

**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	)	

**ORIGINAL PROCEEDING IN MANDAMUS**

**BRIEF OF AMICUS  
INDUSTRIAL INTERVENORS**

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## **JURISDICTIONAL STATEMENT**

Industrial Intervenors adopt the jurisdictional statement provided by the Office of the Public Counsel in its Brief filed today.

## SUMMARY OF ARGUMENT

Finding that the Commission abused its discretion in setting an effective date for its December 29, 2006 Order that “effectively eliminated any meaningful opportunity for public counsel to apply for rehearing, and, thus, to seek review,”<sup>1</sup> this Court ordered 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.”<sup>2</sup>

Refusing to comply with this mandate, on December 4, 2007, the Commission issued an order *titled*: “Order Vacating December 29, 2006 Order Granting Expedited Treatment And Approving Tariffs, And Order Approving Tariffs.” The Commission openly refused to vacate its previous decision. In fact, the Commission points out, that through its December 4, 2007 Order, it “***simultaneously re-approves*** the tariff sheets filed by the Empire District Electric Company on December 28, 2006.”<sup>3</sup>

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<sup>1</sup> *State ex rel. Office of the Public Counsel v. Missouri Public Service Commission*, 236 S.W.3d 632, 636 (Mo. banc 2007).

<sup>2</sup> *Id.* at page 637 (emphasis added).

<sup>3</sup> *Order Vacating December 29, 2006 Order Granting Expedited Treatment And Approving Tariffs, And Order Approving Tariffs*, Case No. ER-2006-0315, issued December 4, 2007, at page 1. (emphasis added).

Case law provides that “[w]here a judgment is vacated or set aside by a valid order or judgment, *it is entirely destroyed and the rights of the parties are left as though no such judgment had even been entered.*”<sup>4</sup>

In its December 4, 2007 Order, the Commission refused to recognize that its December 29, 2006 order was “entirely destroyed.” Furthermore, the Commission’s order, by finding that Empire was entitled to charge and keep the rates collected pursuant to the tariff approved in the December 29, 2006 order, refused to ensure that “the rights of the parties are left as though no such judgment had even been entered.” Indeed, by attempting to make its order retroactive, it left the parties without any remedy for this unlawful collection. Though appearing to claim (and still claiming in this proceeding) that the parties could now seek rehearing, the Commission has yet to deny a single application for rehearing and applications for stay, some now over 16 months old. By doing this, the Commission attempts to deny the parties access to Missouri courts, denies them the rights recognized by Article V, Section 18 of our state Constitution, and denies them the ability to seek a stay from the courts.

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<sup>4</sup> 49 C.J.S. Judgments §357. See also, *Buchanan v. Cabiness*, 245 S.W.2d 868, 873 (Mo. 1951).

**POINTS AND AUTHORITIES RELIED UPON**

**I. THE PUBLIC SERVICE COMMISSION VIOLATED THIS COURT'S MANDAMUS TO VACATE ITS DECEMBER 29, 2006 ORDER BECAUSE IT FAILED TO PERFORM ITS NON-DISCRETIONARY DUTY TO COMPLY WITH THAT WRIT OF MANDAMUS IN THAT THE COMMISSION ATTEMPTED TO RETROACTIVELY REINSTATE ITS DECEMBER 29, 2006 ORDER AS THOUGH NO DIRECTIVE TO VACATE THAT ORDER HAD EVER BEEN ISSUED BY THIS COURT.**

- *Buchanan v. Cabiness*, 245 S.W.2d 868 (Mo. 1951)
- 49 C.J.S. Judgments §357

## STANDARD OF REVIEW

This is an original proceeding in mandamus. Therefore, the Court must determine whether it meets the criteria for the issuance of mandamus. The standard for the issuance of a writ of mandamus is:

- (a) 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.
- (b) The writ can only be issued to compel a party to act when it was his duty to act without it.
- (c) It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none.
- (d) A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed.
- (e) He must show himself possessed of a clear and legal right to the remedy.
- (f) Mandamus does not issue except in cases where the ministerial duty sought to be coerced is definite, arising under conditions admitted or proved and imposed by law.<sup>5</sup>

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<sup>5</sup> *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157, 165-166 (Mo. 2006).

## **STATEMENT OF FACTS**

Industrial Intervenors adopt the statement of facts provided by the Office of the Public Counsel.

## ARGUMENT

I. THE PUBLIC SERVICE COMMISSION VIOLATED THIS COURT’S MANDAMUS TO VACATE ITS DECEMBER 29, 2006 ORDER BECAUSE IT FAILED TO PERFORM ITS NON-DISCRETIONARY DUTY TO COMPLY WITH THAT WRIT OF MANDAMUS IN THAT THE COMMISSION ATTEMPTED TO RETROACTIVELY REINSTATE ITS DECEMBER 29, 2006 ORDER AS THOUGH NO DIRECTIVE TO VACATE THAT ORDER HAD EVER BEEN ISSUED BY THIS COURT.

In SC88390, this Court ruled that the Commission abused its discretion by denying Public Counsel [and, by implication, other parties] a “reasonable period of time” to seek rehearing.<sup>6</sup> This Court ordered 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.”<sup>7</sup>

The Commission violated this clear mandate.

Instead, the Commission engaged in selective compliance, only choosing to change those portions that had no financial impact on Empire. In clear violation of this Court’s order, the Commission vacated *only* that aspect of its December 29,

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<sup>6</sup> *State ex rel. Office of the Public Counsel v. Missouri Public Service Commission*, 236 S.W.3d 632, 637 (Mo. banc 2007) (emphasis added).

<sup>7</sup> *Id.*

2006 order which established the effective date by which parties were to file an application for rehearing. It then “simultaneously” reaffirmed that aspect of its order which approved Empire’s compliance tariff. “To comply with the mandate, the Commission hereby vacates its order as directed, and simultaneously re-approves the tariff sheets filed by The Empire District Electric Company on December 28, 2006.”<sup>8</sup> The Commission’s non-compliance is further emphasized later in the order.

Thus, the Commission concludes that if Empire charged the rates as approved in the December 29, 2007 [sic – should be 2006] order, it charged the correct rates. And further, those rates remain the rates “in effect at the time” until the order is vacated. After the order is vacated, the current order approving the tariffs will become effective and once again, Empire will be required to charge the just and reasonable rates as determined by the Commission in its Report and Order and clarifying order.<sup>9</sup>

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<sup>8</sup> *Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs*, Case No. ER-2006-0315, issued December 4, 2007 at page 1. (emphasis added).

<sup>9</sup> *Id.* at pages 6-7.

The Commission's action in response to the Supreme Court's opinion and mandate is not consistent with the jurisprudence discussing the vacation of orders. It is well settled that a vacated order is destroyed and has no effect.

Where a judgment is vacated or set aside by a valid order or judgment, *it is entirely destroyed and the rights of the parties are left as though no such judgment had even been entered.* No further steps can be legally taken to enforce the vacated judgment. The original judgment is not susceptible to appeal and cannot become a final judgment from which an appeal can be taken. The action, however, is left pending and undetermined, and further proceeding may be had and taken therein.<sup>10</sup>

This legal doctrine has been repeatedly accepted by Missouri courts.

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. The matters in controversy are left open for future determination.<sup>11</sup>

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<sup>10</sup> 49 C.J.S. Judgments §357.

<sup>11</sup> *Buchanan v. Cabiness*, 245 S.W.2d 868, 873 (Mo. 1951) (citing to Freeman on Judgments, 5<sup>th</sup> Ed., Vol. 1, Sec. 302; 49 C.J.S. 357, Sec. 306; A.L.I. Restatement of Judgments, Sec. 41, Comments d and e). See also, *State ex rel. Seiser's Estate v. Lasky*, 565 S.W.2d 792 (Mo.App.E.D. 1978); *Ball v. Shannon*, 975 S.W.2d 947

The notion that a vacated judgment is destroyed and the parties restored to their previously existing status is so widely accepted as to be absolute.<sup>12</sup>

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(Mo.App.S.D. 1998); *B— L— C— (K--)* v. *W—W—C--*, 568 S.W.2d 602, 604 (Mo.App.W.D. 1978) (A vacated judgment “loses all efficacy as an adjudication.”).

<sup>12</sup> *Nielson v. Patterson*, 65 P.3d 911, 914 (Az. 2003) (“A vacated judgment lacks force or effect and places parties in the position they occupied before entry of the judgment.”); *State v. Phillips*, 353 A.2d 706, 708 (Ct. 1974) (“Setting aside or vacating a prior order renders the situation the same as though the order had never been made.”); *E.I. DuPont De Nemours v. Native Hammock Nursery*, 698 So.2d 267, 270 (Fl. 1997) (“Where a judgment is vacated or set aside, it is as though no judgment had ever been entered.”); *Osborne Bonding & Sur. Co. v. State*, 491 S.E.2d 837, 839 (Ga. 1997) (“By vacating a judgment, the trial court returns the case to the posture it occupied prior to that judgment.”); *People v. Eidel*, 745 N.E.2d 736, 745 (Il. 2001) (“To ‘vacate’ a judgment is to nullify or cancel it. A judgment that has been vacated is void. It is “entirely destroyed. The vacatur restores the parties to the status quo ante, as though the trial court judgment had never been entered.”); *Standard Life Assn. v. Merrill*, 75 P.2d 825, 827 (Ks. 1938) (“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. The matters in controversy are left open for future

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determination.”); *Morris v. Morris*, 10 S.W.2d 277, 279 (Ky. 1928) (“the status of these parties now is the same that it was on December 17, 1927, before these judgments were entered”); *Young v. Progressive Cas. Ins. Co.*, 671 A.2d 515, 518 (Md. 1996) (“the judgment was vacated and thereafter ceased to exist.”); *In re Hollensbee’s Estate*, 67 So.2d 275, 276 (Ms. 1953) (“Where a judgment is vacated or set aside by a valid order or judgment, it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered. No further steps can be legally taken to enforce the vacated judgment.”); *Miller v. Schlereth*, 36 N.W.2d 497, 506 (Ne. 1949) (“An order or decree which is vacated is nullified so that the resulting situation is precisely the same as if the order or decree had never existed. The result of the vacating of the decree was to remit the parties in all respects to the position which they occupied immediately succeeding the original filing of the pleadings in the district court.”); *McKay v. Estate of McKay*, 501 A.2d 610, 613 (N.J. 1984) (“When a judgment is vacated or set aside . . . it is entirely destroyed and the rights of the parties are left as though no such judgment had been entered.”); *Wuenschel v. New Mexico Broadcasting Corp.*, 500 P.2d 194, 195 (N.M. 1972) (“When the original judgment was vacated, the status of the case was as though no judgment had been entered.”); *In re Grube’s Will*, 294 N.Y.S. 311, 314 (N.Y.Sur. 1937) (“It is, of course, obvious that when an order or decree is vacated, it is nullified, and the resulting situation is precisely the same ‘as if it never had existed.’”); *Tims v. Holland Furnace Co.*, 90 N.E.2d 376, 380 (Oh.

Because the Commission refused to comply with this Court’s mandate, and through its attempt to retroactively “fix” its earlier abuse of discretion, the parties are denied the ability even to seek a judicial stay of the approval order which could well have prevented the unlawful collection.

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1950) (“The generally accepted rule is that where a court, in the proper discharge of its judicial functions, vacates an order or judgment previously entered, the legal status is the same as if the order or judgment had never existed. In other words, the vacation of a judgment results in the destruction thereof.”); *Todd v. Orr*, 145 P. 393, 394 (Ok. 1944) (“the whole suit or matter stands precisely as if no such consideration had been had or entered of record, and all parties interested are remitted back to such rights and remedies as they had before the making of the orders or judgments so vacated.”); *In re Higbee’s Estate*, 93 A.2d 467, 469 (Pa. 1953) (“Where a judgment is vacated or set aside by a valid order or judgment, it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered.”); *P.V. Intern. Corp v. Turner, Mason & Solomon*, 700 S.W.2d 21, 22 (Tx. 1985) (“if a judgment is set aside, the cause stands as if there has been no final judgment. The effect of setting aside a judgment is to place the parties in the position they occupied before the rendition of judgment.”); *Weber v. Biddle*, 431 P.2d 705, 710 (Wa. 1967) (“a judgment which has been vacated by a valid order is entirely destroyed, and the rights of the parties are left as though no such judgment had ever been entered.”).

In response to the Supreme Court mandate to “vacate” its previous decision, the Commission failed either to destroy its previous decision or to return the parties to the status that existed prior to the vacatur. Instead, the Commission attempted to retroactively reaffirm its previous order.

Such action does not comply with the Supreme Court’s mandate and the Commission, apparently, must be specifically ordered to completely vacate, in all aspects, its December 29, 2006 Order. And, since it allegedly “re-approves” the tariff sheets filed by Empire, a finding contained in the December 29, 2006 decision, the Commission now should also be required to vacate its December 4, 2007 Order Vacating December 29, 2006 Order Granting Expedited Treatment And Approving Tariffs, And Order Approving Tariffs.

## CONCLUSION

Industrial Intervenors, consistent with the Petition for Writ of Mandamus, ask the Court to make absolute its preliminary writ of mandamus and direct the Commission to completely vacate, in all aspects, its December 29, 2006 Order. And, since it allegedly “re-approves” the tariff sheets filed by Empire, a finding contained in the December 29, 2006 decision, the Commission should also be required to vacate its December 4, 2007 Order Vacating December 29, 2006 Order Granting Expedited Treatment And Approving Tariffs, And Order Approving Tariffs.

Respectfully submitted,

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**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 2,139 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.

\_\_\_\_\_  
David Woodsmall

**CERTIFICATE OF SERVICE**

Pursuant to Supreme Court Rules 84.07(a) and 84.06(g), the undersigned hereby certifies that two copies of this brief, along with a disk containing an electronic version of the brief complying with Supreme Court Rule 84.06(g), were hand-delivered or sent by U.S. Mail, postage prepaid, on this 16th day of April, 2008, to the following counsel of record:

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