 L. Ed. 2d 312, 88 S. Ct. 1344 (1968); *In Re Other Southwest Area Rate Case, Shell Oil Company et al. v. Federal Power Commission*, 484 F.2d 469 (5th Cir. 1973); and *Illinois Bell Tel. Co. v. Illinois Commerce Commission*, 414 Ill. 275, 111 N.E.2d 329 (1953). One statement in the last case is of interest: "[5, 6] The construction contended for seems to be in conflict with the spirit of the act. One of its primary purposes was to set up machinery for continuous regulation as changes in conditions require. It appears to be inherent in the act itself." The statute of Illinois is different from that of Missouri, but we think the "spirit of the act" analysis is logical and should be the standard in this state. In fact, this court said in *State ex rel. Chicago, R.I. & P.RR Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (1958): "Its [Commission's] supervision of the public utilities of this State is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest." To rule otherwise would make § 393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers. See, *McGrew v. Missouri Pacific Ry. Co.*, 230 Mo. 496, 132 S.W. 1076 (1910).
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> Since the very purpose of having the Commission is to have an agency with such expertise as to be sensitive to changing conditions, we rule that the trial court was in error in rejecting the Commission's action in that regard.

In a similar vein, in *State ex rel. Capital City Water Co. v. Mo. Pub. Servs. Comm'n*, 850 S.W.2d 903 (Mo. Ct. App. 1993), the Court held that the Commission did not err by disallowing recovery of costs for a water supply contract in a rate case although the contract was in place during five previously rate increase cases which were resolved by settlement, and that *estoppel* did not apply.

When exercising its powers the Commission is required to act lawfully and reasonably. § 386.510, RSMo. (See also, Mo. Const. Art. V, § 18).

The Commission does not have the power to construe contracts.

The Court in *State ex rel. GS Techs. Operating Co. v. PSC of Mo.*, 116 S.W.3d 680 (Mo. App. 2003), stated, "In this case, GST [wa]s essentially asking the Commission to adjudicate its claim that it was overcharged under the special contract because the cost of replacement power, a factor in the variable cost component of GST's rate under the special contract, should be KCPL's actual costs, offset by any insurance recoveries." *Id*. at 696. The Court held that the Commission had no power to give the requested relief. *Id*. As to supporting caselaw, the Court said the following:

> Prior case law supports the Commission's conclusions. As a creature of statute, the Commission has only those powers conferred either expressly or implicitly by statute as necessary to carry out the specifically-granted powers. State ex rel. Utility Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n, 585 S.W.2d 41, 49 (Mo. banc 1979). Among the authority the Commission possesses is the power to determine the proper rate classification applicable to a utility customer for services rendered and to be rendered. State ex rel. Kansas City Power & Light Co. v. Buzard, 350 Mo. 763, 168 S.W.2d 1044, 1047-48 (Mo. banc 1943). If the Commission determines that the customer was improperly classified for services already rendered, the customer may then seek a remedy in the circuit court to recover the excess amount charged under the improper classification. *Id*. While the "Commission does have exclusive jurisdiction of all utility rates," "when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of an overcharge is made, only the courts can require an accounting or render a judgment for the overcharge." Wilshire Constr. Co. v. Union Elec. Co., 463 S.W.2d 903, 905 (Mo. 1971). This is so because the Commission "cannot 'enforce, construe nor annul' contracts, nor can it enter a money judgment." *Id*. (quoting May Dep't Stores Co. v. Union Elec. Light & Power Co., 341 Mo. 299, 107 S.W.2d 41, 49 (Mo. 1937)). Likewise, the Commission does not have the authority to do equity or grant equitable relief. Am. Petroleum Exch. v. Pub. Serv. Comm'n, 172 S.W.2d 952, 955 (Mo. 1943).

The Commission cannot enforce its powers directly; the Commission must resort to the courts to enforce its powers.

The Commission's power to enforce its orders is found in Missouri statute, particularly § 386.600, RSMo. That statute provides:

> An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and

> prosecuted to final judgment by the general counsel to the commission, or for actions commenced under section 386.752 to 386.764, the attorney general. No filing or docket fee shall be required of the general counsel or the attorney general. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in this chapter, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding. All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order.

***State ex rel. Riverside Pipeline Co., L.P. v. PSC of Mo.*, 215 S.W.3d 76 (Mo. 2007).**

In *State ex rel. Riverside Pipeline Co., L.P. v. PSC of Mo.*, 215 S.W.3d 76 (Mo. *en banc* 2007)[4] the Missouri Supreme Court analyzed whether the Commission's adoption of the terms of a Stipulation and Agreement parties in a prior case entered into to resolve the prudency of a natural gas utility's natural gas purchases for the gas it supplied to its customers while certain gas purchase contracts were in effect made it unlawful for the Commission to review the prudency of the natural gas utility's natural gas purchases for the gas it supplied to its customers for a period that started after the utility extended those gas purchase contracts.

The Supreme Court correctly recognized that the Stipulation and Agreement is a settlement agreement, the meaning of which is ascertained by applying the rules used to interpret contracts:

> A stipulation, like any other settlement agreement, must be construed using ordinary rules of contract construction. *Andes v. Albano,* 853 S.W.2d 936, 941 (Mo. banc 1993). A contract must be construed as a whole so as to not render any terms meaningless, and a construction that gives a reasonable meaning to each phrase and

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> clause and harmonizes all provisions is preferred over a construction that leaves some of the provisions without function or sense. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003).

State ex rel. Riverside Pipeline, 215 S.W.3d at 84. The Court then concluded that the settlement agreement language, "As a result of this Stipulation, the Signatories agree that neither the execution of [certain agreements entered into by MGE's predecessor, Western Resources], nor the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review," is unambiguous "and precludes any further ACA prudence reviews of the Missouri Agreements." It then held, "[T]he PSC acted unlawfully in failing to disallow the ACA prudence reviews altogether and, thus, further acted unlawfully in conducting its own review of those prudence reviews."

Where the Supreme Court went astray, understandably, was in holding the Settlement Agreement bound the Commission. It is important to observe that by statute the Commission can empower any person employed by it to exercise any power the Commission possesses.[5] It must do so in writing.[6] The Commission has exercised that power and designated certain of its employees by rule—the Commission's Staff[7]—act as a party in cases before the Commission. Importantly, because it cannot confer powers it does not have, the powers the Commission confers on the Commission's Staff are no

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[5] The commission may 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; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission. § 386.240, RSMo.

[6] See § 386.280, RSMo.

[7] Commission staff means all personnel employed by the commission whether on a permanent or contractual basis except commissioners; commissioner support staff, including technical advisory staff; personnel in the secretary's office; and personnel in the general counsel's office, including personnel in the adjudication department. Employees in the staff counsel's office are members of the commission staff. 20 CSR 4240-2.010(5).
Party includes any applicant, complainant, petitioner, respondent, intervenor, or public utility in proceedings before the commission. Commission staff and the public counsel are also parties unless they file a notice of their intention not to participate within the time established for interventions by commission rule or order. 20 CSR 4240-2.010(10).

greater than the powers the Commission possesses. As pointed out above, the Commission's powers are police powers sourced from the Legislature which even the Legislature cannot abridge. In short, neither the Commission's Staff nor the Commission could contractually abridge the Commission's police powers which allow it to adapt to changing conditions regardless of contracts.

Further, in cases before the Commission the Commission's Staff, although designated as a "party" by Commission rule 20 CSR 4240-2.010(5) (see footnote 8), when viewed through the lens of court litigation have a role more like that of a special master than a litigant party. It cannot be overstated that purpose of the Commission is to investigate and act based on what it learns in those investigations. The Commission existed (1913) long before Missouri adopted its version of the Model State Administrative Procedure Act (circa 1945)—the Missouri Administrative Procedure and Review Act codified in Chapter 536, RSMo. That Act addresses settlements:

> Contested cases and other matters involving licensees and licensing agencies described in section 621.045 may be informally resolved by consent agreement or agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in sections 536.060 to 536.095 shall be construed (1) to impair the power of any agency to take lawful summary action in those matters where a contested case is not required by law, or (2) to prevent any agency authorized to do so from assisting claimants or other parties in any proper manner, or (3) to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or (4) to prevent stipulations or agreements among the parties (including, in a proper case, the agency).

§ 536.060, RSMo. Lest there be any doubt about whether cases before the Commission could be proper cases for stipulations or agreements among parties that include the Commission or its employees it is appropriate to reiterate again that even the Legislature cannot abridge the police power and a construction of § 536.060, RSMo, that would do so

is unlawful. In short, the Commission's police powers cannot be abridged by settlement or any other contract.

Wherefore, the Office of Public Counsel offers the foregoing suggestions to support its contemporaneously filed objections to evidence of which the Commission's Staff has requested the Commission to take administrative notice.

Respectfully,

/s/ Nathan Williams

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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 20th day of March 2026.

/s/ Nathan Williams