

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  
REPLY BRIEF OF RELATOR OFFICE OF THE PUBLIC COUNSEL**

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**REPLY POINTS AND AUTHORITIES RELIED UPON**

I.

AN ORDER IN MANDAMUS IS APPROPRIATE BECAUSE THE PSC DENIED PUBLIC COUNSEL A REASONABLE OPPORTUNITY TO FILE AN APPLICATION FOR REHEARING THAT RESULTED IN THE ABRIDGEMENT OF PUBLIC COUNSEL’S RIGHT TO SEEK JUDICIAL REVIEW UNDER MO CONST. 1945 (AS AMENDED 1976) ART. V, SEC 18 AND THE EXCLUSIVE APPEAL PROCESS FOR PSC DECISIONS AND ORDERS IN SECTION 386.510, RSMO 2000.

Mo Const. 1945 (as amended 1976) Art. V, Sec 18

Section 386.500, RSMo 2000

Section 386.510, RSMo 2000

II.

AN ORDER IN MANDAMUS IS APPROPRIATE BECAUSE (1) PUBLIC COUNSEL HAS BEEN DEPRIVED OF ITS EXPLICIT AND SPECIFIC RIGHT TO SEEK JUDICIAL REVIEW OF “ANY AND ALL ORDERS” OF THE PSC (2) THE COMPLAINT PROCESS UNDER SECTION 386.330, RSMO DOES NOT PROVIDE AN ADEQUATE AND EFFICIENT REMEDY, AND (3) THE FACTS AND LAW OTHERWISE MEET THE FURLONG CRITERIA TO JUSTIFY A WRIT OF MANDAMUS.

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

Mo Const. 1945 (as amended 1976) Art. V, Sec 18

Section 386.510, RSMo 2000

Section 386.710, RSMo 2000

## ARGUMENT

### I.

AN ORDER IN MANDAMUS IS APPROPRIATE BECAUSE THE PSC DENIED PUBLIC COUNSEL A REASONABLE OPPORTUNITY TO FILE AN APPLICATION FOR REHEARING THAT RESULTED IN THE ABRIDGEMENT OF PUBLIC COUNSEL'S RIGHT TO SEEK JUDICIAL REVIEW UNDER MO CONST. 1945 (AS AMENDED 1976) ART. V, SEC 18 AND THE EXCLUSIVE APPEAL PROCESS FOR PSC DECISIONS AND ORDERS IN SECTION 386.510, RSMO 2000.

[This section replies to Repondents' brief (prepared and filed by Intervenor The Empire District Electric Company acting on behalf of Respondents) in response to Public Counsel's brief, point I]

The issues here center on this simple statement of the case: the PSC's order is not impervious to judicial review, Public Counsel has the clear, unequivocal, and specific right to invoke that review, and the PSC's order denied that right. The inescapable fact in this case is that the PSC's order condensed the statutory 30 day window to timely file for rehearing to a matter of minutes. The statutory time for the effective date of tariffs and PSC orders is thirty days from issuance to the effective date (Section 386.490.3, RSMo 2000), but the Commission argues that it was permissible to shorten that period. (Resp. Brief, p.15) However, the abbreviation of that time to less than 58 hours violates all sense of fairness and reasonableness and is an abuse of any discretion the PSC may have in timing effective dates. The injustice and arbitrary nature of the reduction to 58 hours become even more pronounced when the real window to file a rehearing application was

less than 80 minutes (20 minutes for a paper motion) from the 3:40 p.m. issuance until the PSC closed its records office for filings before the effective date. Contrary to Respondents' creative scenarios to show that Public Counsel had more than adequate time for a rehearing application, the facts and law demonstrate that the PSC's action is a serious violation of Public Counsel's clear, unequivocal and specific right to appeal PSC decisions and orders. It is appropriate for the Court to issue its writ of mandamus.

Effective and timely rehearing application denied by timing of order

Under PSC rules, an application for rehearing filed after 4:00 p.m. (or at the latest 5:00 p.m. if filed electronically) would be deemed filed on January 2, 2007, the day after the order's effective date. However, this filing date comes too late under Section 386.500, RSMo to invoke Section 386.510, RSMo appeal rights. (Relator's Brief, p. 21-22)

Respondents suggest that "The time allotted was reasonable and sufficient under the circumstances." (Resp. Brief 10-11) Then they surround that argument with cases and discussion that speak to irrelevant issues to the issue at hand. The PSC argues that the filing of a "compliance" tariff does not create a contested case, that there is no right to a hearing, and "the inquiry to determine whether compliance tariffs comport with a Commission report and order is different and much more limited." (Resp. Brief, p. 11-12)

These are not relevant issues here; whether or not this is a contested case or whether a hearing is required has no bearing on Public Counsel's denial of judicial review. Section 386.510, RSMo makes no distinction between contested, noncontested and rule making cases. *State ex. rel. Public Counsel v. Public Service Commission*, 210

*S.W. 3d 344 (Mo App W.D. 2006)*. The restoration and preservation of Public Counsel's appeal rights is the issue in this mandamus proceeding. Public Counsel's purpose in the tariff proceeding was not to relitigate the rate case, but rather to ensure that the tariffs reflected the Report and Order even though Public Counsel opposes the rate case outcome. That is still Public Counsel's goal, one that can be pursued within the statutory process under Section 386.500 and 386.510, RSMo if a rehearing application was possible.

Instead of taking on the real issue, Respondents present a simplistic question as another straw man to attack: "Who better than the Commissioners to make that determination?" (Resp. Brief, p. 11) Certainly, the Commission cannot claim its order here is beyond any judicial review, let alone is immune from suggestions by the parties that the tariffs and the order are erroneous.

#### Unrealistic And Improbable Options

Respondents discount Public Counsel's claim that there was insufficient time to file for rehearing. They conjure up two scenarios that would have Public Counsel either: 1) slap dash a rehearing application together within minutes to beat the clock; or, 2) gamble on a rehearing motion filed after the deadline and after PSC business hours coupled with a prayer for a rule waiver so the rehearing motion will be deemed timely. (Resp. Brief, p. 9-14) Neither scenario is reasonable or appropriate.

Respondents' unrealistic and improbable "options" only show that the PSC's action hindered and blocked Public Counsel's ability to file a timely and effective

rehearing application and deprived Public Counsel of its access to the courts and a meaningful opportunity for judicial review.

Slap dash a rehearing application in minutes

The PSC created a time crunch for Public Counsel that was unreasonable. It now claims that 80 minutes (perhaps even 20 minutes) was more than enough time to file a rehearing motion. (Resp. Brief, p. 11-13) Respondents excuse their arbitrary and unreasonable action by saying that Public Counsel was familiar with the case, was familiar with the tariffs, and recently filed pleadings during the time frame of December 21, 2006 to 5:00 p.m. Friday, December 29<sup>th</sup> and the issues were simple. None of these arguments can turn a 20 minute review, drafting and filing window into a “reasonable and sufficient time.” (Resp. Brief, p. 11-13)

Simplicity and familiarity with the case does not translate into adequate time to prepare a pleading that will meet the test for full and specific inclusion of all grounds for appeal or else suffer waiver. Empire filed then withdrew, and then filed yet another set of purportedly compliance tariffs on December 27 and 28, making the question of what tariffs and what was their effect and their compliance with the Report and Order at least subject to debate and inquiry. Respondents’ notation of 16 pleadings filed by all parties-including Empire and the Staff-as proof of Public Counsel’s ability to file a rehearing motion confounds logic and credibility. (Resp. Brief, p. 12) Even though two OPC pleadings were filed on December 28 and 29, this is not probative evidence of a “reasonable and sufficient time.”

### Filing out of time with a request for a rule waiver

In Respondents' view, Public Counsel suffered no denial of its rights since it was free to file for rehearing out of time on Friday evening, or Saturday or Sunday and petition the Commission for a waiver of its filing rules under 4 CSR 240-2.015. The explanation of how that waiver would be applied was not provided. (Resp. Bf, p. 10)

This waiver scenario depends on events that not only are impractical, but also improbable. It is not a realistic option. There is no assurance or any reasonable expectation that a waiver would have been granted or even be taken up before the effective date made the issue moot. The waiver rule is broad and general, leaving the undefined "good cause" grounds as well as the nature, extent and terms and conditions of the waiver to the Commission's discretion.

The waiver suggested by Respondents is inconsistent with Public Counsel's rights that were denied by the PSC since it subjects the unambiguous right to seek judicial review to the PSC's prior approval. Public Counsel's general right to appeal the PSC's decisions springs from Mo Const. 1945 (as amended 1976) Art. V, Sec 18, which creates the right to review administrative agency orders and other actions in the courts. Public Counsel's specific right to appeal PSC decisions and orders is in Sections 386.710, Section 386.500 and 386.510, RSMo. This explicit and unambiguous right and authority to seek judicial review, extends to "any and all orders" of the PSC. Section 386.710, RSMo. As such, Public Counsel has the right and authority to exercise its appeal rights without first being forced to resort to the Commission for permission. Petitioning for the PSC's discretionary ruling to waive its filing rules as a precondition to filing for

rehearing dilutes Public Counsel's right. In addition, with the timing of the order just 80 minutes before the PSC's records office closed for the three day holiday weekend, a waiver request would have been futile, with little to no likelihood that it would be acted upon before the Monday effective date, if at all. The PSC's unlawful and unreasonable order cannot be excused or saved by the existence of this general waiver rule.

#### Correction to Initial Brief

Public Counsel apologizes to the Court and to Respondents for an inaccurate statement in its Brief that Respondents admitted that the time to file a rehearing motion was not sufficient. In preparation of the brief, counsel inadvertently referred to an electronic version of the petition that differed in numbering from the petition filed with the Court. In that version, paragraph 13 of Public Counsel's Petition (the paragraph containing the allegation) was labeled as paragraph 12, leading to the mistaken belief that the PSC's answer admitted the allegation of insufficient time to file. (*See*, OPC Brief, p. 31, which shows the error.) To correct the record, the PSC's answer admitted the PSC filing rules 4 CSR 240-2.045 (2) and 4 CSR 240-2.080 (11) and that regular business hours for the records room ended at 5:00 p.m., but denied that the amount of time allotted for the filing of rehearing applications was insufficient. (Petition, para. 12, p.5; Respondents' Brief, p.7)

#### PSC created circumstances for this mandamus, not Public Counsel

For Respondents to blame Public Counsel is the same as arguing that Public Counsel fixed the time of the order's issuance late on Friday December 29, 2006 and made Monday, January 1, 2007 as the effective date. Respondents' claim that Public

Counsel intentionally set up the circumstances that lead to this mandamus action is spurious and improper. (“It appears, however, that Public Counsel intentionally decided not to file a motion for rehearing and/or reconsideration regarding the Tariff Order, and, instead, elected to come to this Court seeking an extraordinary remedy.”) (Resp. Brief, p. 13) Respondents’ omission of any citation to any evidentiary support or any reasonable inference in the record confirms the specious argument. (Resp. Brief, p. 13) This false claim imputes malicious motives and a lack of good faith to Public Counsel’s actions without evidence or any reasonable grounds.

Motions for Rehearing based on the December 21, 2006 Report and Order could not reach the issue involving the nonconforming tariffs because the dispute occurred almost 10 days after the decision. The only realistic and practical vehicle to correct the tariff order was to seek rehearing, and if denied, seek judicial review of that order.

Public Counsel, when faced with the denial of its ability to pursue its statutory remedies to seek judicial review by the Commission’s order and under its filing rules, sought appropriate redress of its rights and protection of the public’s interest by seeking judicial relief through the extraordinary writ of mandamus. That action is appropriate and was brought in good faith. The parties are before the Court because of Respondents’ order, and not because of some conspiracy or untoward scheme by Public Counsel.

## II.

AN ORDER IN MANDAMUS IS APPROPRIATE BECAUSE (1) PUBLIC COUNSEL HAS BEEN DEPRIVED OF ITS EXPLICIT AND SPECIFIC RIGHT TO SEEK JUDICIAL REVIEW OF “ANY AND ALL ORDERS” OF THE PSC (2) THE

COMPLAINT PROCESS UNDER SECTION 386.330, RSMO DOES NOT PROVIDE AN ADEQUATE AND EFFICIENT REMEDY, AND (3) THE FACTS AND LAW OTHERWISE MEET THE FURLONG CRITERIA TO JUSTIFY A WRIT OF MANDAMUS.

[This section replies to Repondents' brief (prepared and filed by Intervenor The Empire District Electric Company acting on behalf of Respondents) in response to Public Counsel's brief, point II]

Respondents' suggestion of alternative remedies for OPC is misplaced and offers no real remedy. Respondents turn to blaming others for this case-OPC, other industrial customers, even the circuit court-rather than volunteer to end this case and provide a reasonable time for filing a rehearing application.

Public Counsel did not interfere or restrain the Commission's ability to set a sufficient interval between the order's issuance date and effective date. The PSC made that choice to constrain the time frame. The Commission ignored Public Counsel's pleadings filed on December 28 and 29 to draw its attention to the dispute concerning the tariffs. The so called "failure" to file a motion to suspend is only a smoke-screen. The Commission acted without taking up the concerns and with such speed that any further pleading was futile or would have been too late.

Complaint process not a remedy.

Section 386.510, RSMo, is the exclusive statutory remedy to challenge and judicially review PSC orders and decisions. Due to the PSC's order, that remedy is no longer available to Public Counsel unless the Court issues a writ of mandamus to direct

the PSC to rescind that order and provide a reasonable opportunity to file a motion for rehearing under Section 386.500, RSMo. Complaints under Sections 386.390, 393.130 and 386.490, RSMo are inadequate and inefficient as they do not provide the specific relief Public Counsel seeks. These complaints are directed at the Company's rates as just and reasonable while the relief sought here in mandamus is directed to the PSC's denial of Public Counsel's right to appeal the tariff order. A complaint case would cause undue expense and delay as it could lead to the relitigation of issues in the just completed rate case if intervenors raise these issues. The complaint case outcome does not provide a speedy and effective remedy to vindicate and secure that right.

*Furlong* criteria satisfied

Public Counsel has identified how each element of the *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157 (Mo. 2006) criteria for the issuance of a writ of mandamus is satisfied by the facts and law in this case. (Relators Brief, p. 33-41) Respondents point to 3 items that they claim are not satisfied.

One, the ability of the PSC to select an effective date is discretionary. (Resp. Brief, p. 20) However, within the scope of that discretion there is a measure of reasonableness that must be observed or the exercise of discretion becomes an abuse of power and an unlawful act. The PSC is mandated to recognize the rights of parties. By law and by the Missouri Constitution, Public Counsel has the right to judicial review. Mandamus lies to enforce that right.

Second, Respondents claim that Public Counsel could have filed for rehearing, but intentionally by-passed that route to set up this mandamus action. Public Counsel has previously addressed this claim.

Finally, Respondents state that they have not refused to act and “have not failed to act when they were required to do so.” (Resp. Bf. p. 20-21) Respondents will act only if required to do so. Public Counsel asks the Court to so order the relief sought. The PSC failed to provide a reasonable opportunity to seek rehearing. The PSC contends it would be willing to act but Public Counsel’s mandamus and the premature and unlawful petition in the circuit court has prevented it from taking action. (Resp. Bf, p. 16-17) However, the PSC has not acted on Public Counsel’s petitions for mandamus filed either at the Western District or at this Court by opening the door to rehearing it closed on December 29, 2006. Unless required to do so by this Court, it will not do so.

**CONCLUSION**

Public Counsel asks the Court to reject the arguments of Respondent Public Service Commission and its Commissioners and intervenor Empire Electric Company and find that the action of the commission was unlawful and unreasonable, make its preliminary writ of mandamus permanent, direct the Commission to vacate its order issued December 29, 2006 and, upon the issuance of any further order, allow a reasonable time before the effective date so that Public Counsel can pursue its right to appeal with a timely application for rehearing, and for such other relief as the Court deems 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 3,001 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 August 6, 2007, to the following counsel of record:

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