

**IN THE SUPREME COURT OF MISSOURI**

State of Missouri ex rel, )  
Office of the Public Counsel, )  
 )  
Relator, )  
 )  
vs. ) Case No. SC89176  
 )  
Public Service Commission of the )  
State of Missouri, et al )  
Respondents )  
and )  
 )  
Empire District Electric Company, )  
 )  
Intervenor. )

**ORIGINAL PROCEEDING IN MANDAMUS  
REPLY BRIEF OF RELATOR OFFICE OF THE PUBLIC COUNSEL**

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**REPLY POINTS AND AUTHORITIES RELIED UPON**

I.

AN ORDER IN MANDAMUS IS APPROPRIATE BECAUSE THE PSC FAILED TO VACATE ITS DECEMBER 29, 2006 ORDER DESPITE THE EXPLICIT MANDATE OF THIS COURT TO DO SO.

Cases

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*State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585  
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## ARGUMENT

### I.

AN ORDER IN MANDAMUS IS APPROPRIATE BECAUSE THE PSC FAILED TO VACATE ITS DECEMBER 29, 2006 ORDER DESPITE THE EXPLICIT MANDATE OF THIS COURT TO DO SO.

The relief sought (compliance with this Court's order) is narrow

This action seeks nothing more than enforcement of this Court's October 30, 2007 decision. Respondents and Intervenor-Respondent The Empire District Company in their briefs<sup>1</sup> put forth a valiant effort to make this action appear much more complex than it really is. Empire hints at this approach at the very beginning of its brief (page 5), where it describes the relief that Relator “purportedly” seeks. This Court ordered the Commission to vacate its December 29, 2006 order, and to issue a new order with sufficient time between its issue and its effective date to allow for the preparation and filing of an application for rehearing. The Commission only complied with the second part of this order. Although it used the word “vacate” in the title of its December 4, 2007 order, the Commission explicitly stated that “Until the December 29, [2007] order of the Commission is vacated, it remains in full force and effect....” (December 4, 2007 order, page 4). A tribunal cannot “vacate” an order and hold that it remains in full force and

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<sup>1</sup> This reply brief will refer to the two briefs as the “Commission brief” and the “Empire brief.”

effect from the time it is issued until the moment another order “vacates” it.<sup>2</sup> Yet that is exactly what the Commission did in its December 4, 2007 order.

Both the Commission brief and the Empire brief discuss a great deal of irrelevant material, both law and fact, that only serve to distract from the appropriate narrow focus.

Empire in particular asserts that Relator seeks much more from this Court than what appears in Relator's Petition and briefs. Empire asserts at page 6 (and similarly in its Point II, pages 18-19) that “it is clear that Public Counsel is, in effect, seeking a declaration from this Court regarding the lawfulness and reasonableness of the underlying tariffed rates....” This is simply not the case. While Public Counsel has every intention of seeking a declaration about the lawfulness and reasonableness of the underlying tariffed rates, that declaration will be sought in another venue (such as a Writ of Review action pursuant to Section 386.510 RSMo), not in this mandamus action. Empire also states that “Public Counsel asserts that the Commission has failed to comply with the mandate issued in the First Mandamus Case by failing to retroactively 'restore' the 2005 tariffs....” (Empire brief, pages 6, 18). Again, this is an inaccurate description of Public Counsel's position. Empire reads too much into a single phrase in Point I of

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<sup>2</sup>*Buchanan v. Cabiness*, 245 S.W.2d 868, 873 (Mo. 1951). See also, *Ball v. Shannon*, 975 S.W.2d 947 (Mo.App.S.D. 1998) (“The general rule is that when an order or judgment is vacated the previously existing status is restored and the situation is the same as though the order or judgment had never been made.”) (citing to *State ex rel. Seiser’s Estate v. Lasky*, 565 S.W.2d 792 (Mo.App.E.D. 1978)).

Public Counsel's initial brief in this matter. Public Counsel does not ask this Court to restore any tariffs; indeed the word "restore" appears nowhere in Public Counsel's initial brief except for the upper-case description of Point I.<sup>3</sup> Public Counsel simply seeks herein an order requiring the Commission to vacate its December 29, 2006 order.

It is telling that Empire, after spending most of its brief in a discussion of relief that Public Counsel has not sought, cavalierly discards the basis on which Public Counsel does seek relief. Public Counsel asserts that the December 4, 2007 order (the Second Tariff Order) reaffirmed rather than vacated the December 29, 2006 order. Empire concludes that it is "no matter what may or may not have been stated in the Second Tariff Order..." What the Second Tariff Order says does in fact matter very much. It shows that the Commission did not in actuality vacate the tariff as ordered to do so, because it specifically declared the tariff to be effective since January 1, 2007.

#### The Supreme Court has the power to enforce its own judgment

"Courts have inherent power to enforce their own judgments and should see to it that such judgments are enforced when they are called upon to do so." *State of Missouri ex rel. Abdullah, et al v. Roldan*, 207 S.W.3d 642, 646 (Mo. App. W.D. 2006) (citing *Lake Thunderbird Prop. Owners Ass'n, Inc. v. Lake Thunderbird, Inc.*, 680 S.W.2d 761,

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<sup>3</sup> Public Counsel does believe that the tariffs approved by the Commission at the end of Empire's 2005 rate case remain in effect until some other tariffs are lawfully approved to supersede them, but Public Counsel is not seeking a ruling from this Court in this case on that point.

763 (Mo. App. E.D. 1984) (quoting 46 Am.Jur.2d *Judgments* § 898 (1969))) Mo. Rule Civ. Procedure 75.01 restricts the court's right to alter, modify, or change its judgment to 30 days, but "does not prevent the court from enforcing its judgment as originally entered." *Ibid.* (quoting *Multidata Sys. Int'l Corp. v. Zhu*, 107 S.W.3d 334, 339 (Mo. App. E.D. 2003))

Respondents and Empire, as they did in the first mandamus case, argue for denial because there is another adequate remedy available: Section 386.510 RSMo and some other unidentified form of action. The adequacy of the other remedy depends on a number of factors. The other remedy must be "equally as convenient, beneficial and effective as mandamus. *State ex rel. B. v. Brown*, 532 S.W.2d 893, 895 (Mo. App. 1976); *State ex rel. Reis v. Nangle*, 349 S.W.2d 508, 512 (Mo. App. 1961). The other remedy must also be equally efficient. *State ex rel. B. v. Brown, supra*. In addition, the issuance of the writ rather than the use of another remedy is sometimes influenced by the public importance of the matter. *Ibid.*

Section 386.510 RSMo is not an adequate remedy. To enforce the Court's mandamus through the Public Service Commission statutory appeal process would be unnecessary and far from a plain remedy given the nature of the issue.

This Court did find the December 29, 2006 order unlawful

Both the Commission brief (*e.g.*, pages 9, 22) and the Empire brief (*e.g.*, pages 5, 16) opine that this Court in its October 30, 2007 decision<sup>4</sup> did not find the Commission's December 29, 2006 order unlawful. They conclude, apparently, that this Court ordered a perfectly fine Commission order vacated without any thought as to its lawfulness. The Commission and Empire read too much into the Court's Footnote 3.

This Court found that the **timing** of the issuance of the December 29, 2006 order made it unlawful, and so did not examine (nor was it asked to examine) whether the **substance** of the order met the two-pronged *Utility Consumers*<sup>5</sup> test. Empire misconstrues this footnote when it states at pages 5 and 16 that “This Court did not examine or otherwise consider the lawfulness or reasonableness of the First Tariff Order, but rather, considered only the timing of its issuance.” This Court never stated that it did not “otherwise consider the lawfulness” as Empire alleges, but simply that it did not reach the two-pronged *Utility Consumers* test.

Because this Court found the December 29, 2006 order to have been unlawfully issued, this Court ordered it vacated. At page 16 of its brief, Empire states that “Public Counsel asserts that the Commission did not comply with this Court's opinion and

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<sup>4</sup> *State ex rel. Office of the Pub. Counsel v. PSC*, 236 S.W.3d 632, 635 (Mo. 2007), herein referred to as “the first mandamus action.”

<sup>5</sup> *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979).

mandate in the First Mandamus Case because the Commission ‘explicitly reaffirmed the effectiveness of the order it was directed to vacate.’” That is indeed precisely what Public Counsel asserts, and it is at the heart of this action. Empire disagrees and goes on to state that: “The Commission, however, did no such thing.” But the Commission explicitly said: “Until the December 29, [2007] order of the Commission is vacated, it remains in full force and effect....” (December 4, 2007 order, page 4). Public Counsel understands, and the Commission has never disputed, that the language from the December 4, 2007 order means that the Commission affirmed that the December 29, 2006 order was in effect until December 14, 2007.

Like the first mandamus action, this Court is not now asked to apply the two-pronged *Utility Consumers* test

The very narrow focus of this action is whether the Commission, in its December 4, 2007 order, complied with this Court's mandate to vacate the December 29, 2006 order. In a mandamus action, this Court need not and should not (according to all the authorities cited by all parties) examine the reasonableness of either tariff order or examine their lawfulness beyond the question of whether the latter tariff order complied with this Court's mandate. Nor should it issue a declaratory judgment about what tariffs were in effect at any particular time. While those issues may be brought up in other actions, and may ultimately be before this Court, they are necessarily beyond the scope of this mandamus action.

And so Public Counsel is in complete agreement with the Commission when it states (at page 16 of its brief) that:

Relator is not entitled to review of the lawfulness or reasonableness of the substance of the Commission's December 29, 2007 Report and Order [*sic*] approving the tariffs through its Application for Writ of Mandamus. An order from this Court ordering the Commission to disapprove the tariffs and restore Empire's previous rates would be tantamount to a review of a discretionary act of the Commission....

The Commission and Empire want to distract the Court from the narrow focus of this action by ascribing to Relator requests for relief and arguments that Relator never made. There is no request before this Court to establish or “restore” any particular rate. Public Counsel simply wants an order directing the Commission to truly vacate the December 29, 2006 order; that is, to hold that it has no effect and never did.

The Commission only complied with half of this Court's decision in the first mandamus action

The Commission states (at page 18) that in the first mandamus order, “the Commission was ordered to give Relator a reasonable amount of time ... to apply for rehearing....” That is a true statement, but it addresses only half of this Court's October 30, 2007 decision: the Commission was also ordered to vacate its December 29, 2006 order. Indeed, the Commission describes the first mandamus order as the Commission would have liked it have been: “This Court ordered the Commission to vacate its prior order **so as** to allow Relator reasonable time to apply for rehearing.” (Commission brief, page 19, emphasis added). But this Court ordered the Commission to vacate its prior order **and** to allow Relator reasonable time to apply for rehearing.

Relator does not – in this mandamus action – ask this Court “to order the Commission to negate its approval of the challenged tariffs.” (Commission brief, page 19). This Court already effectively negated the Commission's first approval of the challenged tariffs by mandating vacation of the December 29, 2006 order, and the second approval (prospectively, as of December 14, 2007) is not at issue here. Neither does Relator seek “to have the challenged tariffs withdrawn.” (Commission brief, page 19). Relator simply seeks to have the December 29, 2006 order vacated.

The Commission appears to believe that this Court lacks authority to require such vacation, because it opines that “Relator does not have a clearly established right to the relief requested.” (Commission brief, pages 19-20). It is somewhat unclear whether the Commission is referring here to the relief Relator actually did request, or some other request for relief that Relator did not make but that the Commission nonetheless ascribes to Relator. But there is no doubt that this Court has authority to require the Commission to vacate an order that was issued unlawfully (as the Court did in the first mandamus action), and to require subordinate tribunals to comply with the Court's decisions (as Relator requests here).

Empire argues at page 7 that “the Commission was not precluded from issuing an order both vacating its prior order and approving the same tariffs on a going-forward basis.” Relator agrees, but the Commission only did the latter.

The Filed Rate Doctrine has no relevance

Both the Commission and Empire provide the Court with lengthy discussions of why they believe the so-called Filed Rate Doctrine<sup>6</sup> would rob the vacation of the December 29, 2006 order of any effect. Relator has not asked this Court to declare the validity or invalidity of any particular tariffs. Therefore, this argument is clearly beyond the scope of the relief requested.

The argument that the tariffs would have gone into effect by operation of law should be rejected

In their briefs, the Commission and Empire argue that Empire's compliance tariffs would have automatically gone into effect by operation of law in January 2007.<sup>7</sup> The notion that the Commission and Empire can foresee what would have transpired (i.e., tariffs go into effect by operation of law), absent the occurrence of a specific event (i.e.,

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<sup>6</sup> *Southwestern Bell Tel. Co. v. Metro-Link Telecom*, 919 S.W.2d 687, 692 (Tex. App. 1996).

<sup>7</sup> Empire Brief at pages 17-18 (“then the compliance tariffs filed by Empire on December 28, 2006 would have gone into effect by operation of law and without a Commission order on January 27, 2007”); Commission Brief at pages 20-23 (“the tariffs filed by Empire on December 28, 2006 would have gone into effect on January 27, 2007 by operation of law because the Commission took no action to stay or suspend the effectiveness of the tariffs.”).

expedited approval of the tariffs by the Commission), is fundamentally flawed and should be rejected.

It is impossible to know how events would have transpired absent the Commission's abuse of discretion. In fact, even the Commission can not now know what it would have done. Since the time that it issued its December 29, 2006 Order, two Commissioners, including one of the three that were in the majority of the December 29 decision have left and been replaced.

Any claim that the rate tariffs became effective by operation of law as a result of the Court's order in the first mandamus action defies logic. This would make the tariffs effective regardless of this Court's actions.

Therefore, the Commission's and Empire's analysis of the statutes and case law regarding the so-called "file and suspend" process is inadequate and of little or no relevance here. Clearly, the premise of the Commission and Empire's argument that the tariffs would have gone into effect by operation of law is flawed and should be rejected.

The Commission's Points IV and V are wholly irrelevant

The Commission's Point IV has to do with a Writ of Review action file in the Circuit Court of Cole County which action has since been dismissed. The Writ of Review case was filed after the Commission's December 29, 2006 order and dismissed before the December 4, 2006 order. It has no bearing on the question of whether mandamus lies to compel compliance with this Court's October 30, 2007 decision.

The Commission's Point V appears to be a defense against a request for refunds which has not been made at this, or any other, tribunal. Nor has there been a request for

this Court to opine on Empire's property rights, or to determine the lawfulness of the Commission's December 21, 2006 Report and Order.

### CONCLUSION

Public Counsel asks the Court to reject the arguments of Respondents Public Service Commission and its Commissioners and intervenor The Empire District Electric Company and make absolute its preliminary writ of mandamus and

- (1) direct the Public Service Commission of Missouri to immediately and fully comply with the October 30, 2007 opinion and order in *State ex rel. Office of the Public Counsel v. Public Service Commission*, 236 S.W.3d 632 (Mo. banc 2007) and vacate the Public Service Commission's December 29, 2006 order consistent with the Court's opinion; and,
- (2) direct the Commission to immediately vacate its December 4, 2007 order that affirmed the effectiveness of the December 29, 2006 order. Further, Public Counsel asks the Court for such other and additional relief as the Court deems just and proper, including entry of the Court's own order vacating the Commission's December 29, 2006 order and the portion of the December 4, 2007 order affirming the effectiveness of the December 29, 2006 order.

Respectfully submitted,  
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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Supreme Court Rule 84.06(c) that (1) the brief includes the information required by Rule 55.03; (2) the brief complies with the limitations contained in Rule 84.06(b); and (3) the brief contains 3,133 words (exclusive of the cover, certificates of service and compliance, signature blocks, and tables of contents and of authorities) as calculated by Microsoft Word 2003, the software used to prepare the brief.

The undersigned further certifies that a CD-ROM containing an electronic copy of the brief, in compliance with Supreme Court Rule 84.06(g), has been scanned for viruses, and is virus-free.

\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 84.07(a), the undersigned hereby certifies that two copies of this brief, along with a CD-ROM containing an electronic version of the brief complying with Supreme Court Rule 84.06(g), were sent via U.S. Mail, postage prepaid, on April 28, 2008, to the following counsel of record:

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