

IN THE SUPREME COURT OF THE STATE OF MISSOURI

State of Missouri ex rel.)
Office of the Public Counsel,)
)
Relator,)
) Case No. SC89176
vs.)
)
Public Service Commission of the State of)
Missouri, a state agency, and its members)
Jeff Davis, Connie Murray, Robert)
Clayton III, Terry Jarrett, and Lin Appling)
in their official capacity,)
)
Respondents.)

BRIEF OF RESPONDENTS
MISSOURI PUBLIC SERVICE COMMISSION

JENNIFER HEINTZ
Missouri Bar No. 57128

PEGGY A. WHIPPLE
Missouri Bar No. 54758

Attorneys for Relator
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
(573) 751-8701 (Telephone)
(573) 751-9285 (Fax)
jennifer.heintz@psc.mo.gov
peggy.whipple@psc.mo.gov

April 23, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES 5

JURISDICTIONAL STATEMENT 7

STATEMENT OF FACTS 7

STANDARD OF REVIEW 10

POINTS RELIED ON:

- I. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS FROM THIS COURT BECAUSE AN ADEQUATE REMEDY IS AVAILABLE BY JUDICIAL REVIEW IN THAT SECTION 386.510, RSMO PROVIDES THE EXCLUSIVE REMEDY FOR REVIEW OF THE LAWFULNESS AND REASONABLENESS OF COMMISSION DECISIONS..... 11**
- II. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE COMMISSION HAS FULLY COMPLIED WITH THIS COURT’S PRIOR MANDATE IN THAT THE COMMISSION VACATED ITS PREVIOUS ORDER AND GAVE RELATOR AN ADEQUATE OPPORTUNITY TO FILE AN APPLICATION FOR REHEARING 12**
- III. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE RELIEF REQUESTED WOULD NOT RESULT IN THE INEFFECTIVENESS OF THE**

CHALLENGED TARIFFS IN THAT THE CHALLENGED TARIFFS WOULD HAVE GONE INTO EFFECT BY OPERATION OF LAW PRIOR TO THE ISSUANCE OF THIS COURT'S PRIOR MANDATE AND THE CHALLENGED RATES ARE THE ONLY RATES EMPIRE COULD HAVE CHARGED.....12

IV. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE COMMISSION COULD NOT RULE ON PENDING APPLICATIONS FOR REHEARING OR TAKE ANY OTHER ACTION IN THE CASE WHILE THE WRIT OF REVIEW PROCEEDING WAS PENDING IN COLE COUNTY IN THAT THE COMMISSION DID NOT HAVE JURISDICTION OVER THE CASE AT THAT TIME.

.....13

V. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE MANDAMUS CONFERS NO NEW AUTHORITY ON THE PARTY AGAINST WHOM THE WRIT MAY BE ISSUED AND THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ORDER EMPIRE TO ISSUE REFUNDS OR TO ALLOW THE COMPANY TO CHARGE ANY RATES OTHER THAN THE RATES CONTAINED IN ITS TARIFFS.

.....14

ARGUMENT 14
CONCLUSION 27
CERTIFICATE OF SERVICE 28
CERTIFICATION PURSUANT TO RULE 84.06(c) 30

TABLE OF AUTHORITIES

Error! No table of authorities entries found.Error! No table of authorities entries

found.Section 393.15013, 20

JURISDICTIONAL STATEMENT

Relator is seeking a writ of mandamus from this Court for the alleged failure of Respondents to fully comply with this Court's previous Writ of Mandamus, issued on November 15, 2007. This Court has jurisdiction to issue and determine original remedial writs pursuant to Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

The Empire District Electric Company (Empire) filed proposed tariff sheets designed to implement a general rate increase for retail electric service on February 1, 2006.¹ (Respondents' Exhibit 1, page 4). The Missouri Public Service Commission (Commission or Respondent) suspended the proposed tariff sheets. (Exhibit 1, page 4). A contested hearing was held in September of 2006, and a true-up hearing was held on November 20, 2006. (Exhibit 1, pages 4-5). The Commission issued its Report and Order in Case No. ER-2006-0315 on December 21, 2006. (Exhibit 1, page 1). The Commission's December 21, 2006 Report and Order rejected the proposed tariff sheets filed by Empire on February 1, 2006. (Exhibit 1, page 56-58). The December 21, 2006 Report and Order bore an effective date of December 31, 2006. (Exhibit 1, page 1).

Empire filed revised tariff sheets in compliance with the Commission's Report and Order in Case No. ER-2006-0315 on December 28, 2006. (Respondents' Exhibit 2, page 59). Empire also moved the Commission for

¹ Commission Case No. ER-2006-0315.

expedited treatment and requested that the tariffs go into effect on January 1, 2007. (Exhibit 2, page 59). In the absence of expedited treatment, Empire's revised tariffs would have gone into effect on January 27, 2007 by operation of law. (Exhibit 3, page 67). The Commission issued an Order Granting Expedited Treatment and Approving Tariffs on December 29, 2006. (Exhibit 1, page 59). The Commission's December 29, 2006 Order bore an effective date of January 1, 2007. (Exhibit 1, page 59).

Praxair, Inc. and Explorer Pipeline Company filed a Petition for Writ of Review of Case No. ER-2006-0315 on January 31, 2007 in the Cole County Circuit Court. (Case No. 07AC-CC00125) (Exhibit 4, page 77). The Petition was filed before the Commission had ruled on the applications for rehearing from the December 21, 2006 Report and Order. The writ issued by the circuit court ordered the Commission to take no further action in the cause except to file a return to the writ. (Exhibit 4) The Commission filed a motion to set aside the writ on February 6, 2007. (Exhibit 5, page 79). The Circuit Court issued no ruling on the Commission's motion. The Commission filed a return to the writ on March 1, 2007. This case was not dismissed until November 21, 2007 (Exhibit 5).

On January 3, 2007, the Office of the Public Counsel (OPC or Relator) filed a Petition for Writ of Mandamus in the Western District Court of Appeals. (Exhibit 6, page 81). The Western District denied OPC's Petition without opinion on March 9, 2007. (Exhibit 7, page 92).

Following the denial of its Petition by the Western District, Relator filed a Petition for Writ of Mandamus in this Court on March 19, 2007. (Exhibit 8, page 93). This Court issued an Alternative Writ of Mandamus on May 1, 2007. (Exhibit 9, page 107). This Court issued an opinion making its Alternative Writ of Mandamus peremptory on October 30, 2007. (Exhibit 10, page 115). The Court issued its Mandate to the Commission on November 15, 2007. The Court's mandate to the Commission ordered the Commission "to vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006, and allow the public counsel reasonable time to prepare and file an application for rehearing on the tariffs." (Exhibit 11, pages 125-126). This Court explicitly stated in the opinion accompanying the mandate the Court was not addressing the lawfulness or reasonableness of the Commission's December 29, 2006 Order in Case No. ER-2006-0315. (Exhibit 11, page 122, footnote 3). This Court returned jurisdiction to the Commission with its November 15, 2007 mandate.

On December 4, 2007, the Commission issued its Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs. (Exhibit 12, page 127). The Commission's December 4, 2007 Order bore an effective date of December 14, 2007. (Exhibit 3, page 66). The Commission's Order of December 4, 2007 vacated its Order of December 29, 2006. (Exhibit 3, page 72). The Commission's Order of December 4, 2007 also approved Empire's December 28, 2006 revised tariff sheets for service on and after December 14, 2007. (Exhibit 3, pages 72-76).

The Office of the Public Counsel filed its Application for Rehearing on December 13, 2007. (Exhibit 12, page 127). As of the date of this filing, the Commission has not issued an order either granting or denying OPC's December 13, 2007 Application for Rehearing. This Court issued its Preliminary Writ on April 4, 2008. (Exhibit 13, page 134). This Court has ordered Respondents to take no further action in this case pending the resolution of these proceedings. (Exhibit 13, page 134).

STANDARD OF REVIEW²

“Mandamus is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal.” *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo.banc 2007). Issuance of an extraordinary writ does not lie if the party seeking the writ has an adequate legal remedy available. *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547, 549 (Mo.banc 1990). Mandamus is an extraordinary remedy, and courts should issue the writ only sparingly. *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266-67 (Mo.banc 1980). Mandamus will lie to compel the performance of a ministerial act, but mandamus will not lie to compel the performance of a discretionary act. *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 617 (Mo.banc 2006). A party seeking relief through a writ of mandamus must

² This standard of review is applicable to each Point Relied On and each Argument and is incorporated therein.

demonstrate the existence of a clearly established legal right to the relief requested. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo.banc 2006). “Mandamus does not issue except in cases where the ministerial duty sought to be coerced is definite, arising under conditions admitted of and imposed by law.” *Id.* The purpose of mandamus is to compel the performance of a ministerial duty that the one charged with the duty has refused to perform. *Id.* at 165. “It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none. *Id.* at 166.

POINTS RELIED ON

- I. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS FROM THIS COURT BECAUSE AN ADEQUATE REMEDY IS AVAILABLE BY JUDICIAL REVIEW IN THAT SECTION 386.510, RSMO PROVIDES THE EXCLUSIVE REMEDY FOR REVIEW OF THE LAWFULNESS AND REASONABLENESS OF COMMISSION DECISIONS.**

Cases

State ex rel. Public Counsel v. Public Service Commission, 210 S.W.3d 344 (Mo. App. W.D. 2006)

Statutes

Section 386.500, RSMo (2000)

Section 386.510, RSMo (2000)

Section 386.515, RSMo (2000) (Supp. 2007)

II. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE COMMISSION HAS FULLY COMPLIED WITH THIS COURT'S PRIOR MANDATE IN THAT THE COMMISSION VACATED ITS PREVIOUS ORDER AND GAVE RELATOR AN ADEQUATE OPPORTUNITY TO FILE AN APPLICATION FOR REHEARING.

Cases

State ex rel. Mertens v. Brown, 198 S.W.3d 616 (Mo.banc 2006)

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

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

Statutes

Section 386.500, RSMo (2000)

III. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE RELIEF REQUESTED WOULD NOT RESULT IN THE INEFFECTIVENESS OF THE CHALLENGED TARIFFS IN THAT THE

CHALLENGED TARIFFS WOULD HAVE GONE INTO EFFECT BY OPERATION OF LAW PRIOR TO THE ISSUANCE OF THIS COURT'S PRIOR MANDATE AND THE CHALLENGED RATES ARE THE ONLY RATES EMPIRE COULD HAVE CHARGED.

Statutes

Section 386.490, RSMo (2000)

Section 386.520, RSMo (2000)

Section 393.140, RSMo (2000)

Section 393.150, RSMo (2000)

IV. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE COMMISSION COULD NOT RULE ON PENDING APPLICATIONS FOR REHEARING OR TAKE ANY OTHER ACTION IN THE CASE WHILE THE WRIT OF REVIEW PROCEEDING WAS PENDING IN COLE COUNTY IN THAT THE COMMISSION DID NOT HAVE JURISDICTION OVER THE CASE AT THAT TIME.

Cases

State ex rel. Campbell Iron Co. v. Public Service Commission, 296 S.W.

998 (Mo.banc 1927)

State ex rel. Missouri Cable Telecommunications Association v. Missouri Public Service Commission, 929 S.W.2d 768 (Mo. App. W.D. 1996)

V. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE MANDAMUS CONFERS NO NEW AUTHORITY ON THE PARTY AGAINST WHOM THE WRIT MAY BE ISSUED AND THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ORDER EMPIRE TO ISSUE REFUNDS OR TO ALLOW THE COMPANY TO CHARGE ANY RATES OTHER THAN THE RATES CONTAINED IN ITS TARIFFS.

Cases

State ex rel. City of Joplin v. Public Service Commission, 186 S.W.3d 290

(Mo. App. W.D. 2005)

Straube v. Bowling Green Gas Co., 227 S.W.2d 666 (Mo. 1950)

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

Statutes

Section 386.270, RSMo (2000)

ARGUMENT

I. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS FROM THIS COURT BECAUSE AN ADEQUATE REMEDY IS AVAILABLE BY JUDICIAL REVIEW IN THAT SECTION 386.510,

RSMO PROVIDES THE EXCLUSIVE REMEDY FOR REVIEW OF THE LAWFULNESS AND REASONABLENESS OF COMMISSION DECISIONS.

Section 386.500.1, RSMo (2000) provides that the Office of Public Counsel may apply for rehearing of any order or decision of the Commission. The application for rehearing is a prerequisite to seeking judicial review and must be filed prior to making application for judicial review. Section 386.500.2, RSMo (2000).

Section 386.510, RSMo (2000) provides the exclusive means for judicial review of orders issued by the Public Service Commission (Commission). *State ex rel. Public Counsel v. Public Service Commission*, 210 S.W.3d 344, 350 (Mo. App. W.D. 2006). The exclusivity of Section 386.510 RSMo (2000) as a means of judicial review of Commission orders was made explicit by the legislature when the legislature adopted Section 386.515 (2000) (Supp. 2007), which provides in relevant part, “the review procedure provided for in section 386.510 [is] exclusive” to any other procedure for review. Section 386.510 provides for the applicant to apply a writ of review in circuit court for the purpose of having the reasonableness and lawfulness of the Commission’s order determined.

Relator’s Application for Rehearing was filed on December 13, 2007. The Commission’s December 4, 2007 Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs was issued on December 4, 2007. This Order became effective on

December 14, 2007. Relator's Application for Rehearing was timely filed because it was filed before the effective date of the Order, giving OPC a reasonable time to apply for rehearing in accordance with this Court's mandate. The Commission has not yet granted or denied Relator's Application. However, Relator has preserved its right to seek a writ of review pursuant to Section 386.510 in the event that the Commission denies its Application for Rehearing.³

Because the writ of review process of Section 386.510 is the exclusive procedure for review of orders and decisions of the Commission, Relator is not entitled to review of the lawfulness or reasonableness of the substance of the Commission's December 29, 2007 Report and Order approving the tariffs through its Application for Writ of Mandamus. An order from this Court ordering the Commission to disapprove the tariffs and restore Empire's previous rates would be

³ The Commission issued a Report and Order Upon Reconsideration on March 26, 2008. This Report and Order Upon Reconsideration became effective on April 5, 2008. The Report and Order Upon Reconsideration specifically stated that the Office of the Public Counsel's Application for Rehearing with regard to the Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, issued on December 4, 2007, to be effective December 14, 2007, remains pending before the Commission.

tantamount to a review of a discretionary action of the Commission, and mandamus will not lie to compel a discretionary act.

This Court explicitly did not address the question of the lawfulness or reasonableness of the Commission's underlying December 29, 2007 Order in its previous mandate. Because Relator has an adequate legal remedy for a review of the substance of the Commission's decision to approve the tariffs through the writ of review process, review of the lawfulness and reasonableness of the Commission's underlying Order through the extraordinary writ of mandamus is not appropriate and Relator's Petition for Writ of Mandamus must be denied.

II. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE COMMISSION HAS FULLY COMPLIED WITH THIS COURT'S PRIOR MANDATE IN THAT THE COMMISSION VACATED ITS PREVIOUS ORDER AND GAVE RELATOR AN ADEQUATE OPPORTUNITY TO FILE AN APPLICATION FOR REHEARING.

Mandamus will lie to compel the performance of a ministerial act, but mandamus will not lie to compel the performance of a discretionary act. *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 617 (Mo.banc 2006). A party seeking relief through a writ of mandamus must demonstrate the existence of a clearly established legal right to the relief sought. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo.banc 2006). "Mandamus does not issue except in cases where the ministerial duty sought to be coerced is definite, arising

under conditions admitted of and imposed by law.” *Id.* The purpose of mandamus is to compel the performance of a ministerial duty that the one charged with the duty has refused to perform. *Id.* at 165. “It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none.” *Id.* at 166.

The Commission was mandated 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 Public Counsel v. Public Service Commission*, 236 S.W.3d 632, 637 (Mo.banc 2007).

In its previous mandate, the Court ordered the Commission to perform a ministerial act. Namely, the Commission was ordered to give Relator a reasonable amount of time in which to exercise its statutory right to apply for rehearing before the Commission pursuant to Section 386.500. The Commission’s December 4, 2007 Order, issued after this Court handed down its mandate, had a ten-day effective date. The ordered action was ministerial in that the Commission must allow a reasonable opportunity for interested parties to apply for rehearing. The Commission does not have the discretion to foreclose access to the statutory review process. However, the Commission does have the discretion to set the effective date of its orders so long as the effective date allows a reasonable opportunity to make an application for rehearing. The Order issued by the Commission following this Court’s mandate did allow a reasonable opportunity to

apply for rehearing, and Relator did timely file such an application. Relator has therefore been granted the relief ordered by this Court.

The Court explicitly stated that it was not addressing the lawfulness or reasonableness of the Commission's approval of the tariffs. The question addressed by this Court was narrowly focused on the reasonableness of the timing of the approval of the tariffs. The relief granted by this Court was correspondingly narrow. This Court ordered the Commission vacate its prior order so as to allow Relator reasonable time to apply for rehearing. Relator has a clearly established legal right to apply for such rehearing. Allowing sufficient time to make application for such hearing is a ministerial act the Commission must perform. Mandamus was therefore an appropriate remedy.

In contrast, determining whether or not to approve tariffs or whether or not to grant rehearing is within the Commission's discretion. Mandamus does not lie to compel the performance of a discretionary act. The additional relief requested by Relator is not within the proper scope of mandamus because Relator asks this Court to order the Commission to negate its approval of the challenged tariffs. Approval or disapproval of tariffs is within the Commission's discretion. Relator does not have a clearly established legal right to have the challenged tariffs withdrawn. Rather, Relator has a clearly established legal right to follow the statutory review process set out in Sections 386.500 and 386.510. This right was assured by the Court's previous mandate. Because approval or disapproval of tariffs is a matter within the Commission's discretion and because Relator does not

have a clearly established right to the relief requested in its present Petition, Relator's Petition for Writ of Mandamus must be denied.

III. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE RELIEF REQUESTED WOULD NOT RESULT IN THE INEFFECTIVENESS OF THE CHALLENGED TARIFFS IN THAT THE CHALLENGED TARIFFS WOULD HAVE GONE INTO EFFECT BY OPERATION OF LAW PRIOR TO THE ISSUANCE OF THIS COURT'S PRIOR MANDATE AND THE CHALLENGED RATES ARE THE ONLY RATES EMPIRE COULD HAVE CHARGED.

Section 386.490.3, RSMo (2000) provides that “[e]very order or decision of the Commission . . . shall continue in force . . . until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law. . .” Section 393.140(11), RSMo (2000) prohibits a utility from charging “. . . 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; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified. . . .” A tariff filed by a utility goes into effect after 30 days unless the Commission acts to suspend the operation of the tariff. Section 393.140(11); Section 393.150, RSMo (2000). A writ of review proceeding does not suspend the effectiveness of a Commission order unless the circuit court exercises its discretion to stay or

suspend the order. Section 386.520.1, RSMo (2000). Any stay ordered by the circuit court must be secured by a bond posted by the party requesting the stay. *Id.*

In the absence of the Commission's December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, the tariffs filed by Empire on December 28, 2006 would have gone into effect on January 27, 2007 by operation of law because the Commission took no action to stay or suspend the effectiveness of the tariffs. Furthermore, those rates were the rates in effect by operation of law and the rates continued in effect at the time the Commission issued its December 4, 2007 Order vacating its previous order in accordance with this Court's mandate of November 15, 2007. Therefore, the rates contained in those tariffs were in effect from January 1, 2007 until the Commission's December 4, 2007 Order and were the only rates that Empire could lawfully have charged. No application for rehearing would have prevented the challenged tariffs from going into effect. Similarly, a writ of review proceeding would not have stayed or suspended the effectiveness of the challenged tariffs unless the circuit court issued a stay supported by a bond. This Court's mandate returned the parties to the position they would have been in on December 28, 2007 in that the mandate allowed the parties the opportunity to follow the application for rehearing procedures set out in Section 386.500.

Empire began charging the rates contained within its December 28, 2006 tariffs on January 1, 2007. Empire relied on the Commission's December 29, 2006 approval of the tariffs. Furthermore, as these rates were the only rates

Empire knew to be in effect, they were the only rates Empire could have charged under Missouri law. Empire could not have foreseen when it implemented the new rates on January 1, 2007 that this Court would issue a mandate on November 15, 2007 ordering the Commission to vacate its order approving the tariffs. Moreover, the challenged rates contained in the tariffs filed on December 28, 2006 would be in effect even if the tariffs were being reviewed through a writ of review pursuant to Section 386.510. Reversion to the rates that were in effect prior to the December 28, 2006 tariffs would not be the relief that was available to Relator under the normal statutory process available for review of Commission Orders.⁴ Because this relief is not available through normal review channels, Relator is not entitled to this relief through a writ of mandamus and Relator's Petition for Writ of Mandamus must be denied because no new rights can be conferred by mandamus.

This Court's previous mandate made no decision regarding the underlying lawfulness or reasonableness of the Commission's approval of the tariffs. As discussed *supra*, the exclusive means of review of the substance of the Commission's order is the statutory framework provided in Chapter 386. The

⁴ The circuit court of Cole County had the discretion to enter a stay of the Commission's December 21, 2006 Report and Order and to order that all disputed funds be paid into the Court pursuant to Section 386.520. No party to that writ of review proceeding requested a stay from the circuit court and the Commission did not have jurisdiction to stay its Order while the Writ of Review was pending.

challenged tariffs would remain in effect during the pendency of those review proceedings. Relator is not entitled to any relief beyond the procedures set out in that Chapter. Because Relator's current Petition for Writ of Mandamus requests relief that exceeds the statutory framework of Chapter 386, Relator's Petition for Writ of Mandamus must be denied.

IV. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE COMMISSION COULD NOT RULE ON PENDING APPLICATIONS FOR REHEARING OR TAKE ANY OTHER ACTION IN THE CASE WHILE THE WRIT OF REVIEW PROCEEDING WAS PENDING IN COLE COUNTY IN THAT THE COMMISSION DID NOT HAVE JURISDICTION OVER THE CASE AT THAT TIME.

Once a writ of review of a Commission order has commenced in circuit court, the circuit court acquires jurisdiction over the challenged order and the Commission is without jurisdiction to modify the order under review. *State ex rel. Campbell Iron Co. v. Public Service Commission*, 296 S.W. 998, 1001 (Mo.banc 1927). "If review of a PSC order is pending before a circuit court, the PSC may not enter a modified, extended or new order. However, if the judgment of the circuit court becomes final, the PSC regains its jurisdiction to act in a manner not inconsistent with the decision of the circuit court." *State ex rel. Missouri Cable Telecommunications Association v. Missouri Public Service*

Commission, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996) (*motion for rehearing or transfer denied*, Oct. 22, 1996).

Praxair, Inc. and Explorer Pipeline Company, parties to Case No. ER-2006-0315, filed a writ of review in Case No. ER-2006-0315 in the Circuit Court of Cole County. The court issued the writ the same day it was filed. At the time the writ was issued, the Commission had not yet ruled on the parties' initial applications for rehearing. Nonetheless, the circuit court ordered the Commission to take no further action in the case other than to file the return to the writ of review. The Commission filed a motion to set aside the writ; however, this motion was not ruled upon before this case was dismissed on November 21, 2007. While the writ was pending in circuit court, the Commission lost jurisdiction over Case No. ER-2006-0315. The Commission did not regain jurisdiction over Case No. ER-2006-0315 from the circuit court of Cole County until case no. 07AC-CC00125 was dismissed on November 21, 2007. Also, the Commission was ordered by this Court from taking any further action in Case No. ER-2006-0315 when it issued its first preliminary writ in mandamus in Case No. SC88390 on May 1, 2007. The Commission was without power to rule upon the initial application for rehearing filed by Relator because of the improvident writ of review pending in Cole County. The Commission did not regain the ability to act in this case until this Court returned jurisdiction to the Commission on November 15, 2007. During long periods, the Commission had lost jurisdiction to act in the underlying case. While the writ of review was pending in Cole County and the

initial writ was pending before this Court, the Commission similarly lacked any authority to take any other action in this case, including altering Empire’s rates or withdrawing approval of the tariffs as Relator requests. This Court must not issue a writ of mandamus in this case based on any failure of the Commission to act while the Commission was in fact without power to do so.

V. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS BECAUSE MANDAMUS CONFERS NO NEW AUTHORITY ON THE PARTY AGAINST WHOM THE WRIT MAY BE ISSUED AND THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ORDER EMPIRE TO ISSUE REFUNDS OR TO ALLOW THE COMPANY TO CHARGE ANY RATES OTHER THAN THE RATES CONTAINED IN ITS TARIFFS.

The Commission does not have the authority to retroactively correct rates. *State ex. rel. City of Joplin v. Public Service Commission*, 186 S.W.3d 290, 297 (Mo. App. W.D. 2005). The Commission also lacks the authority to order refunds. *Id.* “All rates. . . fixed by the commission shall be in force and shall be prima facie lawful. . .until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.” Section 386.270, RSMo (2000). When a utility collects money under approved tariffs, the money becomes the property of the utility and the utility cannot be deprived of it without violating the utility’s due process rights. *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Mo. 1950). “[I]f funds paid under those Commission-approved tariffs are not

segregated in a court registry pending the final outcome, there is no monetary relief that can be given to the party challenging the rates.” *City of Joplin*, 186 S.W.3d at 297, citing *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 353-54 (Mo. 1951).⁵

In this case, there has been no final determination of the lawfulness and reasonableness of the rates approved by the Commission in Case No. ER-2006-0315. Also, there has been no segregation of monies collected under the newly approved tariffs in excess of the formerly approved tariffs. Any money paid to Empire under those tariffs has become the property of Empire and Empire cannot in accordance with due process be deprived of that property. In any event, a mandamus action is certainly not the proper forum for the determination of the lawfulness of the Report and Order underlying Case No. ER-2006-0315. This Court cannot mandate this Commission to order any refund because the Commission does not have the authority to order refunds and mandamus confers no new rights upon the Commission. Also, it is improper for this Court in this proceeding to make any determination about Empire’s property rights in the

⁵ There has been no judicial review of the rates in this proceeding, so there can be no determination by this Court at this time that this case would be an exception to this general rule. See *State ex rel. Fraas v. Missouri Public Service Commission*, 627 S.W.2d. 882 (Mo.App.WD 1981)

money collected under the rates contained in its current tariffs. Relator's Petition for Writ of Mandamus must be denied.

CONCLUSION

For the foregoing reasons, Relator is not entitled to the relief requested in its Petition for Writ of Mandamus and this Court should quash its preliminary writ and decline to issue a peremptory writ.

WHEREFORE, Respondents request that this Court quash its preliminary writ and decline to enter a peremptory writ and grant such other relief as is just and equitable.

Respectfully submitted,

Jennifer Heintz #57128
573-751-8701 (Telephone)
573-751-9285 (Facsimile)
jennifer.heintz@psc.mo.gov

Peggy A. Whipple #54758
573-526-6715 (Telephone)
573-751-9285 (Facsimile)
peggy.whipple@psc.mo.gov

Missouri Public Service
Commission
P.O. Box 360
Jefferson City, Missouri 65102

Attorneys for Respondents.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, first-class postage prepaid all parties this 23rd day of April, 2008.

OFFICE OF THE PUBLIC COUNSEL
Lewis R. Mills, Jr. – Public Counsel
Michael F. Dandino – Deputy Public Counsel
Christina Baker – Senior Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
Phone: 573-751-1304
Fax: 573-751-5562
lewis.mills@ded.mo.gov

Diana C. Carter
Aquila Networks
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Phone: 573-635-5716
Fax: 573-635-5042
dcarter@brydonlaw.com

Dean L. Cooper
The Empire District Electric Co.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Phone: 573-635-5716
Fax: 573-635-5042
dcooper@brydonlaw.com

James C. Swearngen
The Empire District Electric Co.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Phone: 573-635-5716
Fax: 573-634-4743
ltrackers@brydonlaw.com

Russell L. Mitten
The Empire District Electric Co.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Phone: 573-635-5716
Fax: 573-635-5384
rmitten@brydonlaw.com

Diana C. Carter
The Empire District Electric Co.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Phone: 573-635-5716
Fax: 573-635-5042
dcarter@brydonlaw.com

James M. Fischer
Kansas City Power & Light Co.
101 Madison Street, Suite 400
Jefferson City, MO 65101
Phone: 573-636-6675
Fax: 573-636-6038
jfischerpc@aol.com

William G. Riggins
Kansas City Power & Light Co.
1201 Walnut
Kansas City, MO 64106
Phone: 816-556-6264
Fax: 816-556-6278
bill.riggins@kcpl.com

David Woodsmall
Praxair, Inc.
428 E. Capitol Avenue
Suite 300
Jefferson City, MO 65102
Phone: 573-635-5270
Fax: 573-635-5699
dwoodsmall@fcplaw.com

Shelley A. Woods
MO Dept. of Natural Resources
P.O. Box 899
Jefferson City, MO 65102-0899
Phone: 573-751-1879
Fax: 573-751-1846
shelley.woods@ago.mo.gov

Stuart Conrad
Explorer Pipeline
3100 Broadway, Suite 1209
Kansas City, MO 64111
Phone: 816-753-3112
Fax: 816-756-6037
stucon@fcplaw.com

Stuart Conrad
Praxair, Inc.
3100 Broadway, Suite 1209
Kansas City, MO 64111
Phone: 816-753-3112
Fax: 816-756-6037
stucon@fcplaw.com

Curtis D. Blanc
Kansas City Power & Light Co.
1201 Walnut, 20th Floor
Kansas City, MO 64106
Phone: 816-556-6248
Fax: 816-556-6278
curtis.blanc@kcpl.com

David Woodsmall
Explorer Pipeline
428 E. Capitol Avenue
Suite 300
Jefferson City, MO 65102
Phone: 573-635-5270
Fax: 573-635-5699
dwoodsmall@fcplaw.com

By: _____
Jennifer Heintz

CERTIFICATE PURSUANT TO RULE 84.06(c)

I hereby certify that the foregoing brief of Respondent Missouri Public Service Commission complies with the limitations contained in Rule 84.06 and that:

- (1) The signature block above contains the information required by Rule 55.03;**
- (2) The brief complies with the limitations contained in Rule 84.06(b);**
- (3) The brief contains 5,203 words, as determined by the word count feature of Microsoft Word;**
- (4) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format; and**
- (5) That the attached computer disk has been scanned for viruses and that it is virus free.**

I further certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the service list the 23rd day of April, 2008.

Jennifer Heintz
Attorney for Respondents

IN THE SUPREME COURT OF THE STATE OF MISSOURI

State of Missouri ex rel.)
Office of the Public Counsel,)
)
Relator,)
) Case No. SC89176
vs.)
)
Public Service Commission of the State of)
Missouri, a state agency, and its members)
Jeff Davis, Connie Murray, Robert)
Clayton III, Terry Jarrett, and Lin Appling)
in their official capacity,)
)
Respondents.)

APPENDIX TO
BRIEF OF RESPONDENTS
MISSOURI PUBLIC SERVICE COMMISSION

JENNIFER HEINTZ
Missouri Bar No. 57128

PEGGY A. WHIPPLE
Missouri Bar No. 54758

Attorneys for Relator
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
(573) 751-8701 (Telephone)
(573) 751-9285 (Fax)
jennifer.heintz@psc.mo.gov
peggy.whipple@psc.mo.gov

April 23, 2008

INDEX OF APPENDIX

Respondent’s Exhibit 1A1
 Report and Order of Missouri Public Service Commission issued December
 21, 2006, effective date December 31, 2006

Respondent’s Exhibit 2A59
 Missouri Public Service Commission Order Granting Expedited Treatment
 and Approving Tariffs, issued December 29, 2006

Respondent’s Exhibit 3A66
 Missouri Public Service Commission Order Vacating December 29, 2006
 Order Granting Expedited Treatment and Approving Tariffs, and Order
 Approving Tariffs, dated December 4, 2007

Respondent’s Exhibit 4A77
 Cole County Circuit Court Writ of Review, dated January 31, 2007

Respondent’s Exhibit 5A79
 Docket Sheet from Cole County Circuit Court case 07AC-CC00125

Respondent’s Exhibit 6A81
 Petition for Writ of Mandamus filed by Office of Public Counsel in
 Missouri Court of Appeals, Western District, dated January 23, 2007, WD
 67857

Respondent’s Exhibit 7A92

Order of Western District Court of Appeals denying Writ of Mandamus,
dated March 9, 2007

Respondent’s Exhibit 8A93

Petition for Writ of Mandamus filed by Office of Public Counsel in
Missouri Supreme Court, case SC88390

Respondent’s Exhibit 9A107

Missouri Supreme Court case SC88390 Alternative Writ of
Mandamus, dated May 1, 2007

Respondent’s Exhibit 10A108

Missouri Supreme Court case SC88390 Original Proceeding in
Mandamus filed October 30, 2007

Respondent’s Exhibit 11A117

Supreme Court of Missouri Case SC88390 Judgment, dated
November 15, 2007

Respondent’s Exhibit 12A127

Application for Rehearing filed in Missouri Public Service
Commission by Office of Public Counsel

Respondent’s Exhibit 13A134

Missouri Supreme Court Alternative Writ of Mandamus, dated April
4, 2008

STATUTES

Section 386.270 RSMo (2000)A135

Section 386.490 RSMo (2000)A136

Section 386.500 RSMo (2000)A137

Section 386.510 RSMo (2000)A138

Section 386.515 RSMo (2000)A140

Section 386.520 RSMo (2000)A141

Section 393.140 RSMo (2000)A143

Section 393.150 RSMo (2000)A148