

**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  
BRIEF OF RELATOR OFFICE OF THE PUBLIC COUNSEL**

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## JURISDICTIONAL STATEMENT

This is an action for a writ of mandamus to enforce this Court's writ of mandamus in *State ex rel. Office of the Public Counsel v. Public Service Commission*, 236 S.W.3d 632 (Mo. banc 2007) (hereinafter denoted *First Mandamus Case*) because the Public Service Commission violated the writ's directive to "vacate" its December 29, 2006 order and instead held that its December 29, 2006 order remained effective rather than nullifying the order and restoring the rates in effect before the new tariffs were approved. Because this action is derivative of this Court's original mandamus order, Public Counsel seeks enforcement in this Court rather than in the Court of Appeals, Western District. The filing of this action in this Court in the first instance promotes judicial economy and the interests of justice. Supreme Court Rule 41.03 states: "Rules 41 to 101, inclusive, shall be construed to secure the just, speedy, and inexpensive determination of every action."

On April 8, 2006, the Court overruled without comment Empire's motion to dismiss the petition under Supreme Court Rule 84.22 (a).

Not only does this Court exercise "general superintending control over all courts and tribunals" with authority to "issue and determine original remedial writs." Mo. Const. Art. V, Sec. 4 (1945, as amended 1976), but the Court also has inherent authority based upon common law, "to vindicate its own dignity" and "to enforce obedience to its mandates" and the court whose authority is defied has the power to punish by contempt or to entertain proceedings to that end to enforce its orders when they are not obeyed. (See, *State ex rel. Crowe v. Shepherd*, 177 Mo. 205, 76 S.W. 79 (Mo. 1903) holding that courts have inherent power to enforce orders through contempt). Mandamus is the

appropriate remedial writ when an administrative board acts unlawfully, has exceeded its authority, acted outside of its jurisdiction or abused the exercise of its discretion. *State ex rel. Office of the Public Counsel v. Public Service Commission, supra*, 636; *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 14 (Mo. 1968). The Supreme Court and the Courts of Appeal, but not the circuit courts, can issue extraordinary writs of prohibition or mandamus to, or enjoin, the Commission. Section 386.510, RSMo; *State of Missouri ex rel. A&G Commercial Trucking, Inc. v. Director of the Manufactured Housing, et al.*, 168 S.W.3d 680 (Mo. App. 2005).

## SUMMARY OF THE ARGUMENT

Relator Office of the Public Counsel asks the Court to make its preliminary writ of mandamus absolute and direct the PSC to comply with the October 30, 2007 opinion and order in the *First Mandamus Case*, 236 S.W.3d 632 (Mo. banc 2007) and vacate the Public Service Commission's December 29, 2006 order.

Mandamus is an appropriate remedy to compel the Commission to comply with the October 30, 2007 opinion and order and vacate the Public Service Commission's December 29, 2006 order. While the Commission issued an order on December 4, 2007, it only complied with one requirement: providing a reasonable opportunity for Public Counsel to file its application for rehearing of that new order. Although the Commission maintained that it "vacated" its prior order, it did not set aside that order and specifically held that the rates were effective continuously since January 1, 2007. Unless the Court issues its writ of mandamus to compel full compliance, Public Counsel will continue to be deprived of the rights secured by the issuance the original writ of mandamus.

**POINTS AND AUTHORITIES RELIED ON**

I. THE PUBLIC SERVICE COMMISSION'S DECEMBER 4, 2007 ORDER THAT PURPORTED TO "VACATE" THE DECEMBER 29, 2006 ORDER APPROVING EMPIRE DISTRICT ELECTRIC COMPANY'S TARIFFS WAS UNLAWFUL BECAUSE THE PSC FAILED TO COMPLY WITH THE COURT'S MANDATE IN *STATE EX REL. OFFICE OF THE PUBLIC COUNSEL V. PUBLIC SERVICE COMMISSION*, 236 S.W.3D 632 (MO. BANC 2007) TO VACATE THE ORDER IN THAT THE PSC DID NOT SET IT ASIDE AND TERMINATE THE EFFECT OF ITS DECEMBER 29, 2007 ORDER AND DID NOT RESTORE THE RATES IN EFFECT PRIOR TO THE ORDER, BUT INSTEAD DECLARED THAT EMPIRE'S TARIFFS REMAINED THE PROPER TARIFFS CHARGED TO CUSTOMERS SINCE JANUARY 1, 2007.

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

II. PUBLIC COUNSEL IS ENTITLED TO A WRIT OF MANDAMUS TO COMPEL THE PUBLIC SERVICE COMMISSION TO IMMEDIATELY AND FULLY COMPLY WITH THE COURT'S DIRECTIVE TO VACATE THE DECEMBER 29, 2006 ORDER BECAUSE PUBLIC COUNSEL MEETS THE CRITERIA FOR A WRIT OF MANDAMUS IN *FURLONG V. CITY OF KANSAS CITY* IN THAT THE PUBLIC SERVICE COMMISSION LACKS DISCRETION TO COMPLY WITH THE COURT'S

ORDER AND PUBLIC COUNSEL DOES NOT HAVE AN ADEQUATE AND EFFICIENT LEGAL REMEDY TO REVERSE THE PSC'S ORDER AND ENFORCE THE COURT'S MANDATE IN *STATE EX REL. OFFICE OF THE PUBLIC COUNSEL V. PUBLIC SERVICE COMMISSION*, 236 S.W.3d 632 (MO. BANC 2007).

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

*State ex rel. Kansas City v. Kansas City Gas Co.*, 254 Mo. 515, 163 S.W. 854

(Mo. banc 1914)

*State ex rel. Office of the Public Counsel v. Public Service Commission*, 236 S.W.3d 632

(Mo. banc 2007)

RSMo § 386.510

RSMo § 386.520

## STANDARD OF REVIEW

The standard of review is a *de novo* review to determine if the Public Service Commission's Order of December 4, 2007 violated the Court's first writ of mandamus. The Court exercises unrestricted independent judgment when determining whether an order is lawful and must correct the Commission's erroneous interpretations of the law. *State of Missouri ex rel. Associated Natural Gas Company v. Public Service Comm'n*, 37 S.W. 3d 287, 292 (Mo. App. 2000).

The usual "lawful and reasonable" review under Section 386.510, RSMo and *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1971) does not apply in this mandamus action. *First Mandamus Case*, 236 S.W.3d at 635. As an original proceeding in mandamus, the Court must determine whether it meets the criteria for the issuance of mandamus.<sup>1</sup>

The writ of mandamus is not appropriate to control the discretion the PSC, but is proper "where the administrative board (or court) has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it has abused whatever discretion may have been vested in it." *State ex rel. Keystone Laundry & Drycleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 14 (Mo. 1968) The Commission had no discretion to refuse to vacate its order. Under the criteria set out in *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157, 165-66 (Mo. banc 2006), this is a proper mandamus proceeding like the underlying mandamus proceeding. As in the original

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<sup>1</sup> *Ibid.*

mandamus case Public Counsel has a “clear, unequivocal, specific right to a thing claimed.” *Furlong, supra*.

After the Court determines if there has been a violation of its order, it then proceeds to an analysis of whether issuance of a writ of mandamus is the appropriate remedy. In the First Mandamus Case, the Court applied the criteria identified in *Furlong* as the purpose and the standard for issuance of a writ of mandamus:

- (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 for 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.

## **STATEMENT OF FACTS**

### **Parties**

Relator Office of the Public Counsel is an agency of the State of Missouri and under Sections 386.700 and 386.710, RSMo, represents the public in all proceedings before the Public Service Commission and on appeal before the courts. Public Counsel has the “right to appeal any and all orders of the public service commission to the courts....” Section 386.710.2, RSMo. (Petition for Writ of Mandamus, p. 1)

Respondent Public Service Commission, a state administrative agency with its principle office located in Jefferson City, Cole County, Missouri, has the authority and duty to regulate public utilities, including electric companies under Chapters 386 and 393 RSMo. Respondents Jeff Davis, Connie Murray, Terry Jarrett, Robert Clayton III, and Lin Appling<sup>2</sup> are the duly appointed and acting Commissioners and collectively comprise the current Commission. They are sued in their official capacity. (Petition, p. 2)

Intervenor Empire District Electric Company is a public utility (Section 386.020(42)) and an electrical corporation under Section 386.020(15), RSMo. The Commission has jurisdiction over Empire's services, activities, and rates. (Sections 386.020(42), 386.250 and Chapter 393, RSMo.) (Petition, p. 2)

### **Empire’s Rate Case Before the Commission**

On February 1, 2006, The Empire District Electric Company filed a general rate case (Commission Case No. ER-2006-0315) and proposed tariffs that would increase its

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<sup>2</sup> Lin Appling’s term as Commissioner ended on March 31, 2008.

rates by approximately 10%. The Commission suspended the Company's proposed effective date for the tariffs which left the pre-filing existing tariffs in effect pending approval of new tariffs that reflected the outcome of the rate case. The rate case proceeded as a contested case proceeding with evidentiary hearings. The Commission issued its Report and Order addressing procedural, evidentiary, and regulatory issues on December 21, 2006. (Petition, p. 3)

The Commission rejected the February 1, 2006 tariffs Empire filed to start the case, but authorized Empire in that December 21, 2006 Report and Order to file new tariffs that would produce a smaller increase than the rates proposed in those original February 1 tariffs. The Commission's December 21, 2006 Report and Order authorized Empire to file new tariffs that would increase its rates by \$38,179,048 per year. (Petition, p. 3, 9)

On December 27, 2006, Empire filed new tariffs that it intended to comply with the authorization granted in the Report and Order. After consulting with the Staff of the Commission, Empire withdrew those tariffs on December 28, 2006 and, with the intent to comply with the Report and Order, filed new proposed tariffs that were different from the tariffs filed on December 27, 2006. Later on December 28, 2006 (the same day the tariffs were withdrawn and new tariffs filed), Empire filed a substitute tariff sheet in its continuing effort to conform its proposed tariffs to its interpretation of the authorization granted by the Commission. Also on December 28, 2006, Empire filed a motion for expedited treatment of the newly filed tariffs. (Petition, p. 3)

Over objections of Public Counsel that the tariffs did not comply with the Report and Order, the Commission approved the tariffs in an order on Friday, December 29, 2006, effective January 1, 2007. The order deprived Public Counsel of a reasonable opportunity to file an effective application for rehearing. A detailed history of Public Counsel's first writ of mandamus action and the facts that occurred before the Supreme Court's October 30, 2007 Opinion is set out in that opinion at *State ex rel. Office of the Public Counsel v. Public Service Commission*, 236 S.W.3d 632 (Mo. banc 2007). (Petition, p. 4)

### **Supreme Court Issues Writ of Mandamus**

The Supreme Court issued a unanimous Opinion on October 30, 2007, granting Public Counsel's petition and issuing its writ of mandamus to the Public Service Commission. In its opinion, the Supreme Court found that "applicants must be given a *reasonable period of time* in which to file their petitions" for rehearing. By limiting this opportunity to a mere hour and twenty minutes, "the PSC effectively eliminated any meaningful opportunity for Public Counsel to apply for rehearing, and, thus, to seek review, a remedy to which it is statutorily entitled."<sup>3</sup> The Court found that "the PSC abused its discretion to provide Public Counsel with a reasonable period of time in which to appeal the order." The Court entered its order with two directives: (1) vacate the previous order and (2) allow a reasonable opportunity to file an application for rehearing.

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<sup>3</sup> *Ibid.*

“This Court makes peremptory its alternative writ of mandamus, requiring the PSC 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.”<sup>4</sup>

On November 15, 2007, with the issuance of the Supreme Court’s mandate, jurisdiction over this matter was returned to the Commission. (Petition, p. 5-6)

On December 4, 2007, the Commission issued an “Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs.” The December 4, 2007 order did provide Public Counsel a reasonable time to prepare and file an application for rehearing of that order. The Commission also stated in its order that it vacated its December 29, 2006 Order and stated that it had complied with the Court’s writ of mandamus. However, the PSC then went on to state:

Thus, the Commission concludes that if Empire charged the rates as approved in the December 29, 2007 [*sic; the year 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.

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<sup>4</sup> *Ibid.*

The parties will still be in the position of having effective tariffs with an outstanding challenge.<sup>5</sup>

The practical effect of the Commission's order was to continue Empire's authority to charge the rates approved in the December 29, 2006 order during the period January 1, 2007 (the designated effective date) to December 4, 2007 when the PSC claimed it vacated that order. (Petition, p. 6-7)

Public Counsel filed its application for rehearing of the new order on December 13, 2007 and identified how the Commission's decision is not consistent with the Supreme Court's mandate. To date, the Commission has not ruled on the applications for rehearing of the December 4, 2007 Order. (Petition, p. 8)

Although the Court directed the Commission to vacate the December 29, 2006 order, the Commission held that the tariffs approved by that order were lawfully in effect until the order was vacated. Instead of paying rates based on the rate tariffs in effect at the start of the rate case on February 1, 2006, Empire's customers paid electric rates based on the tariffs approved by the order of December 29, 2006, the order the Court ordered vacated. As a result of the Commission continuing the effectiveness of its tariff order from January 1, 2007 to December 14, 2007, Empire customers paid rates that were approximately \$38 million more than authorized in the pre-filing tariffs. (Petition, p. 9)

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<sup>5</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 pages 6-7; emphasis added.

## ARGUMENT

I. THE PUBLIC SERVICE COMMISSION'S DECEMBER 4, 2007 ORDER THAT PURPORTED TO "VACATE" THE DECEMBER 29, 2006 ORDER APPROVING EMPIRE DISTRICT ELECTRIC COMPANY'S TARIFFS WAS UNLAWFUL BECAUSE THE PSC FAILED TO COMPLY WITH THE COURT'S MANDATE IN *STATE EX REL. OFFICE OF THE PUBLIC COUNSEL V. PUBLIC SERVICE COMMISSION*, 236 S.W.3D 632 (MO. BANC 2007) TO VACATE THE ORDER IN THAT THE PSC DID NOT SET IT ASIDE AND TERMINATE THE EFFECT OF ITS DECEMBER 29, 2007 ORDER AND DID NOT RESTORE THE RATES IN EFFECT PRIOR TO THE ORDER, BUT INSTEAD DECLARED THAT EMPIRE'S TARIFFS REMAINED THE PROPER TARIFFS CHARGED TO CUSTOMERS SINCE JANUARY 1, 2007.

A. This Court ordered the Commission to vacate its December 29, 2006 order, and the Commission failed to do so. On October 30, 2007, this Court held that the Commission's December 29, 2006 order violated Public Counsel's right to appeal and was an abuse of discretion and issued its opinion and writ of mandamus commanding 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."<sup>6</sup> In an order issued December 4, 2007, the Commission once again approved the tariffs filed on December 28, 2006, but this time issued the order

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<sup>6</sup> *First Mandamus Case*, 236 S.W.3d at 636 (Mo. banc 2007)

with an effective date ten days after the issue date, thus allowing Public Counsel reasonable time to prepare and file an application for rehearing. But the Commission did not – either in the December 4, 2007 order or at any other time – vacate the December 29, 2006 order. In fact, in the December 4, 2007 order, the Commission explicitly reaffirmed the effectiveness of the order it was directed to vacate.

1. A recitation of the events at the Commission preceding Public Counsel’s first petition for a writ of mandamus is found in the Statement of Facts section of this brief and will not be repeated here. In response to those events, Public Counsel pursued a mandamus action, first in the Court of Appeals and then in this Court, to compel the Commission to allow adequate time for a request for rehearing of the Commission’s December 29, 2006 order. In its Petition for Writ of Mandamus filed in this Court in the *First Mandamus Case*, Public Counsel closed its petition with the following prayer for relief:

WHEREFORE, Public Counsel requests that the Court issue its preliminary writ of mandamus to the Public Service Commission of Missouri and

(1) direct that the Commission vacate and rescind its December 29 Order Granting Expedited Treatment and Approving Tariffs and,

(2) upon the issuance of a new order – if the Commission so chooses to issue an order – direct that the Commission provide an effective date for such Report and Order or other final order that is at least ten calendar days after the issuance of the Report and Order or other final order or that has an effective date that is after the date of issuance by an amount of time that is

reasonably sufficient to allow for the preparation of an adequate application for rehearing.... (*First Mandamus Case*, Petition for Writ of Review, page 12).

After briefing and argument, this Court agreed that the amount of time the Commission allowed for applications for rehearing of its December 29, 2006 order was clearly unreasonable. In its October 30, 2006 opinion, this Court found that “applicants must be given a *reasonable period of time* in which to file their petitions” for rehearing. By limiting this opportunity to a mere hour and twenty minutes, “the PSC effectively eliminated any meaningful opportunity for Public Counsel to apply for rehearing, and, thus, to seek review, a remedy to which it is statutorily entitled.”<sup>7</sup> This Court entered the following order: “This Court makes peremptory its alternative writ of mandamus, requiring the PSC 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.”<sup>8</sup> Although the wording is somewhat different, it is clear that this Court granted the two-pronged relief Public Counsel requested: vacation of the December 29, 2006 order **and** sufficient opportunity to apply for rehearing of any subsequent order.

B. In response, the PSC issued an order that gave Public Counsel just half of the relief granted by this Court: a reasonable opportunity to file for rehearing of the new

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

order. Although it denominated its action as vacating the December 29, 2006 order, the Commission held that the rates approved in the December 29, 2006 order “remain the rates 'in effect at the time' until the order is vacated.”<sup>9</sup>

1. The intent of the Commission's December 4, 2007 order is clear: the Commission wanted to continue the effectiveness of all aspects of the December 29, 2006 order except its effective date. It did not want to vacate or nullify the December 29, 2006 order but rather to modify it slightly, and only to the extent of allowing an application for rehearing of the modified order to be filed almost a year later. The Commission and Empire have now collectively filed four pleadings in this matter, and they have yet to cite to any accepted legal definition of “vacate” with which the Commission's December 4, 2007 order is consistent. Instead, they gloss over the failure to vacate and instead stress that the December 4, 2007 order complies with the second part of this Court's October 30, 2007 decision (concerning the effective date of a subsequent order). The October 30, 2007 decision required two actions, joined by the word “and.” The Commission cannot comply by choosing to take only the latter of the two actions.

2. To comply with this Court's October 30, 2007 order, the Commission should have completely set aside its December 29, 2006 order and held that it had no effect. This is not a difficult concept, nor is the requirement to vacate based on an obscure bit of *dicta* in the October 30, 2007 decision. While the Commission actually

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<sup>9</sup> *Order Granting Expedited Treatment and Approving Tariffs*, Case No. ER-2006-0315, issued December 29, 2006.

vacating its December 29, 2006 order may have dismayed Empire, it is an action clearly and explicitly **required** by the Commission pursuant to this Court's October 30, 2007 decision. Had Empire or the Commission been concerned about the consequences of such vacation, or this Court's use of the term “vacate,” they could have requested clarification or reconsideration. They did not do so, and the October 30, 2007 decision is final – and the Commission's obligation to comply with it is absolute. Upon vacation of the December 29, 2006 order, the Commission was authorized by this Court's October 30, 2007 decision to (and in fact did) prospectively approve the December 28, 2006 tariffs. But prospective approval with adequate time for rehearing requests is only half of the relief granted in the October 30, 2007 decision.

II. PUBLIC COUNSEL IS ENTITLED TO A WRIT OF MANDAMUS TO COMPEL THE PUBLIC SERVICE COMMISSION TO IMMEDIATELY AND FULLY COMPLY WITH THE COURT'S DIRECTIVE TO VACATE THE DECEMBER 29, 2006 ORDER BECAUSE PUBLIC COUNSEL MEETS THE CRITERIA FOR A WRIT OF MANDAMUS IN *FURLONG V. CITY OF KANSAS CITY* IN THAT THE PUBLIC SERVICE COMMISSION LACKS DISCRETION TO COMPLY WITH THE COURT'S ORDER AND PUBLIC COUNSEL DOES NOT HAVE AN ADEQUATE AND EFFICIENT LEGAL REMEDY TO REVERSE THE PSC'S ORDER AND ENFORCE THE COURT'S MANDATE IN *STATE EX REL. OFFICE OF THE PUBLIC COUNSEL V. PUBLIC SERVICE COMMISSION*, 236 S.W.3d 632 (MO. BANC 2007).

A. All of the *Furlong*<sup>10</sup> criteria for issuance of a writ of mandamus are satisfied in this action. In *Furlong*, this Court identified the purpose and the standard for issuance of a writ of mandamus. The facts and law in this case meet that purpose and standards.

Pursuant to *Furlong*, the Court will look favorably on a petition for writ of mandamus if the following purpose and factors are present:

1. 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.
2. The writ can only be issued to compel a party to act when it was his duty to act without it.
3. It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none.
4. A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed.
5. He must show himself possessed of a clear and legal right to the remedy.
6. 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.

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<sup>10</sup> *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157, 165-166 (Mo. 2006)

An analysis of this case demonstrates that it dovetails into these essential elements identified in *Furlong* that support the issuance of a writ of mandamus.

1. Public Counsel's purpose in seeking this writ of mandamus is to compel the Commission to comply with this Court's October 30, 2007 decision, a ministerial act which the Commission has failed to perform.

2. Pursuant to this Court's October 30, 2007 decision, the Commission was required to vacate its December 29, 2006 order. The Commission has a duty to do so without this Court issuing a new writ of mandamus.

3. The Commission has authority to vacate its December 29, 2006 order, and so a new writ of mandamus will confer upon the Commission no new authority.

4. As the prevailing party in the *First Mandamus Case*, Public Counsel has a clear, unequivocal specific right to have the Commission comply with the relief granted in that case and vacate its December 29, 2006 order.

5. This Court's October 30, 2007 decision created a duty on the part of the Commission to comply with that decision. Public Counsel has a clear and legal right to an order in mandamus requiring the Commission to fulfill that duty.

6. In this case, the ministerial duty is definite: the Commission must comply with the October 30, 2007 decision and vacate its December 29, 2006 order. This duty is imposed by the October 30, 2007 order and is proved quite simply by reference to that order.

B. There are no adequate alternative remedies. Both Empire and the Commission suggest that mandamus does not lie because Public Counsel may be able to raise on

appeal pursuant to Section 386.510 RSMo the Commission's failure to comply with this Court's October 30, 2007 decision. This suggestion does not bear scrutiny. This mandamus action, like the underlying writ of mandamus issued on October 30, 2007, does not supersede or violate the statutory appeal procedure. As the *Furlong* analysis demonstrates, failure to comply with an order of mandamus is tailor-made for a second order of mandamus. Waiting for the Commission to rule upon all the pending applications for rehearing, and then prosecuting a lengthy appeal pursuant to Section 386.510 RSMo is simply not an adequate way to enforce a clear mandate from this Court. Moreover, because of the operation of Section 386.520 RSMo, the Commission's December 29, 2006 order, which this Court has ruled to be a nullity *ab initio*, would be presumed lawful and effective throughout the appeals process.

Mandamus is the only remedy that will provide adequate relief in this case. Although it is not a tool to be used lightly, in circumstances like those here, it is the only tool able to create an adequate remedy. *State ex rel. Kansas City v. Kansas City Gas Co.*, 254 Mo. 515, 163 S.W. 854, 857 (Mo. banc 1914) described the limitations of relief by mandamus:

[A] writ of mandamus has been justly denominated a hard and fast writ, and an unreasoning writ, a cast-iron writ, the right arm of the court. It is essentially the exponent of judicial power, and hence is reserved for extraordinary emergencies. It does not issue except in cases where the ministerial duty sought to be coerced is simple and definite, arising under

conditions admitted or proved and imposed by law. It does not issue where the right is doubtful, or where there is another adequate remedy.

In *State of Missouri, ex rel. Kelley v. Mitchell*, 595 S.W.2d 261 (Mo. 1980), the Court said that because of the nature of mandamus “the remedial writ ought to be reserved for those cases in which no alternative measure will be effective. ‘Its object is not to supersede but to supply the want of a legal remedy.’” The Commission’s failure to carry out the mandate to vacate its December 29, 2006 order has left Public Counsel without any other adequate legal remedy.

C. Respondents refer to the Filed Rate Doctrine. In Missouri, the Filed Rate Doctrine has been defined as follows:

The 'filed rate' doctrine says, in essence, that any rate **filed with and approved** by the appropriate regulatory agency has the imprimatur of government and cannot be the subject of legal action against the private entity that filed it." (See, *Keith A. Rowley, Immunity from Regulatory Price Squeeze Claims: From Keigh, Parker, and Boerr to Town of Concord and Beyond*, 70 Tex. L. Rev. 399, 400 n. 6 (1991). )<sup>11</sup>

Respondents suggest that, because of this doctrine, the result of this Court issuing a second order of mandamus will be other than what they presume Public Counsel believes the result will be.

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<sup>11</sup> *Southwestern Bell Tel. Co. v. Metro-Link Telecom*, 919 S.W.2d 687, 692 (Tex. App. 1996); emphasis added.

1. Such arguments are well beyond the scope of this case, which is exceedingly narrow: this Court mandated that the Commission vacate one of its orders, the Commission did not do so, and Public Counsel now seeks enforcement of the Court's mandate. The time to debate the propriety of requiring the Commission to vacate its order was during the *First Mandamus Case*. The question of whether the Filed Rate Doctrine has any impact on what rates Empire was lawfully allowed to charge between January 1, 2007 and December 14, 2007 will almost certainly arise in some future case, but it does not bear on the narrow issue in this case. This case is neither about re-examining the outcome of the *First Mandamus Case* nor about anticipating future arguments, but rather about compelling compliance with an unequivocal order of this Court.

2. In any event, the Filed Rate Doctrine only applies to rates that have been filed with and lawfully approved<sup>12</sup> by a regulatory body. Because the Commission's December 29, 2006 order must be vacated, lawful approval of Empire's December 28, 2006 tariffs dates from the effective date of the Commission's December 4, 2007 order (December 14, 2007), not January 1, 2007.

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<sup>12</sup> There may be some instances in some jurisdictions in which tariffs can become lawfully approved through inaction of the regulatory body. This is not one of those instances, and the question is beyond the scope of this proceeding.

D. Although the Commission makes cursory reference to several affirmative defenses, none of them are applicable to the current action. (Respondents' Answer, p. 6-7)

1. The Commission's first, second and fourth defenses are that Section 386.510 RSMo provides the exclusive remedy for judicial review of any Commission action. As recently as October 30, 2007, this Court has determined that mandamus can be an appropriate and allowable action against the Commission. The Court's decision in the *First Mandamus Case* effectively counters the argument that Section 386.510 RSMo is the only way to review Commission action.

2. The third affirmative defense appears to be, at least in part, a defense against an application for rehearing rather than a petition for mandamus; it concludes with the statement, "No application for rehearing would have prevented the challenged tariffs from going into effect." The gist of the defense seems to be that vacation of the Commission's December 29, 2006 order will have no effect on the tariffs purportedly approved in that order, and so the Commission has discretion to not comply with the Court's October 30, 2007 mandate to vacate that order.<sup>13</sup> Even if the Commission's

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<sup>13</sup> Public Counsel disagrees with the argument that Empire's December 29, 2006 tariffs will have become effective on January 27, 2007 if the Commission's December 29, 2006 order is vacated. But Public Counsel can at least follow that argument, which is more than can be said for the Commission's next argument that, because the tariffs will have become effective "by operation of law" on January 27, 2007, they were necessarily

arguments about the effect of vacation are accurate, which they are not, the Commission still does not have discretion to ignore a direct order from this Court.

3. The fifth defense accurately states the law with respect to compelling discretionary acts, but it is not applicable to the request for relief here. Public Counsel seeks a writ of mandamus to compel the performance of a non-discretionary act. Nothing in the Commission's two filings in this case lends any support to the notion that the Commission has discretion as to whether it will comply with an order of the Missouri Supreme Court.

4. The sixth defense is simply a mischaracterization of the Commission's actions. Until the Commission vacates the December 29, 2006 order, it has not discharged its obligations under the Court's prior mandate.

5. The seventh and final affirmative defense is too obtuse to allow a meaningful reply. It refers to unspecified actions and unspecified documents, claiming them to be, respectively, official actions and official documents. Public Counsel concedes that some actions of the Commission are official, as are some documents issued by the Commission. Nonetheless, the officialness of unspecified actions and documents does not constitute a defense to the very narrow request for relief sought here: this Court mandated that the Commission vacate one of its orders, the Commission did not do so, and Public Counsel now seeks enforcement of the Court's mandate.

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in effect on January 1, 2007.

## CONCLUSION

Public Counsel asks the Court to make absolute its preliminary writ of mandamus and direct the Public Service Commission of Missouri to 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 to vacate the portion of the December 4, 2007 order affirming 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 5731 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 compact disk 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 16, 2008, to the following counsel of record:

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