

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel, )  
Office of the Public Counsel, )  
 )  
Relator, )  
 )  
vs. ) Case No. SC88390  
 )  
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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(A) THE COMMISSION ISSUED THE ORDER SO CLOSE TO ITS EFFECTIVE DATE THAT UNDER COMMISSION FILING RULES PUBLIC COUNSEL HAD LESS THAN 80 MINUTES TO REVIEW THE ORDER AND PREPARE AND FILE BEFORE THE EFFECTIVE DATE A REHEARING

MOTION THAT IS THE ESSENTIAL PREREQUISITE FOR JUDICIAL REVIEW;

(B) AS A RESULT, THE PSC VIOLATED ITS DUTY TO PROVIDE A REASONABLE OPPORTUNITY TO SEEK JUDICIAL REVIEW, AN ESSENTIAL PART OF THE PSC LAW;

(C) THE PSC IMPAIRED PUBLIC COUNSEL'S VITAL RIGHT TO APPEAL FROM THE COMMISSION'S RATE ORDER; AND

(D) THE PSC ABUSED ITS DISCRETION TO MAKE ORDERS EFFECTIVE IN LESS THAN 30 DAYS BY ORDERING A JANUARY 1, 2007 EFFECTIVE DATE THAT THWARTED JUDICIAL REVIEW..... 23

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(A) THE COMMISSION VIOLATED ITS DUTY TO PROVIDE A MEANINGFUL OPPORTUNITY FOR JUDICIAL REVIEW SINCE THE EFFECTIVE DATE GAVE PUBLIC COUNSEL LESS THAN 90 MINUTES TO FILE AN EFFECTIVE REHEARING MOTION;

(B) THE COMMISSION REFUSES TO RETRACT ITS ORDER AND ISSUE ANOTHER ORDER WITH SUFFICIENT TIME TO ALLOW PUBLIC COUNSEL TO FILE FOR REHEARING UNLESS COMPELLED TO DO SO;

(C) MANDAMUS WILL NOT CONFER NEW AUTHORITY TO PUBLIC COUNSEL, BUT ALLOWS IT EXERCISE ITS EXISTING DUTY TO REPRESENT THE PUBLIC THROUGH APPEALS;

(D) WITHOUT THE WRIT, PUBLIC COUNSEL WILL NOT BE ABLE TO EXERCISE ITS CLEAR, UNEQUIVOCAL, SPECIFIC RIGHT TO APPEAL THIS ERRONEOUS ORDER THAT DOES NOT CONFORM TO THE PSC'S RATE CASE DECISION;

(E) THE COURT'S SUPERVISORY AUTHORITY OVER THE PSC MAKES MANDAMUS THE APPROPRIATE REMEDY WHEN THE PSC'S ORDER IS EFFECTIVE AT A TIME THAT PRECLUDES JUDICIAL REVIEW; AND

(F) THE PSC'S VIOLATION OF ITS MINISTERIAL DUTY TO PROVIDE A MEANINGFUL OPPORTUNITY FOR JUDICIAL REVIEW IS APPARENT FROM THE ORDER THAT IDENTIFIES THE INTERVAL BETWEEN THE ISSUE DATE AND THE EFFECTIVE DATE THAT PRECLUDED PUBLIC COUNSEL FROM FILING A TIMELY AND EFFECTIVE REHEARING MOTION..... 33

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## JURISDICTIONAL STATEMENT

This case involves the Office of Public Counsel's petition for an original writ of mandamus from this Court to remedy the Missouri Public Service Commission's deprivation of Public Counsel's ability to file for rehearing resulting in the denial of Public Counsel's right to appeal under Mo. Const. Art. V. Sec. 18 (1945, as amended 1976), and Sections 386.710.2 (3) and 386.500, RSMo. This PSC order not only approved rates contrary to the PSC's decision on the substantive ratemaking issues in the just concluded rate case, but also unlawfully and unreasonably restricted the time for Public Counsel to seek rehearing and judicial review of the order. By compressing the interval between the order's issuance and the order's effective date, the order restricted Public Counsel to less than 90 minutes to prepare and file a rehearing motion that sufficiently preserved the issues for appeal under Section 386.500, RSMo. As a result of this unlawful and unreasonable action, the Commission abused its discretion to set a reasonable time before an order becomes effective and deprived Public Counsel of its statutory right to appeal as the public's representative.

The Supreme Court has jurisdiction in this case because it has "general superintending control over all courts and tribunals" and has authority to "issue and determine original remedial writs." Mo. Const. Art V, Sec. 4 (1945, as amended 1976). 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. 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 PSC. 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 provide Public Counsel with a reasonable opportunity to exercise its constitutional and statutory rights under Mo. Const. Art. V. Sec. 18 (1945, as amended 1976), and Sections 386.710.2(3) and 386.500, RSMo to seek judicial review of the December 29, 2006 order approving rate tariffs. Specifically, Public Counsel asks that the Court issue a writ that mandates the PSC to rescind its unlawful and unreasonable order. The writ should also direct that, if the Commission issues any further order approving Empire's tariffs, it must provide a reasonable interval between the issuance of the order and the effective date. Public Counsel is entitled to a meaningful opportunity to seek an appeal of any PSC decision, including a reasonable time period to file an adequate motion for rehearing that is required for an appeal to the courts under Sections 386.500 and 386.510, RSMo.

Mandamus is an appropriate remedy to compel the Commission to vacate its unlawful order so that it can issue a lawful order that provides a reasonable time to file for rehearing. Sections 386.500 and .510, RSMo comprise the exclusive statutory appeal process which was denied as a result of the timing of the PSC's order. The complaint process is not an adequate remedy as it would mean the relitigation of the reasonableness of the rates while the real issue at hand is whether the tariff rates approved in the order conform to the outcome in the Report and Order. The complaint process would cause undue expense and delay and would not provide the specific relief Relator seeks.

**POINTS AND AUTHORITIES RELIED ON**

I. THE OFFICE OF THE PUBLIC COUNSEL IS ENTITLED TO AN ORDER IN MANDAMUS THAT DIRECTS THE PUBLIC SERVICE COMMISSION TO RESCIND ITS DECEMBER 29, 2006 ORDER APPROVING EMPIRE'S RATE TARIFFS THAT WERE EFFECTIVE ON JANUARY 1, 2007 BECAUSE THE ORDER IS UNLAWFUL AND UNREASONABLE AND VIOLATES PUBLIC COUNSEL'S RIGHT TO JUDICIAL REVIEW UNDER MO. CONST. ART. V, SEC. 18 (1945, AS AMENDED 1976) AND SECTIONS 386.710.2 AND 386.500, RSMO IN THAT:

(A) THE COMMISSION ISSUED THE ORDER SO CLOSE TO ITS EFFECTIVE DATE THAT UNDER COMMISSION FILING RULES PUBLIC COUNSEL HAD LESS THAN 90 MINUTES TO REVIEW THE ORDER AND PREPARE AND FILE BEFORE THE EFFECTIVE DATE A REHEARING MOTION THAT IS THE ESSENTIAL PREREQUISITE FOR JUDICIAL REVIEW;

(B) AS A RESULT, THE PSC VIOLATED ITS DUTY TO PROVIDE A REASONABLE OPPORTUNITY TO SEEK JUDICIAL REVIEW, AN ESSENTIAL PART OF THE PSC LAW;

(C) THE PSC IMPAIRED PUBLIC COUNSEL'S VITAL RIGHT TO APPEAL FROM THE COMMISSION'S RATE ORDER; AND

(D) THE PSC ABUSED ITS DISCRETION TO MAKE ORDERS EFFECTIVE IN LESS THAN 30 DAYS BY ORDERING A JANUARY 1, 2007

EFFECTIVE DATE THAT THWARTED JUDICIAL REVIEW.

*Moore v. Board of Educ.*, 836 S.W.2d 943 (Mo. banc 1992)

*State ex rel. County of Jackson v. Missouri PSC*, 985 S.W.2d 400, 403 (Mo. App.  
1999)

*Dabin v. Director of Revenue*, 9 S.W.3d 610 (Mo. banc 2000)

*State ex rel. Alton R. Co. v. Public Service Com.*, 348 Mo. 780 (Mo. 1941)

II. THE OFFICE OF THE PUBLIC COUNSEL IS ENTITLED TO AN ORDER IN MANDAMUS THAT DIRECTS THE PUBLIC SERVICE COMMISSION TO RESCIND ITS DECEMBER 29, 2006 ORDER APPROVING EMPIRE'S RATE TARIFFS THAT WERE EFFECTIVE ON JANUARY 1, 2007 BECAUSE PUBLIC COUNSEL DOES NOT HAVE ANOTHER ADEQUATE AND EFFICIENT REMEDY AND IT MEETS THE CRITERIA FOR A WRIT OF MANDAMUS IN *FURLONG V. CITY OF KANSAS CITY* IN THAT:

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(F) THE PSC'S VIOLATION OF ITS MINISTERIAL DUTY TO PROVIDE A MEANINGFUL OPPORTUNITY FOR JUDICIAL REVIEW IS APPARENT FROM THE ORDER THAT IDENTIFIES THE INTERVAL BETWEEN THE ISSUE DATE AND THE EFFECTIVE DATE THAT PRECLUDED PUBLIC COUNSEL FROM FILING A TIMELY AND EFFECTIVE REHEARING MOTION.

*State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11  
(Mo. 1968)

*State ex rel. McNary, et al. v. Hais*, 670 S.W.2d 494 (Mo. banc 1984)

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

*State ex rel. County of Jackson v. Missouri PSC*, 985 S.W.2d 400 (Mo. App. 1999)

## STANDARD OF REVIEW

The standard of review for Public Service Commission decisions is for the court to determine whether the PSC's action was lawful and reasonable. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979). This is also the standard in this case. In addition, since this case is an original proceeding in mandamus, the Court must also determine whether it meets the criteria for the issuance of mandamus. *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157, 165-166 (Mo. 2006)

Section 386.510, RSMo, defines the scope of review for a Public Service Commission order as a determination of the lawfulness and reasonableness of the order appealed. *State ex rel. Chicago, Rock Island & Pacific Railroad Company v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. banc 1958). The statute does not differentiate between types of cases, including any review made as part of a proceeding requesting extraordinary remedial action.

*State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979) defined the standard of review as a two-pronged analysis to determine (1) whether the Commission's order is lawful and (2) whether it is reasonable and based on competent and substantial evidence upon the whole record. Reviewing courts must conduct this same "contested case review" for all cases arising out of the PSC. *State ex rel. Coffman v. Public Service Commission*, 121 S.W.3d 534, 540-542 (Mo. App. 2003). Under this analysis, the court first examines whether the order was lawful, that is, was authorized by statute. *Coffman at 541; State ex rel Midwest*

*Gas Users' Ass'n v. Public Service Commission*, 976 S.W.2d 485, 491 (Mo. App. 1998).

In the next step, the court examines the reasonableness of the order by an evaluation of whether the order was arbitrary, capricious or was an abuse of discretion. The court also determines reasonableness by determining if there was substantial, competent evidence in the record to support the decision. *Coffman at 541*.

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 reasonableness review in the second prong analysis looks at the record to determine whether the decision is supported by competent and substantial evidence or is against the overwhelming weight of the evidence or is otherwise whether the order is arbitrary or capricious. *State ex rel. Chicago, Rock Island & Pacific Railroad Company v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. banc 1958); *State ex rel. Utility Consumers Council of Missouri, supra*, at 47.

The reviewing court's task is not to determine what decision the court would have made, but rather its purpose is to assure that the commission acts in accord with due process of law and its findings and decisions do not run afoul of constitutional and statutory requirements. *State ex rel. Union Electric Company v. PSC*, 765 S.W. 2d 618, 622 (Mo. App. 1988) citing *State ex rel Chicago, Rock Island & Pacific Railroad Company, supra*, at 796.

In addition to these standards for review, the Court reviews the record to evaluate whether the case merits issuance of a writ of mandamus. *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157, 165-166 (Mo. 2006) explained 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 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. Respondents Jeff Davis, Connie Murray, Steve Gaw, Robert Clayton III, and Lin Appling are the duly appointed and acting Commissioners and collectively comprise the current Commission. They are sued in their official capacity. (Petition, p.1)

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.1)

These facts are undisputed by Respondents Commission and Commissioners. (Respondents’ Return to Court’s Alternate Writ of Mandamus, May 31, 2007, para.1, p.4)

## Rate Case

The approval of the rate tariffs on December 29, 2006 with an effective date of January 1, 2007 is the subject of this mandamus proceeding. However, its origins are rooted some 11 months ago when the Empire District Electric Company, a regulated electric corporation under Chapters 386 and 393, RSMo, filed its general rate case on February 1, 2006 seeking approximately a 10% increase in customer rates. (Attachment 1, December 21, 2006, Report and Order; Respondents' Return, para.1, p. 4)

The rate case was commenced under the file and suspend process in Section 393.150, RSMo. The company filed its proposed tariffs and pre-filed expert testimony, documents and exhibits to support its required revenue for operations, investment and debt, the company's rate of return analysis, and the proposed rate structure that the company anticipates will produce that revenue and earnings. The rate case also included proposed tariffs that would implement the company's rate structure. The tariffs listed an issue day reflecting the company's filing day with an effective date for the tariffs that was 30 days after the issuance day. If not suspended, the tariffs would have gone into effect by operation of law on the effective date designated on the tariff sheets. However, the Commission suspended the tariffs and commenced the rate case No. ER-2006-0315. The Commission held an evidentiary hearing and received briefs from the parties. (Petition, p.1; Respondents' Return, para.1, p. 4)

## Report and Order Issued

In the December 21, 2006, Report and Order, the PSC decided the various substantive rate case issues for Empire's required revenue and the resultant rate structure

to give it the opportunity to achieve that revenue requirement. In that R&O, the PSC rejected the proposed tariffs Empire filed with its original rate proposal and directed the company to file tariffs that reflected and conformed to the substantive decisions reached in the R&O. (Attachment 1, R&O, p.58; Respondents' Return, para.1, p. 4)

#### Implementing Tariffs Filed and Public Counsel Objects to Tariffs

Empire filed what it termed as conforming tariffs on December 27, 2006. The following day, Tuesday, December 28, 2006, Empire withdrew those tariffs. Later that same day (December 28, 2006), Empire filed another set of tariffs to replace the withdrawn tariffs. In a motion accompanying the last filing, Empire suggested that the PSC expedite approval since Empire contended that the tariffs were required to be approved by January 1, 2007. (Petition, p.2; Attachment 2, Empire Motion for Expedited Consideration and Approval of Tariff Sheets Filed in Compliance with Commission Order on Less Than Thirty Days Notice, p.2; Respondents' Return, para.1, p. 4)

On December 28, 2006, Public Counsel filed its objection to the tariffs contending that they did not conform to the decision and further objected to Empire's claim that the tariffs were required by law to be approved by January 1, 2007. (Petition, p. 2; Attachment 3, Public Counsel's Response to Empire's Motion to Expedite, p. 1-2) Public Counsel followed that objection with another pleading, filed December 28, 2006, asserting that the tariffs before the PSC did not comply with its rate case decision. (Petition, p.2; Attachment 3, Public Counsel's Response to Empire's Response to Staff Recommendations, p. 1-2; Respondents' Return, para.1, p. 4) The PSC Staff said the tariffs were in compliance and recommended approval with the expedited January 1,

2007 effective date. (Petition, p. 2; Attachment 5, Public Service Commission December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs; Respondents' Return, para.1, p. 4)

Order Approving Tariff Rates Issued Late Afternoon Friday, December 29, 2006

The PSC approved the last set of replacement tariffs as filed by Empire in an order with an effective date of January 1, 2007, issued at approximately 3:40 p.m., Friday, December 29, 2006. (Petition, p. 2-3; Attachment 5: Public Service Commission December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs; Respondents' Return, para.1, p. 4)

PSC Rules Govern Filing Date For Rehearing Motion

The Commission has an electronic filing and information system known as EFIS which can be used to file pleadings and view certain filed records at any time. Under the Commission's rule on electronic filing (4 CSR 240-2.045(2)), any pleading filed electronically after the business hours of the Commission's records room shall be considered filed as of the next following business day. (Petition, p. 2-3) In a separate "paper filing" rule (4 CSR 240-2.080(11)), pleadings printed on paper that are received in the Commission's records room after 4:00 p.m. will be stamped as "filed" on the next day the Commission is regularly open for business. The rules do not define the "regular business hours" of the PSC, although by practice the records room's "regular business hours" ends and the office closes not later than 5 o'clock p.m., Monday through Friday. (Petition, p.2-3 Respondents' Return, para.1, p. 4) With the holiday closing of state offices on Monday, January 1, 2007, EFIS electronic filing of a rehearing motion after 5

p.m. on December 29, 2006 or the filing of a hard copy paper motion after 4 p.m. on December 29, 2006, would not be deemed filed under Commission rules until Tuesday, January 2, 2007, a day after the December 29 order and the tariffs became effective.

Writ of Mandamus Petition denied at Court of Appeals, Western District

Public Counsel filed a Petition for Writ of Mandamus with the Missouri Court of Appeals, Western District, on January 4, 2007. (WD67857) (Attachment 6) On March 9, 2007, the Court denied Public Counsel's Petition for Writ of Mandamus without opinion disposing of the mandamus proceeding before that Court. (Attachment 7)

Preliminary Writ issued

On March 19, 2007, Public Counsel filed its Petition for Writ of Mandamus. The Court issued its preliminary writ on May 1, 2007. Respondent PSC and Intervenor Empire filed their answers to Relator's Petition on May 31, 2007.

## ARGUMENT

### I

THE OFFICE OF THE PUBLIC COUNSEL IS ENTITLED TO AN ORDER IN MANDAMUS THAT DIRECTS THE PUBLIC SERVICE COMMISSION TO RESCIND ITS DECEMBER 29, 2006 ORDER APPROVING EMPIRE'S RATE TARIFFS THAT WERE EFFECTIVE ON JANUARY 1, 2007 BECAUSE THE ORDER IS UNLAWFUL AND UNREASONABLE AND VIOLATES PUBLIC COUNSEL'S RIGHT TO JUDICIAL REVIEW UNDER MO. CONST. ART. V, SEC. 18 (1945, AS AMENDED 1976) AND SECTIONS 386.710.2 AND 386.500, RSMO IN THAT:

(A) THE COMMISSION ISSUED THE ORDER SO CLOSE TO ITS EFFECTIVE DATE THAT UNDER COMMISSION FILING RULES PUBLIC COUNSEL HAD LESS THAN 90 MINUTES TO REVIEW THE ORDER AND PREPARE AND FILE BEFORE THE EFFECTIVE DATE A REHEARING MOTION THAT IS THE ESSENTIAL PREREQUISITE FOR JUDICIAL REVIEW;

(B) AS A RESULT, THE PSC VIOLATED ITS DUTY TO PROVIDE A REASONABLE OPPORTUNITY TO SEEK JUDICIAL REVIEW, AN ESSENTIAL PART OF THE PSC LAW;

(C) THE PSC IMPAIRED PUBLIC COUNSEL'S VITAL RIGHT TO APPEAL FROM THE COMMISSION'S RATE ORDER; AND,

(D) THE PSC ABUSED ITS DISCRETION TO MAKE ORDERS EFFECTIVE IN LESS THAN 30 DAYS BY ORDERING A JANUARY 1, 2007 EFFECTIVE DATE THAT THWARTED JUDICIAL REVIEW.

### **Introduction**

The Commission's order that approved Empire Electric Company's rate tariffs designed to implement the decision in the rate case is unlawful and unreasonable because, as a result of its timing of the effective date, it denied Public Counsel's right under Mo. Const. Art. V, Sec. 18 (1945, as amended 1976) guaranteeing that decisions of administrative agencies are subject to judicial review. Further, it is unlawful and unreasonable because it prevented Public Counsel from filing an effective and timely motion for rehearing under Sections 386.500.1 and .2, RSMo, that is mandatory for any subsequent appeal under Section 386.510, RSMo. Also, the order is unlawful and unreasonable because it prevented Public Counsel as the public's representative from exercising its vital right under Section 386.710.1(2) and 386.710.3, RSMo. to appeal PSC decisions to the courts. The Commission abused its discretion to make orders effective in less than 30 days from issuance (Section 386.490.3, RSMo,) when it fixed the effective date at a time that failed to allow Public Counsel a reasonable opportunity to seek judicial review.

Since the Commission's failure to provide a reasonable opportunity for the exercise of Public Counsel's constitutional and statutory rights for judicial review was unauthorized by law, the order is unlawful. The timing of the effective date was an abuse of discretion that unreasonably impaired Public Counsel's ability to file a timely

application for rehearing, thus cutting off its appeal rights. Since appeal under Section 386.510, RSMo has been thwarted, mandamus should issue to direct the PSC to vacate its order and “to compel the doing of that which is right . . . though it may sometimes have the effect of rescinding that which was wrong.” *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 14-15 (Mo. 1968).

### **Effective Date of Rate Tariffs Deny Rehearing and Appeal Rights**

The PSC made a conscious decision to select the January 1, 2007 effective date, a date that did not afford Public Counsel with a meaningful opportunity to appeal by depriving Public Counsel of a meaningful time to file a motion for rehearing. Under Sections 386.500.2 and 386.510, RSMo, a motion for rehearing is an essential first step in the perfection of an appeal to the circuit court. The rehearing process is part of the appeal process.

The appeal process for PSC decisions and orders is a vital portion of the bundle of rights of the Office of the Public Counsel. This bundle of rights includes the right to due process of law (*State ex rel. Fischer v. PSC*, 645 S.W.2d 39, 43 (Mo. App. 1982)) and the specific right to judicial review of administrative decisions enjoyed by all parties in Mo. Const. Art. V, Sec. 18 (1945, as amended 1976). The court in *In re St. Joseph Lead Co.*, 352 S.W.2d 656, 659-660 (Mo. 1961) held that Missouri's policy of judicial review of administrative decisions is manifest and its status as part of the fundamental law in the constitution cannot be questioned. Public Counsel also has the rights available to all interested parties in PSC proceedings to appeal orders and decisions. Sections 386.500.2

and 386.510, RSMo. Public Counsel is identified in Sections 386.500.1 and .2 as a specific entity entitled to this rehearing and appeal process.

As the advocate of the public before the Commission and on appeal in the courts, Public Counsel has broader rights to appeal than other litigants. The public's watchdog for utility matters has an unfettered right to appeal "any and all" Commission orders. (Section 386.710.2, RSMo). This broad power to test any PSC order stems from the history of the Office of the Public Counsel. It was created in the 1970s in response to a widespread belief that the utility regulatory process was flawed because the interests of utility customers were not adequately represented and because there was no entity charged with ensuring that the Commission fulfilled its duty to protect the public. Public Counsel was thus given two important roles: to represent the interests of the public before the Commission and to seek judicial review of any order of the Commission. (*See, Barvick, "Public Advocacy Before the Missouri Public Service Commission," 42 UMKC L. Rev. 181 (1977)* for a discussion by Missouri's first Public Counsel, William M. Barvick, shortly after the original act creating the Public Counsel was amended in 1977 adding Section 386.710.2, RSMo, that it was clear that the Legislature was very conscious of the importance of Public Counsel's broad right of appeal.)

Public Counsel has a special and specific authority and duty to represent the public which gives it rights for access and participation in the full PSC process, including the rehearing and appeal segments of that process. Access and participation in a process or proceeding, such as a PSC rate case or order approving rate increases, often turns on whether or not the agency has provided sufficient time for a party to have access to the

process (e.g., intervention in a case near its commencement) and participation at a time where participation by that party would be meaningful to the record, the outcome, or the protection of that party's rights and interests.

"Due process contemplates the opportunity to be heard at a meaningful time in a meaningful manner." *Moore v. Board of Educ.*, 836 S.W.2d 943, 948 (Mo. banc 1992). Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play, (*Tonkin v. Jackson County Merit System Commission*, 599 S.W. 2d 25, 32-33 (Mo. App. 1980); *Jones v. State Department of Public Health and Welfare*, 354 S.W. 2d 37, 39-40 (Mo. App. 1962)). An administrative process (like a rate case where a hearing is but one part) should also be governed by "rudimentary elements of fair play" as a standard of lawful and reasonable conduct.

Due process requires that parties be afforded a full and fair hearing (participation) at a meaningful time and in a meaningful manner. *State ex rel. Fischer v. Public Service Com.*, 645 S.W.2d 39, 43 (Mo. App. 1982). Here Public Counsel was not afforded a reasonable amount of time to take action to gain access and participation in the appeal process and was denied its due process right as well as other rights granted by constitution or statute.

In *State ex rel. County of St. Louis v. Public Service Commission*, 360 Mo. 270, 273, 228 S.W.2d 1 (Mo. 1950), the issuance of a Report and Order supplemental concurrence on January 31 was held to be unlawful and a nullity by the reviewing circuit court because it was issued so near the February 1 effective date that it deprived interested persons of the reasonable opportunity to prepare and file motions for rehearing.

Because the circuit court remanded the order to the Commission so it could issue a valid and lawful decision, the appeal was dismissed.

In *State ex rel. County of Jackson v. Missouri PSC*, 985 S.W.2d 400, 403 (Mo. App. 1999), the court held that a writ of mandamus is the appropriate remedy when the Commission deprives a party of its right to judicial review and issues an “order, made final and effective on the date of its entry, **thereby precluding review through the judicial review procedure of section 386.510...**” (emphasis supplied)

In *Dabin v. Director of Revenue*, 9 S.W.3d 610, 614 (Mo. banc 2000), this Court held that, in an appeal of a driver license revocation based on a traffic conviction, a meaningful opportunity for a hearing on a circuit court appeal includes a reasonable time in which to challenge the findings of the traffic judge. The Court ruled that the two drivers “were not afforded an opportunity to challenge the commissioner's findings of facts in a meaningful manner.” *Dabin*, 614. In one case, the judge entered judgment the “very day” that the traffic commissioner entered findings of facts while, in the other case, the judge adopted the commissioner's findings of facts as the court’s judgment on the day after the entry of those findings. “These short amounts of time are inadequate times in which to challenge the commissioner's findings in the circuit court...” *Dabin*, 614.

Although the *Dabin* Court found one day or less to pursue an appeal as unreasonable, it was unable to find authority in reported appellate cases to identify what may be a reasonable time. After noting the time frames considered reasonable to perfect appeals in small claims cases (10 days) and certain family court cases (15 days), the Court suggested that a review of other proceedings to determine a reasonable time is

instructive on “the necessary and appropriate procedure to accomplish the ends of due process requirements.” *Dabin, 614.*

### **Abuse of Discretion**

Under Section 393.150, RSMo relating to the filing of electric rate cases, the Commission has 11 months to issue its decision on the tariffs filed to commence the rate case. The initial period is 30 days, followed by an additional 120 days, and if a hearing has not been held, for an additional 6 months. Section 386.150, RSMo. When the Commission issued its decision on the merits on December 21, 2006 it also rejected the tariffs filed to start the rate case on February 1, 2006. The clock in Section 393.150 stopped running since the Commission completed its task when it issued that Report and Order. It was then up to Empire to file conforming tariffs to implement that decision.(Attachment 1, R&O, 58) Empire’s reason for expedited treatment was false because the Commission had no duty to approve the tariffs to be effective by January 1, 2007. In objecting to that “fast track” treatment, Public Counsel, as well as parties Praxair, Inc. and Explorer Pipeline, Inc., advised the PSC that approval by January 1, 2007 was not mandatory. Approval of the tariffs based on this erroneous interpretation of Section 393.150, RSMo was unreasonable. (Petition, p.2; Attachment 5, Order)

Further, the order was unreasonable in light of Public Counsel’s two pleadings filed on December 28, 2006 that cast serious doubt on the accuracy and conformity of the tariffs. Contrary to the statements in the Answers of Respondents and Empire, there was no evidence or suggestion made at any time that Public Counsel had abandoned its objections; the opposition to the tariffs remained clear and unambiguous. It was the

unreasonable haste of the PSC at the urging of Empire to make the tariffs effective by January 1<sup>st</sup> that cut off further discussion and made further filings of objections futile after the order was approved.

The Commission abused its discretion to approve tariffs on less than 30 days from date of filing, December 28, 2006. (Section 386.490.3, RSMo) The effect of rushing the effectiveness of the order was to promote the interests of Empire at the expense of the customer's right to be charged in accordance with the December 21, 2006 decision and at the cost of the denial of the public's appellate rights. The PSC abused its discretion in approving these implementing tariffs that were contrary to its own rate case decision without allowing parties the opportunity to explain the problems with the tariffs. The PSC had no discretion to prevent meaningful judicial review to correct the erroneous and unlawful rates approved in the December 29, 2006 order.

The PSC closed the door on the public advocate's ability to seek rehearing by setting an unfair and unreasonable effective date for its order. With a January 1, 2007 effective date, the order could not be reviewed under Commission rules relating to the filing of pleadings.

The Commission approved Empire's tariff in an order (Attachment 5) issued on December 29, 2006 at approximately 3:40 p.m. The Commission's order stated that it would be effective on January 1, 2007. In Respondents' Answer, para. 1, on page 4, Respondents admit these facts, including the time the order was issued as alleged in Petition, paragraph 10. For Public Counsel to challenge the order, it had to draft an application for rehearing and file it before the effective date of the order. (Section

386.500, RSMo) Under the Commission’s rule on electronic filing applicable to pleadings, including applications or motions for rehearing, any pleading filed electronically after the business hours of the Commission’s records room is considered filed as of the next following business day. (4 CSR 240-2.045(2)). The regular business hours are not established by rule, but the practice and policy is that the records room closes at 5:00 p.m. Monday through Friday. In a separate Commission rule that governs “paper filing,” pleadings received in the records room after 4:00 p.m. will be stamped “filed” the next day the Commission is regularly open for business. (4 CSR 240-2.080(11)) According to Commission’s rules, Public Counsel’s application for rehearing of the December 29, 2006 order would have been untimely unless it was filed in a paper version *within twenty minutes* of the issuance of the order, or filed electronically *within an hour and twenty minutes*. In Respondents’ Answer, para. 1, on page 4, Respondents admit this fact alleged in Petition, paragraph 11.

Twenty minutes – or even an hour and twenty minutes – is insufficient to review the order and prepare and file an application for rehearing. In Respondents’ Answer, para. 1, on page 4, Respondents admit this fact alleged in Petition, paragraph 12. Such a short period of time is inadequate to prepare even the most basic pleading, much less an application for rehearing which must note every point that will be raised on appeal; any point not raised in the motion for rehearing is not preserved for judicial review at any level of appeal. (Section 386.500, RSMo). These facts are also admitted in Respondents’ Answer, para. 1, p.4.

Even if it wanted to, the Commission lacks jurisdiction to consider an application for rehearing unless it is filed before the effective date of the order for which rehearing is sought. “If the motion for rehearing was not timely filed, the order and decision of the commission became final and conclusive and was not reviewable by the circuit court. It was immaterial that the secretary of the commission may have received and filed the motion for rehearing out of time, or that the commission may have ruled the motion upon its merits. *State ex rel. Alton R. Co. v. Public Service Com.*, 348 Mo. 780, 789 (Mo. 1941).

By issuing its order late in the afternoon on Friday, December 29, 2006 with an effective date of January 1, 2007, a federal and state holiday and a day before the Commission’s next regular business day, January 2, 2007, the Commission foreclosed Public Counsel’s ability to file an application for rehearing, let alone file an application that preserves issues for review. Without the timely filing of an application for rehearing, there can be no judicial review (Section 386.500, RSMo).

## ARGUMENT

### II

THE OFFICE OF THE PUBLIC COUNSEL IS ENTITLED TO AN ORDER IN MANDAMUS THAT DIRECTS THE PUBLIC SERVICE COMMISSION TO RESCIND ITS DECEMBER 29, 2006 ORDER APPROVING EMPIRE'S RATE TARIFFS THAT WERE EFFECTIVE ON JANUARY 1, 2007 BECAUSE PUBLIC COUNSEL DOES NOT HAVE ANOTHER ADEQUATE AND EFFICIENT REMEDY AND BECAUSE THE CRITERIA FOR A WRIT OF MANDAMUS IN *FURLONG V. CITY OF KANSAS CITY* ARE MET IN THAT:

- (A) THE COMMISSION VIOLATED ITS DUTY TO PROVIDE A MEANINGFUL OPPORTUNITY FOR JUDICIAL REVIEW SINCE THE EFFECTIVE DATE GAVE PUBLIC COUNSEL LESS THAN 90 MINUTES TO FILE AN EFFECTIVE REHEARING MOTION;
- (B) THE COMMISSION REFUSES TO RETRACT ITS ORDER AND ISSUE ANOTHER ORDER WITH SUFFICIENT TIME TO ALLOW PUBLIC COUNSEL TO FILE FOR REHEARING UNLESS COMPELLED TO DO SO;
- (C) MANDAMUS WILL NOT CONFER NEW AUTHORITY TO PUBLIC COUNSEL, BUT ALLOWS IT EXERCISE ITS EXISTING DUTY TO REPRESENT THE PUBLIC THROUGH APPEALS;
- (D) WITHOUT THE WRIT, PUBLIC COUNSEL WILL NOT BE ABLE TO EXERCISE ITS CLEAR, UNEQUIVOCAL, SPECIFIC RIGHT TO APPEAL

THIS ERRONEOUS ORDER THAT DOES NOT CONFORM TO THE PSC'S RATE CASE DECISION;

(E) THE COURT'S SUPERVISORY AUTHORITY OVER THE PSC MAKES MANDAMUS THE APPROPRIATE REMEDY WHEN THE PSC'S ORDER IS EFFECTIVE AT A TIME THAT PRECLUDES JUDICIAL REVIEW; AND

(F) THE PSC'S VIOLATION OF ITS MINISTERIAL DUTY TO PROVIDE A MEANINGFUL OPPORTUNITY FOR JUDICIAL REVIEW IS APPARENT FROM THE ORDER THAT IDENTIFIES THE INTERVAL BETWEEN THE ISSUE DATE AND THE EFFECTIVE DATE THAT PRECLUDED PUBLIC COUNSEL FROM FILING A TIMELY AND EFFECTIVE REHEARING MOTION.

### **Introduction**

The PSC cannot time the issuance of its order and the order's effective date so as to deprive Public Counsel of a reasonable opportunity to prepare and file a rehearing motion. To do so nullifies the ability to file for rehearing, the necessary step for Public Counsel to exercise its constitutional and statutory rights to appeal.

The January 1, 2007 effective date was set so close to the order's issuance late in the day on Friday, December 29, 2006 that under Commission rules and with the state offices closing for the New Year's holiday, Public Counsel had less than 90 minutes to review the order and prepare and file a rehearing motion.

The rehearing motion is not a mere formality. It must be a comprehensive identification of the specific grounds for appeal that will then govern the issues throughout all levels of judicial review. If not specifically raised in the rehearing motion, the error is waived. In Respondents' Answer, para. 1, on page 4, Respondents admit this fact.

The Commission violated its duty to protect both the utility and the ratepayer in rate cases by preventing Public Counsel, the ratepayer's statutory representative, from exercising its appeal rights. Empire filed its implementing tariffs with a 30 day effective date, but asked for an expedited effective date. While the Commission can set the effective date of its order at less than the statutory 30 days period from the date of the order, it must provide an interval that can reasonably provide for the filing of a rehearing motion. The Commission acts unlawfully and in excess of its jurisdiction when it provided no real window of opportunity for rehearing. It abused any discretion it may have to set the effective date when it acted in this arbitrary and capricious manner.

**Mandamus is the appropriate remedy**

Mandamus is an appropriate remedy to compel the undoing of a judicial act done without jurisdiction. In *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 14-15(Mo. 1968), the Court held that mandamus is appropriate where the administrative agency 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, *citing State ex rel. Knight Oil Co. v.*

*Vardeman*, 409 S.W.2d 672, 675 (Mo. Banc 1966) If, as a matter of law, the action of respondents is wrong, then they have abused any discretion which they may have had.

The Court further said that mandamus is applicable to compel an administrative agency to do it right even if it has the effect of rescinding that wrong act or order. "And where acts of public officers in respect to public rights are involved, the good faith and solemn belief of the officer should not be concerned where there has been an abuse of discretion accomplished by disobedience of the law. To hold otherwise would be to surrender the functions of the judiciary to the administrative." *Keystone*, *supra*, at 15.

The *Keystone* Court also identified other factors to consider in determining if mandamus would lie. The availability of other remedies would normally exclude issuance of the writ, but "such other remedies must be adequate and equally efficient." *Keystone*, *supra*, at 15 The Court should also consider the "public importance" of the matter.

### **Complaint case to contest the tariff and rates is not an adequate remedy**

The Commission and Empire suggest in their Answers to the Court's preliminary writ that mandamus does not lie because Public Counsel has another remedy to challenge the tariff and rates that became effective January 1, 2007. But the complaint process under Section 386.330, RSMo, is not an adequate remedy in these circumstances. If Public Counsel brought a complaint, it would mean that the 11 month rate case proceeding just completed in December 2006 may have to be relitigated, but this time Public Counsel rather than Empire would shoulder the burden to prove that the rates were unreasonable and unjust. Section 386.430, RSMo. The PSC's action has already

deprived Public Counsel of the statutory appeal remedy; it also deprived Public Counsel of a meaningful opportunity in the same proceeding to bring to the Commission and a reviewing court a showing of the conflict between the approved rate tariffs and the Commission's December 21, 2006 Report and Order that addressed the ratemaking issues. The complaint process would mean the commencement of a new case, with notice to interested parties, preparation and pre-filing of testimony, and an evidentiary hearing. This complaint process designed to test the justness and reasonableness of rates would be employed all to correct tariffs that Relator contends improperly implement rates that do not conform to the decision on the issues that was not 10 days old when the PSC approved these erroneous tariffs.

The complaint process is inadequate because it means undue delay in addressing the improper rates and adds unnecessary and unreasonable litigation expenses for Public Counsel, other parties, the Commission Staff and the Commission and its Regulatory Law Judges. Throughout that additional delay, the customers will be charged the wrong rates without the ability for a refund since these billed rates were approved (though erroneously) and are presumed lawful. Section 386.270, RSMo. The complaint process provides neither a full or efficient remedy and therefore is inadequate. *See, State ex rel. McNary, et al. v. Hais, 670 S.W.2d 494, 497 (Mo. banc 1984)* where a writ of prohibition was granted because the court found that an appeal is not a full and adequate remedy since the lower court's action was beyond its jurisdiction and without authority and because an appeal causes unwarranted expense and delay.

### **Furlong standard for mandamus**

In *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157, 165-166 (Mo. 2006), this Court identified the purpose and the standard for issuance of a writ of mandamus. The facts and law in this case meet that criteria and standards.

The Court will look favorable on a petition for writ of mandamus if the following elements and factors are present.

- 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.

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.

(a) The Commission has a duty to issue orders that allow a party to timely file a motion for rehearing as the essential first step for appeal. Therefore, the effective date must be sufficiently later than the issue date so that Public Counsel can prepare and file a sufficient and effective application for rehearing (Section 386.500, RSMo) and then file the appeal under Section 386.510, RSMo. However, the PSC has refused to perform that duty and violated Public Counsel's right to seek rehearing and an appeal when it approved the tariffs with less than 90 minutes before the deadline for filing a motion for rehearing that would be effective to preserve judicial review. In Respondents' Answer, para. 1, on page 4, Respondents admit to Relator's allegation that the time Public Counsel had to file a rehearing motion was not sufficient time.

(b) The Commission will not carry out its duty to provide Public Counsel with sufficient time to invoke the judicial review process under Section 386.500 *RSMo.*, unless the Court issues the requested writ of mandamus to compel the Commission to act lawfully in accordance with its duty. The Court's order will compel the PSC to provide a sufficient and reasonable interval between the new order's issuance and effective dates. The writ will give Public Counsel a fair and reasonable opportunity to file an adequate and timely application for rehearing preliminary to an appeal.

(c) A writ of mandamus will not confer any new authority to Public Counsel, but will simply allow Public Counsel to exercise its existing authority to take the first step in the appeals process in Section 386.500, RSMo. The writ will also allow it to carry out its duty to represent the public in appeals of PSC decisions. (Section 386.710, RSMo)

(d) Public Counsel has a clear, unequivocal, specific right to appeal orders issued by the Commission (Section 386.710.1 (2), and Section 386.500.1 and 386.500.2, RSMo.) This special role and right of Public Counsel is undisputed. Unless the Court issues the writ of mandamus, Public Counsel will be unable to exercise that right.

(e) Public Counsel has a clear and legal right to this remedy because the Court has general supervisory authority jurisdiction over the Commission under MO Const Art. V, Sec. 4. A writ of mandamus is the appropriate remedy when the Commission deprives a party of its right to judicial review and issues an “order, made final and effective on the date of its entry, **thereby precluding review through the judicial review procedure of section 386.510...**” *State ex rel. County of Jackson v. Missouri PSC*, 985 S.W.2d 400, 403 (Mo. App. 1999). (*emphasis supplied*).

(f) The Commission has no discretion to violate Public Counsel’s right to appeal. It must perform its ministerial duty to issue an order that provides a reasonable opportunity to file an application for rehearing and pursue an appeal. This duty to permit judicial review is clear, definite, and unambiguous. On the face of the Commission’s December 29, 2006 order (Attachment 5) it is apparent that the Commission issued an order with an effective date that precluded Public Counsel from filing a rehearing motion and deprived Public Counsel of its right to an appeal to the courts. As demonstrated in Argument I of Relator’s Brief, the law imposes these conditions that the Commission must follow in making its decisions. The Commission has violated the law and acted unreasonably in this case.

For these reasons, Public Counsel asks the Court to make its preliminary writ of mandamus absolute and provide Public Counsel with this full and adequate remedy that will reclaim its right to appeal the Commission's erroneous rate order on behalf of the public.

## CONCLUSION

Public Counsel asks the Court make absolute its preliminary writ of mandamus and direct the Public Service Commission of Missouri to vacate and rescind its December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs. Further, Public Counsel asks the Court to direct the Commission that upon the issuance of a new order approving any tariffs to implement its December 21, 2006, Report and Order, the Commission must 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 after the date of issuance that is a reasonably sufficient time to allow for the preparation of an adequate application for rehearing and for such other and additional relief as the Court deems just and proper.

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 7,888 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 three-and-one-half-inch diskette 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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Lewis R. Mills, Jr.

## CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 84.07(a), the undersigned hereby certifies that two copies of this brief, along with a three-and-one-half-inch 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 June 29, 2007, to the following counsel of record:

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