

TABLE OF CONTENTS

Table of Authorities..... 3

Jurisdictional Statement..... 5

Summary of the Argument 5

Points and Authorities Relied On..... 8

Standard of Review 10

Statement of Facts 11

Argument..... 15

I. Respondents fully complied with the mandate issued in *State ex rel. Office of the Public Counsel v. PSC*, 236 S.W.3d 632 (Mo. banc 2007), with the issuance of its Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs on December 4, 2007, to be effective December 14, 2007, because the Commission fulfilled this Court’s requirements that it vacate the First Tariff Order and allow Public Counsel a reasonable amount of time to seek rehearing regarding the tariffs, in that the Commission was not directed by this Court to reinstate or approve, on a going-forward basis, any particular tariffs. (Responds to Public Counsel’s Point I) 15

II. Public Counsel is not entitled to the requested writ with regard to the Commission’s First Tariff Order and Second Tariff Order, because Public Counsel has not met the criteria for the issuance of a writ of mandamus, in that Public Counsel does not seek the compulsion of a ministerial duty, but instead seeks a declaration from this Court regarding the lawfulness and reasonableness of

Empire’s tariffed rates and seeks to compel the Commission to retroactively reinstate the 2005 rates which had been on file prior to the Commission’s decision in Case No. ER-2006-0315 and had been found to be unjust and unreasonable.

(Responds to Public Counsel’s Point II) 18

III. The Commission has not violated the mandate of this Court, because the Commission issued the Second Tariff Order in which it vacated the First Tariff Order and provided Public Counsel and all other parties an opportunity to seek rehearing regarding the tariffs, in that the Commission did not attempt to retroactively reinstate the First Tariff Order, but instead re-approved the tariffs on a going-forward basis. (Responds to Point I of the Amicus Brief of the Industrial Intervenors)..... 23

Conclusion 25

Certificate of Compliance..... 27

Certificate of Service 28

TABLE OF AUTHORITIES

CASES

Furlong Companies v. City of Kansas City, 189 S.W.3d 157 (Mo. 2006) 9, 19

H.J. Inc. v. Northwestern Bell Telephone Company, 954 F.2d 485 (8th Cir. 1992)21-22

Lightfoot v. City of Springfield, 236 S.W.2d 348 (Mo. 1951) 20, 21

National Tube Co. v. Ayres, Aud., 89 N.E.2d 129 (Ohio 1949)..... 18

State ex rel. City of Joplin v. Missouri Public Service Commission, 186 S.W.3d 290
(Mo. App. W.D. 2005) 9, 20, 21

State ex rel. Laclede Gas Company v. Public Service Commission, 535 S.W.2d
561(Mo.App. 1976) 17

State ex rel. Missouri Growth Association v. State Tax Commission, 998 S.W.2d 786
(Mo. 1999) 10

State ex rel. Office of the Public Counsel v. Missouri Public Service Commission,
236 S.W.3d 632 (Mo. banc 2007) 5, 8, 10, 15, 16

*State ex rel. Utility Consumers Council of Missouri, Inc. v. Missouri Public Service
Commission*, 585 S.W.2d 41 (Mo. banc 1979) 8, 9, 17, 18, 22

State ex rel. Valley Sewage Co. v. Public Service Commission, 515 S.W.2d 845
(Mo.App. K.C.D. 1974) 12

State ex rel. Washington University v. Public Service Commission, 272 S.W. 971
(Mo 1925) 12-13

Tims v. Holland Furnace Co., 90 N.E.2d 376, 380 (Ohio 1950) 18

Williams v. Gammon, 912 S.W.2d 80 (Mo.App. W.D. 1995) 10

STATUTES AND RULES

Mo. Const. Art. V, §4 5

RSMo. §386.270..... 9, 21

RSMo. §393.140..... 8, 9, 13, 17, 23

RSMo. §393.150..... 9, 17, 18

JURISDICTIONAL STATEMENT

The Empire District Electric Company (“Empire”) agrees that this Court has general jurisdiction over this matter pursuant to Mo. Const. Art. V, Sec. 4 (1945, as amended 1976).

SUMMARY OF THE ARGUMENT

Relator, the Office of the Public Counsel (“Public Counsel”), purportedly seeks a writ herein in order to force the Respondents, the Missouri Public Service Commission (the “Commission”) and its duly appointed and confirmed members, to comply with the Court’s October 30, 2007 opinion and order in a prior writ proceeding (SC88390) involving the same parties and the same underlying Commission rate case (the “First Mandamus Case”). Specifically, Public Counsel asserts that the Commission has failed to vacate its Order Granting Expedited Treatment and Approving Tariffs, issued December 29, 2006, to be effective January 1, 2007, in Commission Case No. ER-2006-0315 (the “First Tariff Order”).

In the First Mandamus Case, the Court concluded that the Commission abused its discretion in issuing the First Tariff Order with regard to the time allowed for the filing of rehearing applications. The Court directed the Commission to “vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006, and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs.” *State ex rel. Office of the Public Counsel v. PSC*, 236 S.W.3d 632, 637 (Mo. banc 2007). 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. *Id.* at 635.

Public Counsel asserts that the Commission did not truly vacate the First Tariff Order because the Commission did not “terminate the effect” of the First Tariff Order and did not “restore the rates in effect prior to the Order.”¹ (Point I, Brief of Relator) Public Counsel also argues that Empire’s customers, as a result of the Commission’s failure to fully comply with the Court’s mandate, have “paid rates that were approximately \$38 million more than authorized in the pre-filing tariffs.” (Brief of Relator, p. 17) Although Public Counsel states that the “filed rate doctrine” does not bear on the issues of this writ proceeding (Brief of Relator, p. 27), 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 which are designed to allow Empire the opportunity to recover its costs and earn a return and which have been filed with and approved by the Commission. In other words, Public Counsel seeks a decision on the merits of the existing rates.

The mandate of this Court was issued on November 15, 2007, and in conformity with the directive of this Court, the Commission issued its Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs on December 4, 2007, to be effective December 14, 2007 (the “Second Tariff Order”). Contrary to the allegations of the Public Counsel, as well as the allegations of

¹ For clarity, Empire will refer to the tariffs which had previously been the authorized rates and on file prior to the Commission’s decision in Case No. ER-2006-0315 as the “2005 tariffs.”

the self-defined Industrial Intervenors,² the Commission has fulfilled the requirements of this Court's mandate.

While 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, the Industrial Intervenors assert that the Commission has failed to comply with the prior mandate by simultaneously re-approving the 2007 tariffs on a prospective basis. (Amicus Brief, p. 6) This Court, however, did not mandate that the Commission reinstate the 2005 tariffs which were in effect prior to the initiation of the subject rate case. This Court did not make any statement regarding what the Commission should do following vacation of the First Tariff Order, other than to allow the Public Counsel a reasonable time to prepare and file an application for rehearing on the tariffs.

Accordingly, the Commission was not precluded from issuing an order both vacating its prior order and approving the same tariffs on a going-forward basis. The Second Tariff Order took effect ten days after its issuance, and Public Counsel timely

² Counsel for the "Industrial Intervenors" filed a Motion for Leave to File Brief on behalf of Praxair, Inc., Explorer Pipeline, Inc., General Mills, Inc., Enbridge Energy, LP, and Wal-Mart Stores, Inc, and those entities were permitted to file an Amicus brief herein. Empire notes that, of this list of industrial customers, only Praxair and Explorer sought and obtained intervention in the subject rate case, Case No. ER-2006-0315. Further, only Praxair, Explorer, and General Mills sought and obtained intervention in Empire's rate case currently pending before the Commission (Case No. ER-2008-0093).

filed an application for rehearing with the Commission regarding the same. Public Counsel will now be able to raise, in a subsequent writ of review proceeding, all issues properly preserved with regard to the tariffs. Accordingly, there is nothing left for this Court to compel.

POINTS AND AUTHORITIES RELIED ON

I. RESPONDENTS FULLY COMPLIED WITH THE MANDATE ISSUED IN *STATE EX REL. OFFICE OF THE PUBLIC COUNSEL V. PSC*, 236 S.W.3D 632 (MO. BANC 2007), WITH THE ISSUANCE OF ITS ORDER VACATING DECEMBER 29, 2006 ORDER GRANTING EXPEDITED TREATMENT AND APPROVING TARIFFS, AND ORDER APPROVING TARIFFS ON DECEMBER 4, 2007, TO BE EFFECTIVE DECEMBER 14, 2007, BECAUSE THE COMMISSION FULFILLED THIS COURT’S REQUIREMENTS THAT IT VACATE THE FIRST TARIFF ORDER AND ALLOW PUBLIC COUNSEL A REASONABLE AMOUNT OF TIME TO SEEK REHEARING REGARDING THE TARIFFS, IN THAT THE COMMISSION WAS NOT DIRECTED BY THIS COURT TO REINSTATE OR APPROVE, ON A GOING-FORWARD BASIS, ANY PARTICULAR TARIFFS.

(Responds to Public Counsel’s Point I)

State ex rel. Office of the Public Counsel v. Missouri Public Service Commission, 236 S.W.3d 632 (Mo. banc 2007)

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

RSMo. §393.140(11)

RSMo. §393.150

II. PUBLIC COUNSEL IS NOT ENTITLED TO THE REQUESTED WRIT WITH REGARD TO THE COMMISSION'S FIRST TARIFF ORDER AND SECOND TARIFF ORDER, BECAUSE PUBLIC COUNSEL HAS NOT MET THE CRITERIA FOR THE ISSUANCE OF A WRIT OF MANDAMUS, IN THAT PUBLIC COUNSEL DOES NOT SEEK THE COMPULSION OF A MINISTERIAL DUTY, BUT INSTEAD SEEKS A DECLARATION FROM THIS COURT REGARDING THE LAWFULNESS AND REASONABLENESS OF EMPIRE'S TARIFFED RATES AND SEEKS TO COMPEL THE COMMISSION TO RETROACTIVELY REINSTATE THE 2005 RATES WHICH HAD BEEN ON FILE PRIOR TO THE COMMISSION'S DECISION IN CASE NO. ER-2006-0315 AND HAD BEEN FOUND TO BE UNJUST AND UNREASONABLE. (Responds to Public Counsel's Point II)

Furlong Companies v. City of Kansas City, 189 S.W.3d 157 (Mo. 2006)

State ex rel. City of Joplin v. Missouri Public Service Commission, 186 S.W.3d 290 (Mo.App. W.D. 2005)

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

RSMo. §386.270

RSMo. §393.140(11)

III. THE COMMISSION HAS NOT VIOLATED THE MANDATE OF THIS COURT, BECAUSE THE COMMISSION ISSUED THE SECOND TARIFF ORDER IN WHICH IT VACATED THE FIRST TARIFF ORDER AND PROVIDED THE

PUBLIC COUNSEL AND ALL OTHER PARTIES AN OPPORTUNITY TO SEEK REHEARING REGARDING THE TARIFFS, IN THAT THE COMMISSION DID NOT ATTEMPT TO RETROACTIVELY REINSTATE THE FIRST TARIFF ORDER, BUT INSTEAD RE-APPROVED THE TARIFFS ON A GOING-FORWARD BASIS.

(Responds to Point I of the Amicus Brief of the Industrial Intervenors)

STANDARD OF REVIEW

The “lawful and reasonable” standard of review under RSMo. Chapter 386 does not apply herein. *State ex rel. Office of the Public Counsel v. PSC*, 236 S.W.3d 632, 635 (Mo. banc 2007). Instead, this Court determines if the criteria for the issuance of mandamus have been satisfied.

As this Court has noted, a “writ of mandamus will not ordinarily issue to control the discretion of an administrative body such as the PSC.” *State ex rel. Office of the Public Counsel v. PSC*, 236 S.W.3d 632, 635 (Mo. banc 2007). This Court further stated that a “writ of mandamus is issued ‘to compel the performance of a ministerial duty that one charged with the duty has refused to perform.’” *Id.* (internal citations omitted). Mandamus is only appropriate to require the performance of a ministerial act, and mandamus “cannot be used to control the judgment or discretion of a public official.” *State ex rel. Missouri Growth Ass’n v. State Tax Comm’n*, 998 S.W.2d 786, 788 (Mo. 1999) (internal citations omitted). The purpose of mandamus is “to execute and not to adjudicate; it coerces performance of a duty already defined by law.” *Williams v. Gammon*, 912 S.W.2d 80, 83 (Mo.App. W.D. 1995).

STATEMENT OF FACTS

Empire will not restate in detail the underlying factual background of this matter. Empire generally concurs in the factual statements contained within the Statement of Facts section of Public Counsel's Brief. Empire, however, believes it is important to highlight a few additional facts and also to rebut the opinions expressed by Public Counsel in its Statement of Facts.

The First Tariff Order and the Second Tariff Order were issued in conjunction with a Report and Order issued by the Commission on December 21, 2006, to be effective December 31, 2006 ("Report and Order"), in Commission Case No. ER-2006-0315, an electric rate case initiated by Empire. The Report and Order rejected the proposed tariff sheets filed by Empire almost eleven months earlier and directed Empire to file revised tariff sheets to implement the terms of the Report and Order. (Report and Order, pp. 57-58)³ With the Report and Order, the Commission found that Empire's average return on common equity ("ROE") had been "fairly low," at eight percent in 2001 and 2002, six percent or lower for 2003 and 2004, and 6.04 percent for 2005, with an expected return of 6.5 percent for 2006. (Report and Order, p. 20) In contrast, the Commission noted the industry national average ROE for electric utilities of 10.55 percent for 2005. (Report and Order, p. 20) The Commission further found that Empire's existing tariffed rates then on file (the 2005 rates) prevented Empire from recovering

³ The Report and Order is included in the Appendix to the Brief of The Empire District Electric Company, pp. A1-A59.

\$26.8 million of prudently incurred fuel and purchased power costs annually. (Report and Order, pp. 43-44) The Report and Order, in essence, authorized a rate increase of approximately \$29 million.

Pursuant to the Report and Order, on December 27, 2006, Empire filed revised tariff sheets to implement the rate increase and a motion for expedited treatment requesting approval of the tariff sheets on less than thirty days notice. Additional revised tariff sheets (the “compliance tariffs” or “2007 tariffs”) were filed on December 28, 2006, along with a motion for expedited treatment. (Petition for Writ of Mandamus, p. 3) The Commission found the compliance tariffs (Commission Tariff File No. YE-2007-0488) submitted by Empire to implement an increase in Empire’s gross annual electric revenues of \$29,369,397 to be an accurate reflection of the terms of the Report and Order. The Commission also concluded that any additional delay or further suspension beyond January 1, 2007 (a date eleven months after the rate case was initiated by Empire) would be unreasonable and would preclude Empire from earning the “just and reasonable” rates the Commission authorized through the Report and Order.⁴ Accordingly, on December

⁴ As noted by the Commission in the Report and Order, a just and reasonable rate is one that is fair to both the utility and its customers (*State ex rel. Valley Sewage Co. v. Pub. Serv. Commission*, 515 S.W.2d 845 (Mo.App. K.C.D. 1974)), is sufficient to keep utility plants in proper repair for effective public service, and is sufficient to insure to investors a reasonable return upon funds invested for the public service (*State ex rel.*

29, 2006, the Commission issued the First Tariff Order approving the compliance tariffs for service rendered by Empire on and after January 1, 2007.⁵

It is noteworthy that the Commission was not required to issue an order affirmatively approving the compliance tariffs. As will be discussed in Argument section I herein, the Commission may permit tariffs to go into effect, by operation of law, on thirty days' notice and without a hearing or order approving the same. In the case at hand, however, the Commission found good cause pursuant to RSMo. §393.140(11) to approve the tariffs on less than thirty days' notice, and thus, an order approving the tariffs (the First Tariff Order) was issued.

On January 1, 2007, Empire began providing service and charging customers pursuant to the compliance tariffs authorized by the Report and Order and approved by the First Tariff Order. At no time was the effectiveness of the compliance tariffs stayed by the Commission or by any court. It is the rate increase authorized by the Report and Order, and first implemented through the tariffs which took effect on January 1, 2007, that the Public Counsel, in effect, seeks to set aside by means of the instant writ request.

Pursuant to this Court's opinion and mandate in the First Mandamus Case, the Commission issued the Second Tariff Order on December 4, 2007, to be effective

Washington University v. Pub. Serv. Commission, 272 S.W. 971 (Mo 1925)). (Report and Order, p. 9)

⁵ The First Tariff Order is included in the Appendix to the Brief of Relator Office of the Public Counsel at pages A22-A28.

December 14, 2007, in which it once again found the 2007 tariffs to be an accurate reflection of the rate increase authorized by the Report and Order.⁶ Public Counsel filed a timely application for rehearing on December 13, 2007, alleging that the Second Tariff Order is unlawful, unjust, unreasonable, and unconstitutional for many reasons, including that it fails to separately and adequately identify conclusions of law and findings of fact, is not based upon competent and substantial record evidence, and is an unlawful interpretation of the result of this Court's mandate in the First Mandamus Case.

Public Counsel asserts that the practical effect of the Second Tariff Order is the continuation of Empire's authority to charge the rates approved in the First Tariff Order during the period January 1, 2007 (effective date of First Tariff Order) to December 14, 2007 (effective date of Second Tariff Order). (Brief of Relator, p. 17) With the Second Tariff Order, the Commission vacated the First Tariff Order and approved the same tariffs on a going-forward basis. At that point, the Commission could not change what rates were charged between January 1 and December 14, 2007, and, as discussed below, it is the "filed rate doctrine" and other applicable law which governs the impact of the vacation of the First Tariff Order and the issuance of the Second Tariff Order with regard to the rates charged during the period of January 1, 2007 to December 14, 2007 – not the Second Tariff Order itself.

⁶ The Second Tariff Order is included in the Appendix to the Brief of Relator Office of the Public Counsel at pages A1-A11.

ARGUMENT

This Court should not make absolute its preliminary writ of mandamus issued herein. The Public Counsel is not entitled to an order in mandamus as requested with regard to the orders of the Commission approving the compliance tariffs of Empire.

I. Respondents fully complied with the mandate issued in *State ex rel. Office of the Public Counsel v. PSC*, 236 S.W.3d 632 (Mo. banc 2007), with the issuance of its Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs on December 4, 2007, to be effective December 14, 2007, because the Commission fulfilled this Court's requirements that it vacate the First Tariff Order and allow Public Counsel a reasonable amount of time to seek rehearing regarding the tariffs, in that the Commission was not directed by this Court to reinstate or approve, on a going-forward basis, any particular tariffs. (Responds to Public Counsel's Point I)

In the First Mandamus Case, the Court concluded that the Commission abused its discretion in issuing the First Tariff Order with regard to the time allowed for the filing of rehearing applications. The Court directed the Commission to "vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006, and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs." *State ex rel. Office of the Public Counsel v. PSC*, 236 S.W.3d 632, 637 (Mo. banc 2007). The Commission, with the issuance of the Second Tariff Order, did just as it was directed. With one order, the Commission vacated the First Tariff Order and re-approved the same tariffs on a going-forward basis. The Second Tariff Order was effective ten

days after its issuance, and, as such, Public Counsel was allowed a reasonable amount of time to prepare and file an application for rehearing with regard to the Commission's approval of Empire's tariffs.

With regard to the allegations of the Public Counsel and the Industrial Intervenors, it is important to note that this Court did not mandate that the Commission reinstate the 2005 tariffs (those which had previously been the authorized rates and on file prior to the Commission's decision in Case No. ER-2006-0315). This Court, noting that it did not examine or otherwise consider the lawfulness or reasonableness of the First Tariff Order, but rather considered only the timing of its issuance, also did not direct the Commission as to whether or not it should re-approve the 2007 tariffs which resulted from the rate case decision on a going-forward basis. *Id.* at 635. This, of course, is a matter soundly within the discretion of the Commission and would not be the proper subject of a writ of mandamus.

The vacation of an order or judgment does not turn back time, but instead cancels the effectiveness of that order and may create the legal fiction that such an order never existed. Public Counsel asserts that the Commission did not comply with this Court's opinion and mandate in the First Mandamus Case because the Commission "explicitly reaffirmed the effectiveness of the order it was directed to vacate." (Brief of Relator, p. 19) The Commission, however, did no such thing. Instead, the Commission vacated the First Tariff Order, approved the same tariffs on a going-forward basis, and noted the law with regard to filed tariffs (discussed in section II below).

Public Counsel argues that, in order for the Commission to comply with the mandate of the First Mandamus Case, the Commission needs to “completely set aside” the First Tariff Order and hold that “it had no effect.” (Brief of Relator, p. 21) As noted above, however, the Commission could not turn back time. It could only vacate the First Tariff Order and cancel the effectiveness of the same.

Additionally, it is important to note that if the First Tariff Order is deemed to truly have had no effect, then the compliance tariffs filed by Empire on December 28, 2006 (Commission Tariff File No. YE-2007-0488) would have gone into effect by operation of law and without a Commission order on January 27, 2007. This is because in the absence of a suspension order from the Commission, the Commission may permit new rates to take effect based on a mere tariff filing by a utility – without a hearing and without the issuance of an order. *See* RSMo. §§393.140(11)⁷ and 393.150⁸; *see also State ex rel. Laclede Gas Company v. Public Service Commission*, 535 S.W.2d 561, 566 (Mo.App. 1976) (because of the statutory “file and suspend” provisions, the Commission has the discretionary power to allow new rates to go into effect immediately by “non-action”); *see also State ex rel. Utility Consumers Council of Missouri, Inc. v. Missouri Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979) (a utility’s rates may be

⁷ A copy of the statute is included in the Appendix to the Brief of The Empire District Electric Company, pp. A60-A64.

⁸ A copy of the statute is included in the Appendix to the Brief of The Empire District Electric Company, pp. A65-A66.

increased without requirement of a hearing). In the subject rate case, however, the Commission issued the Second Tariff Order affirmatively re-approving the same tariffs so that, in conformity with this Court's mandate, Public Counsel would have an opportunity to seek rehearing (and subsequent judicial review) of the Commission's approval of the tariffs.

Public Counsel, with no supporting authority, also claims that the Commission needed to restore the 2005 rates (presumably retroactively) in order to comply with this Court's previous mandate. To the contrary, however, the Commission was within its rights to issue a substantially similar decision, with the 2007 tariffs being re-approved on a going-forward basis. *See Tims v. Holland Furnace Co.*, 90 N.E.2d 376, 380 (Ohio 1950) (citing *National Tube Co. v. Ayres, Aud.*, 89 N.E.2d 129 (Ohio 1949)); *see also* RSMo. §393.150 and *State ex rel. Utility Consumers Council of Missouri, Inc.*, 585 S.W.2d at 48, with regard to the Commission's right to approve the compliance tariffs without a hearing. Additionally, as noted above and as will be discussed in detail below, it is the "filed rate doctrine" and other applicable law which governs the impact of the vacation of the First Tariff Order and the issuance of the Second Tariff Order with regard to the rates charged during the period of January 1, 2007 to December 14, 2007.

II. Public Counsel is not entitled to the requested writ with regard to the Commission's First Tariff Order and Second Tariff Order, because Public Counsel has not met the criteria for the issuance of a writ of mandamus, in that Public Counsel does not seek the compulsion of a ministerial duty, but instead seeks a declaration from this Court regarding the lawfulness and reasonableness of

Empire's tariffed rates and seeks to compel the Commission to retroactively reinstate the 2005 rates which had been on file prior to the Commission's decision in Case No. ER-2006-0315 and had been found to be unjust and unreasonable. (Responds to Public Counsel's Point II)

Public Counsel points to *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157 (Mo. 2006), and argues that the facts and law in the instant case meet the *Furlong* criteria and standards. These factors, however, are not all present, and, accordingly, the requested writ should not be granted. The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty that one charged with the duty has refused to perform. The Public Service Commission has not refused to perform any ministerial duty. To the contrary, the Commission has fully complied with the Court's prior mandate and nothing remains to be compelled. Additionally, as Public Counsel actually seeks a decision with regard to the lawfulness and reasonableness of Empire's tariffed rates, any such challenge may be made in a subsequent Chapter 386 review proceeding.

Public Counsel asserts that arguments regarding the "filed rate doctrine" are beyond the narrow scope of this case which is that "this Court mandated that the Commission vacate one of its order, the Commission did not do so, and Public Counsel now seeks enforcement of the Court's mandate." (Brief of Relator, p. 27) To support the argument that another writ of mandamus is warranted, however, Public Counsel concedes that the Commission was authorized to prospectively approve the 2007 tariffs for service rendered on and after the effective date of Second Tariff Order, but argues that the

Commission failed to truly vacate the First Tariff Order by not restoring the 2005 rates **retroactively** for the period of January 1, 2007 (effective date of First Tariff Order) to December 14, 2007 (effective date of Second Tariff Order). (Brief of Relator, pp. 17, 22).

In order to accept Public Counsel's argument in this regard, this Court would need to set aside general principles of due process with regard to regulated utilities and the rates they charge, the established concept known as the "filed rate doctrine" and the equally well-established doctrine against retroactive ratemaking. As such, Public Counsel's assertion that the filed rate doctrine is not at issue is misleading. Just as the vacation of an order cannot turn back time, it cannot abrogate the applicable statutes and a significant body of case law.

As noted above, on January 1, 2007, Empire began providing service and charging customers pursuant to the compliance tariffs authorized by the Report and Order and approved by the First Tariff Order. At no time was the effectiveness of the compliance tariffs stayed by the Commission or by any court, and at no time were monies collected under the First Tariff Order segregated. Empire has been providing a service, and in exchange for that service, has been unconditionally collecting the tariffed rates in reliance upon the orders of the Commission.

In *State ex rel. City of Joplin v. Missouri Public Service Commission*, it was stated that principles of due process prevent a court from taking the property of a public utility where that property consists of money collected from ratepayers pursuant to lawful rates. 186 S.W.3d 290, 299 (Mo. App. W.D. 2005) (citing *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 354 (Mo. 1951)). The *Joplin* court went on to state that a Commission order

that sets rates is “*prima facie* lawful and reasonable” until finally decided otherwise by the courts. *Id.* (citing RSMo. §386.270⁹ (“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.**”) (emphasis added)).

Pursuant to the analysis set forth by the *Joplin* court, from the issuance of a commission order approving a rate going forward, and until finally determined otherwise by the court, the filed rate is considered prima facie lawful. *See Joplin*, 186 S.W.3d at 299. In *Joplin*, the court reviewed the case of *Lightfoot v. City of Springfield*, noting that a consumer had not requested that the money collected by that utility pursuant to the authorized rate increase be impounded pending a decision on appeal. The *Joplin* court stated that the funds came into the utility’s possession unconditionally, and, because there was no stay fund, that the utility’s property could not be taken without violating due process. *Id.* at 297, 299 (citing *Lightfoot*, 236 S.W.2d at 353-354).

These general due process concepts coincide with the logic of what has become known as the “filed rate doctrine.” This doctrine forbids a regulated entity, such as Empire, from charging rates for its services other than those filed with the appropriate regulatory authority. *H.J. Inc. v. Northwestern Bell Telephone Company*, 954 F.2d 485,

⁹ A copy of the statute is included in the Appendix to the Brief of The Empire District Electric Company, p. A67.

488 (8th Cir. 1992).¹⁰ Additionally, the doctrine prohibits a party from recovering damages calculated by comparing the filed rate and the rate that might have been adopted absent the conduct in issue. *Id.* In referencing other cases, the Eighth Circuit noted that the doctrine is designed, in part, to protect utilities charging the filed rates. *Id.* at 490.

In accordance with the filed rate doctrine, a regulated utility is forbidden from charging rates other than those filed with and/or approved by the Commission. In other words, beginning on January 1, 2007, Empire was legally obligated to charge the rates set forth in the tariffs then on file with the Commission and which had been approved by the Commission with the First Tariff Order. Empire had the right to rely, and is protected in its reliance, on the filed rates in providing utility service to its customers in Missouri. This conclusion is mandated by the filed rate doctrine and supported by the analysis regarding retroactive ratemaking set forth by this Court in *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 58 (Mo. banc 1979) (ordering a refund of the amount collected under the fuel adjustment clause “would clearly be confiscatory, and to order an offset of this refund by what a ‘reasonable rate’ would have been would be (retroactive) ratemaking at the order of this court, something we cannot do.”).

¹⁰ The Eighth Circuit stated that the rationale underlying the filed rate doctrine applies whether the rate at issue was approved by a federal regulatory authority or a state agency. 954 F.2d at 494. Thus, the rationale of the filed rate doctrine is applicable to rates established by the Missouri Public Service Commission.

In accordance with the filed rate doctrine, as well as RSMo. §393.140(11),¹¹ Empire is forbidden from charging rates to its Missouri customers other than those filed with and/or approved by this Commission. In other words, beginning on January 1, 2007, Empire was legally obligated to charge the rates set forth in the tariffs then on file with the Commission and which had been approved by the Commission with the First Tariff Order. Further, pursuant to the doctrine against retroactive ratemaking, with the issuance of the Second Tariff Order, the Commission was prevented from retroactively reinstating the 2005 tariffs – tariffs which had previously been found to be unjust and unreasonable, in part because they resulted in Empire failing to recover \$26.8 million of prudently incurred fuel and purchased power costs annually. Lastly, no matter what may or may not have been stated in the Second Tariff Order, it is the “filed rate doctrine” and the other applicable law discussed herein which governs the impact of the vacation of the First Tariff Order and the issuance of the Second Tariff Order with regard to the rates charged during the period of January 1, 2007 to December 14, 2007.

III. The Commission has not violated the mandate of this Court, because the Commission issued the Second Tariff Order in which it vacated the First Tariff Order and provided Public Counsel and all other parties an opportunity to seek

¹¹ RSMo. §393.140(11) reads, in part, as follows: “No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time . . .”

rehearing regarding the tariffs, in that the Commission did not attempt to retroactively reinstate the First Tariff Order, but instead re-approved the tariffs on a going-forward basis. (Responds to Point I of the Amicus Brief of the Industrial Intervenors)

Unlike Public Counsel which acknowledges that the Commission was authorized to prospectively approve the 2007 tariffs for service rendered on and after the effective date of the Second Tariff Order, the Industrial Intervenors appear to argue that the Commission failed to comply with this Court's prior mandate by re-approving the 2007 tariffs when it issued its order vacating the First Tariff Order. (Amicus Brief, pp. 12, 17) Like Public Counsel, however, the Industrial Intervenors point to the fact that the Commission discussed principles of the "filed rate doctrine" in the Second Tariff Order and then argue that this discussion amounts to the retroactive reinstatement of the First Tariff Order. At the heart of the argument of the Industrial Intervenors is the definition of "vacate." As discussed above, however, the vacation of an order does not turn back time, but instead cancels the effectiveness of that order and may create the legal fiction that such an order never existed.

The Industrial Intervenors argue that the Commission's actions, as represented by the Second Tariff Order, are "not consistent with the jurisprudence discussing the vacation of orders." Numerous case cites are then listed. A review of these cases, however, does not reveal a case on point with regard to a regulated utility and its tariffs. Instead, the majority of the cases involve jurisdictional or similar procedural questions, do not pertain to administrative law or agencies, and are cited for general principles that

are not directly applicable to and do not answer the questions at issue in the instant proceeding. A review of the cases cited by the Industrial Intervenors also does not reveal any authority which supports the argument that the 2005 rates should have been retroactively reinstated following the issuance of this Court's mandate in the First Mandamus Case and/or the Industrial Intervenors' apparent argument that the Commission was not authorized to re-approve the 2007 rates on a going-forward basis. Instead, the cases cited indicate that the Commission was within its authority to vacate the First Tariff Order, as directed by this Court, and enter a substantially similar order approving Empire's compliance tariffs on a prospective basis.

The statutes and cases applicable to the matter at hand are discussed above in Argument sections I and II. In summary, the Commission vacated the First Tariff Order by stating as such in the Second Tariff Order and by cancelling the effects of the First Tariff Order with regard to the time for the filing of applications for rehearing and thus seeking judicial review. Nothing in the prior mandate of this Court, or in any other law or decision, required – or even allowed – the Commission to retroactively reinstate the 2005 tariffs, just as nothing prevented the Commission from re-approving the 2007 tariffs on a prospective basis.

CONCLUSION

Given the facts and law set out above, Public Counsel has not shown a clear and unequivocal right to mandamus. The Commission has complied with all aspects of this Court's prior mandate. The relief sought by the Public Counsel herein is outside the proper scope of a mandamus action, and, with regard to the lawfulness and

reasonableness of the Report and Order and the Commission's approval of Empire's compliance tariffs, Public Counsel has other, adequate remedies available to it.

WHEREFORE, The Empire District Electric Company respectfully requests the Order of this Court dissolving its preliminary writ and denying Public Counsel's Petition for Writ of Mandamus. Empire requests such other and further relief as the Court deems just and proper under the circumstances.

BRYDON, SWEARENGEN & ENGLAND P.C.

James C. Swearengen #21510

Diana C. Carter #50527

312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Telephone: (573) 635-7166
Facsimile: (573) 634-7431
E-Mail:

DCarter@BrydonLaw.com <mailto:Paulb@brydonlaw.com>

Attorneys for The Empire District Electric Company

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Supreme Court Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 5,824 words (exclusive of the cover, certificates of compliance and service, and signature block), as calculated by Microsoft Word, the software used to prepare this brief.

The undersigned further certifies that a three-and-one-half inch diskette containing an electronic copy of this brief is in compliance with Supreme Court Rule 84.06(g), has been scanned for viruses, and is virus-free.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rules 84.07(a) and 84.06(g), the undersigned hereby certifies that a copy of this brief and a disk containing an electronic version of the brief complying with Supreme Court Rule 84.06(g) were hand-delivered on this 23rd day of April, 2008, to counsel of record:

Ms. Jennifer Heintz
Ms. Peggy Whipple
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102

Mr. Stuart W. Conrad
Mr. David Woodsmall
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65101

Ms. Shelley A. Woods
Missouri Department of Natural Resources
P.O. Box 899
Jefferson City, MO 65102-0899

James M. Fischer
Curtis D. Blanc
William G. Riggins
Kansas City Power & Light Company
101 Madison, Suite 400
Jefferson City, MO 65101

Mr. Lewis Mills, Jr.
Ms. Christina Baker
Mr. Mike Dandino
Office of the Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, Missouri 65102

IN THE SUPREME COURT OF MISSOURI

State ex rel. Office of the Public Counsel,)	
)	
Relator,)	
)	
vs.)	Case No. SC89176
)	
Public Service Commission of the)	
State of Missouri, et al.,)	
)	
Respondents.)	

**APPENDIX TO THE
BRIEF OF THE EMPIRE DISTRICT ELECTRIC COMPANY**

APPENDIX

Table of Contents

Report and Order issued in Commission Case No. ER-2006-0315 A1

RSMo. §393.140..... A60

RSMo. §393.150..... A65

RSMo. §386.270