

**IN THE SUPREME COURT OF THE STATE OF MISSOURI**

**State of Missouri, ex rel. Aquila, Inc., et al,** )

**Appellants,** )

**v.** )

**Missouri Public Service Commission.** )

**Respondent.** )

**Case No. SC 90982**

---

**SUBSTITUTE BRIEF OF RESPONDENT  
MISSOURI PUBLIC SERVICE COMMISSION**

---

**JENNIFER HEINTZ  
Missouri Bar No. 57128**

**Attorney for Respondent  
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](mailto:jennifer.heintz@psc.mo.gov)**

**October 8, 2010**

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** -----3

**TABLE OF AUTHORITIES** -----3

**JURISDICTIONAL STATEMENT**-----4

**STATEMENT OF FACTS**-----4

**STANDARD OF REVIEW**-----7

**POINTS RELIED ON**-----7

**I**-----7

*The Commission’s orders approving the compliance tariffs and granting expedited treatment must be affirmed because the orders were lawful in that the Commission has the statutory authority to delegate approval of such orders to its Regulatory Law Judges. (Responsive to Point One of the Industrials’ Points Relied On* -----8

**II**-----8

*The Commission’s orders approving the compliance tariffs and granting expedited treatment are lawful because the Commission approved the actions of the Regulatory Law Judge when it denied the applications for rehearing of the Regulatory Law Judge’s orders and allowed the compliance tariffs to go into effect. (Responsive to Point Two of the Industrials’ Points Relied On).* -----8

**III**-----9

*The Commission’s orders approving the compliance tariffs and granting expedited treatment must be affirmed because under Section 393.140(11) the tariffs would have gone into effect thirty days after they were filed by Aquila in that the Commission took no action to suspend the effectiveness of the tariffs after they were filed. (Not responsive to any of Appellant’s Points Relied On).* -----9

**ARGUMENT** -----9

**CONCLUSION** ----- 18

**CERTIFICATE OF SERVICE**----- 19

**CERTIFICATE OF COMPLIANCE** ----- 20

# TABLE OF AUTHORITIES

## CASES

<i>Aquila, Inc. v. Public Service Commission</i> , 2010 WL 1539865 (Mo. Ct. App. W.D.) (April 20, 2010)-----	8
<i>Office of Public Counsel v. Public Service Commission</i> , 293 S.W.3d 63, 69 (Mo. Ct. App. S.D. 2009) -----	7
Section 512.020, RSMo (2000) (Supp. 2008)-----	4, 7
<i>State ex rel. Missouri Gas Energy v. Public Service Commission</i> , 186 S.W.3d 376, 381 (Mo. Ct. App. W.D. 2005) -	7

## STATUTES

Section 386.130, RSMo (2000)-----	8, 11
Section 386.240, RSMo (2000)-----	8, 10, 11, 12, 13, 14, 15
Section 386.430, RSMo (2000)-----	8, 12
Section 386.500, RSMo (2000)-----	9, 15
Section 393.150, RSMo (2000)-----	9, 16
<i>State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission</i> , 552 S.W.2d 696 (Mo.banc 1977)-----	8

## **Jurisdictional Statement**

This case is before the Court on AG Processing and the Sedalia Industrial Energy Users' Association (the Industrials) Application to Transfer under Article V, Section 10 of the Missouri Constitution and Missouri Supreme Court Rule 83.04. This Court granted transfer after an opinion affirming the Missouri Public Service Commission's (Commission) Orders Approving Compliance Tariffs and Granting Expedited Treatment by the Court of Appeals. The Industrials challenge the findings by the circuit court and the Court of Appeals that the Commission properly approved the compliance tariffs filed by the utility through a delegation of authority to its Regulatory Law Judge.

The Honorable Jon E. Beetem of the Circuit Court of Cole County affirmed the Commission's orders on February 2, 2009. The Court of Appeals affirmed the Commission's orders on April 20, 2010. This Court ordered transfer from the Court of Appeals on August 31, 2010.

## **Statement of Facts**

This appeal arises from a general rate case filed by Aquila, Inc.<sup>1</sup>, an electric utility regulated by the Commission. In a Report and Order voted on by all five Commissioners acting as a body, the Commission rejected the tariffs that Aquila originally filed to initiate the rate case. (Respondent Commission's Appendix, p. A177). The Report and

---

<sup>1</sup> Aquila has subsequently been acquired by Kansas City Power & Light (KCPL), another electric utility regulated by the Commission. The issues surrounding the acquisition of Aquila by KCPL are not before this Court in this case.

Order directed Aquila to file replacement tariff sheets (called compliance tariffs) in accordance with the decisions announced by the Commission in the Report and Order. (Respondent Commission's Appendix, p. A178). The Industrials timely filed an application for rehearing from the Commission's Report and Order. (Respondent Commission's Appendix, p. A70).

Aquila filed compliance tariffs as directed. (Respondent Commission's Appendix, p. A86). The initial compliance tariffs had an effective date 30 days from the date of filing. (Respondent Commission's Appendix, p. A97). Thirty days is the amount of time allowed by statute for the Commission to take action to reject or suspend tariffs that have been filed. If the Commission does not act to reject or suspend proposed tariffs within that time, the tariffs take effect by operation of law. The Commission also has the statutory authority to approve tariffs on less than 30 days' notice for good cause shown. With its first set of compliance tariffs, Aquila filed a motion for expedited treatment seeking to have the tariffs approved in less than 30 days. (Respondent Commission's Appendix, p. A88). Aquila filed a second set of compliance tariffs on June 18 with an effective date of July 18, 2007 (Respondent Commission's Appendix, p. A46). Aquila also filed a motion to expedite approval of these tariffs. (Respondent Commission's Appendix, p. A47).

The Commission employs attorneys known as Regulatory Law Judges or presiding officers to preside over hearings and to perform other functions with respect to the processing of cases at the Commission. The Commission is permitted by statute to delegate authority to these Regulatory Law Judges.

The Regulatory Law Judge assigned to the Aquila rate case issued an order approving some of the compliance tariffs and granting Aquila's motion for expedited treatment and approving the tariffs to be effective before the regular 30-day effective date. (Respondent Commission's Appendix, p. A62). As a result of this order, the first set of compliance tariffs went into effect on May 31, rather than on June 20. (Respondent Commission's Appendix, p. A69). The Regulatory Law Judge issued a second order approving the tariffs and granting expedited treatment. (Respondent Commission's Appendix, p. A43). As a result of the orders approving the tariffs and granting expedited treatment, the second set of compliance tariffs went into effect on July 5, 2007, a difference of only 13 days from the regular 30-day effective date. (Respondent Commission's Appendix, p. A45). The Commission took no action to suspend either set of compliance tariffs.

The Industrials filed applications for rehearing from the orders approving the tariffs and granting expedited treatment. (Respondent Commission's Appendix, p. A37 and A57). The Commission denied all pending applications for rehearing. (Respondent Commission's Appendix, p. A31). Following the denial of the applications for rehearing, the Industrials filed petitions for writ of review in the circuit court. (Respondent Commission's Appendix, p. A55). The circuit court affirmed the Commission's orders. (Respondent Commission's Appendix, p. A29). The Industrials filed an appeal in the Court of Appeals for the Western District. (Respondent Commission's Appendix, p. A10). The Court of Appeals also affirmed the Commission's orders by written opinion.

(Respondent Commission’s Appendix. P. A28). This Court granted the Industrials’ application for transfer following the opinion issued by the Court of Appeals.

### **Standard of Review**

Commission orders are reviewed to determine whether they are lawful and reasonable. *Office of Public Counsel v. Public Service Commission*, 293 S.W.3d 63, 69 (Mo. Ct. App. S.D. 2009). An order is lawful if the Commission acted within its statutory authority. *Id.* In its lawfulness assessment, the reviewing court must “exercise unrestricted, independent judgment and correct any erroneous interpretations of law.” *Id.*, (quoting *State ex rel. Missouri Gas Energy v. Public Service Commission*, 186 S.W.3d 376, 381 (Mo. Ct. App. W.D. 2005). An order is reasonable if it is supported by substantial and competent evidence upon the whole record, if it is not arbitrary, capricious or an abuse of discretion. *Id.*

A Commission order has the presumption of validity. *Public Counsel*, 293 S.W.3d at 69. The burden is on the party opposing the order to prove that the order is invalid. *Id.* All evidence and all reasonable supporting inferences are viewed in the light most favorable to the order. *Id.*

The reviewing court reviews the order of the commission, not the circuit court’s judgment. *Id.* at 68-9. This standard of review is applicable to each Point Relied On.

### **Points Relied On**

#### **I**

**The Commission’s orders approving the compliance tariffs and granting expedited treatment must be affirmed because the orders were lawful in**

**that the Commission has the statutory authority to delegate approval of such orders to its Regulatory Law Judges. (Responsive to Point One of the Industrials' Points Relied On).**

**Statutes**

Section 386.130, RSMo (2000)

Section 386.240, RSMo (2000)

Section 386.430, RSMo (2000)

Section 386.500, RSMo (2000)

**Cases**

*State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696 (Mo.banc 1977)

*Aquila, Inc. v. Public Service Commission*, 2010 WL 1539865 (Mo. Ct. App. W.D.) (April 20, 2010)

**II**

**The Commission's orders approving the compliance tariffs and granting expedited treatment are lawful because the Commission approved the actions of the Regulatory Law Judge when it denied the applications for rehearing of the Regulatory Law Judge's orders and allowed the compliance tariffs to go into effect. (Responsive to Point Two of the Industrials' Points Relied On).**

**Statutes**

Section 386.240, RSMo (2000)

Section 386.500, RSMo (2000)

### **Cases**

*Aquila, Inc. v. Public Service Commission*, 2010 WL 1539865 (Mo. Ct. App. W.D.) (April 20, 2010)

### **III**

**The Commission's orders approving the compliance tariffs and granting expedited treatment must be affirmed because under Section 393.140(11) the tariffs would have gone into effect thirty days after they were filed by Aquila in that the Commission took no action to suspend the effectiveness of the tariffs after they were filed. (Not responsive to any of Appellant's Points Relied On).**

### **Statutes**

Section 393.140, RSMo (2000)

Section 393.150, RSMo (2000)

### **Argument**

#### **I**

**The Commission's orders approving the compliance tariffs and granting expedited treatment must be affirmed because the orders were lawful in that the Commission has the statutory authority to delegate approval of such orders to its Regulatory Law Judges. (Responsive to Point One of the Industrials' Points Relied On).**

Section 386.240, RSMo (2000) plainly provides for the delegation of authority by the Commission:

The commission may authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized by this chapter to do or perform; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission.

Section 386.240 places no limitation on the acts, matters or things that the Commission may delegate. The statutory language is broad in that it encompasses “any act, matter or thing.” (emphasis added). Section 386.240 only provides that any order issued by an employee of the Commission must be authorized or approved by the Commission to be binding on any person or utility. The Commission has promulgated rules that provide for the delegation of authority to Regulatory Law Judges (called “presiding officers” in the rules) to carry out functions necessary for the prompt resolution of cases. Section 386.240 contains no requirement that the delegation of authority be made in a public hearing. Section 386.240 merely provides that the action taken by a delegatee be authorized or approved by the Commission.

*State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696 (Mo.banc 1977) is inapposite to this case. In *Philipp*, the court held that the Commission’s system of notational voting could not be used in lieu of a public meeting of the Commissioners. *Id.* at 702. The court found that the system of notational voting, where a proposed report and order was circulated to each Commissioner and each

Commissioner indicated approval or disapproval in writing, did not satisfy the requirements of Section 386.130. *Id.* Section 386.130 requires that a quorum of the Commission vote in a public meeting when acting as a body. The *Philipp* court did not construe Section 386.240.

The Court of Appeals rejected the Industrials' argument that Section 386.130 requires that Section 386.240 be interpreted to allow the Commission to resolve only interlocutory matters by delegation of authority. *Aquila, Inc. v. Public Service Commission*, 2010 WL 1539865 \*3 (Mo. Ct. App. W.D.) (April 20, 2010). The Court of Appeals found that reading the *Philipp* court's interpretation of the quorum requirement of Section 386.130 into Section 386.240

would render the delegation statute a complete nullity, because under the literal language of *Philipp Transit*, no 'valid' order enforceable against regulated entities-of *any* sort-can be issued except by action of 'the commission [as a body] acting at least by a majority, and at a stated meeting.' We will not read *Philipp Transit's* interpretation of another statutory provision (§ 386.130) to completely eliminate the delegation authority plainly granted by § 386.240.

*Id.* (emphasis in original). The reasoning used by the Court of Appeals is sound and should be followed by this Court.

The Court of Appeals also noted that, even if the *Philipp Transit* case does require the Commission to act as a body in performing the 'final act' in a ratemaking case, the Commission did so here. *Aquila, Inc.*, 2010 WL 1539865 at \*3. The Commission, acting

as a body, issued a Report and Order containing its substantive findings in the underlying rate case. The Regulatory Law Judge then issued the challenged orders, finding that the tariffs submitted by Aquila satisfied the Commission's directions as set out in the Report and Order. *Id.* at \*4. The Industrials filed applications for rehearing from these orders, which were denied by the Commission, again acting as a body, as a precondition to judicial review. *Id.* at \*3. As the party challenging the orders, the Industrials have the burden of proving that the orders are invalid. Section 386.430, RSMo (2000). The Industrials have not alleged that either the Report and Order or the applications denying the motions for rehearing were improperly issued under their interpretation of the *Philipp Transit* case. *Id.* The Industrials also have not identified any substantive issue that was decided by the Regulatory Law Judge in the orders approving the compliance tariffs. *Id.* at 4. Instead, those orders served only to approve tariffs that were filed in accordance with the decisions of the Commission as announced in the Report and Order. *Id.*

Under Section 386.240, the Commission may lawfully delegate its authority to its employees, including the authority to approve compliance tariffs and grant expedited treatment, provided that the Commission authorize or approve the action taken by its employees. Even if the Commission were permitted only to delegate non-substantive matters to its Regulatory Law Judges (a limitation that does not appear on the face of the statute), all of the substantive issues in the underlying rate case were decided by the Commission in its Report and Order. The Commission had the opportunity to review the Regulatory Law Judge's actions in approving the compliance tariffs and granting

expedited treatment when it considered the Industrials' applications for rehearing of the challenged orders. The Commission declined to grant rehearing on this issue.

Because the Commission has the statutory authority to delegate any matter to a Regulatory Law Judge under Section 386.240, the delegation of authority in this case was lawful. Even if the *Philipp Transit* case was interpreted as broadly as the Industrials suggest, the Industrials have failed to identify any issue that the Commission improperly delegated to the Regulatory Law Judge for resolution in this case. The Commission decided the substantive issues in its Report and Order and took the final action in this case when it denied the applications for rehearing. The Industrials have not met their burden of demonstrating that the challenged orders are unlawful. Because the orders approving the compliance tariffs and granting expedited treatment are lawful, the orders must be affirmed.

Section 386.500, RSMo (2000) provides that:

No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or any person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unreasonable. The applicant shall not in any court urge or rely on any ground not so set forth in its application for rehearing.

In this case, the Industrials filed three applications for rehearing. None of those applications for rehearing make any argument about the application of Section 386.610, RSMo (2000) to the delegation of authority that occurred in this case. Because the Industrials failed to raise this issue in any application for rehearing, any argument based on Section 386.610 is not properly before this Court and should be disregarded.

## II

**The Commission's orders approving the compliance tariffs and granting expedited treatment are lawful because the Commission approved the actions of the Regulatory Law Judge when it denied the applications for rehearing of the Regulatory Law Judge's orders and allowed the compliance tariffs to go into effect. (Responsive to Point Two of the Industrials' Points Relied On).**

Before an order issued by delegation of authority can be binding upon any utility or person, the order must be "expressly authorized or approved by the commission." Section 386.240, RSMo (2000). The Court of Appeals interpreted this statutory language to mean that the approval of the order can take place after the order by delegation has issued. *Aquila, Inc.*, 2010 WL 1539865 at \*4. The Court of Appeals went on to conclude that even if the challenged orders were issued without the prior authorization of the Commission, the orders were sustainable because the Commission properly approved the orders after they were issued. *Id.* at \*5.

The Court of Appeals found that the Commission “ratified” the orders approving the compliance tariffs and granting expedited treatment when it denied the Industrials’ applications for rehearing based on those orders. *Id.* The Industrials presented to the Commission the same objections to the approval of those orders that they are now presenting to this Court. When the Commission denied the applications for rehearing, it specifically referred to the orders approving the compliance tariffs and granting expedited treatment. *Id.* The orders were referred to as having been issued by the Commission. *Id.* The Court of Appeals found that this constituted “express” approval of the challenged orders as required by Section 386.240. *Id.* The Court of Appeals found that the Commission’s refusal to rehear the orders under the broad power granted to it by Section 386.500 was sufficient to satisfy Section 386.240:

The Commission’s refusal to exercise its plenary discretionary ability to review and reconsider the Tariff Compliance Orders, an action taken with full knowledge of the orders’ issuance, was sufficient approval of the orders to satisfy § 386.240’s requirements.

*Id.*

Section 386.240 does not require that the Commission’s approval of an order issued by delegation take place before the order’s issuance. The statutory language is broad enough to encompass express approval of an order after issuance. The Industrials brought their contentions about the effectiveness of the challenged orders to the Commission’s attention in applications for rehearing of those orders. The Commission was aware of the concerns of the Industrials and declined to rehear the orders. The

Commission instead chose to ratify the orders when it denied the applications for rehearing on this issue. This action by the Commission was enough to satisfy the express authorization or approval requirement of Section 386.240. Because the Commission expressly approved the tariff compliance orders issued by the Regulatory Law Judge, the issuance of those orders was lawful and the Commission's approval of the orders must be affirmed.

### III

**The Commission's orders approving the compliance tariffs and granting expedited treatment must be affirmed because under Section 393.140(11) the tariffs would have gone into effect thirty days after they were filed by Aquila in that the Commission took no action to suspend the effectiveness of the tariffs after they were filed. (Not responsive to any of Appellant's Points Relied On).**

Section 393.140(11) requires that every electric utility file tariffs showing all of the utility's rates and charges with the Commission. Under the statute, no tariff filed with the Commission takes effect until thirty days after the filing is made. Section 393.140(11), RSMo (2000). The Commission may, however, shorten the thirty-day period for good cause shown. Section 393.140(11), RSMo (2000).

The Commission may, upon written notice explaining its reasons for a suspension, suspend the operation of any filed tariff for a period not exceeding the statutory maximum of 120 days plus six months. Section 393.150, RSMo (2000). If the

Commission does not act to suspend a filed tariff, the tariff becomes effective thirty days after filing, unless the Commission finds good cause to shorten the thirty-day window.

In this case, Aquila filed several sets of compliance tariffs after the Commission had rejected its initial tariff filing, two sets of which are at issue in this case. The initial tariffs were suspended by the Commission for the maximum period of time allowed by statute. The Commission had a full rate case hearing and issued a detailed Report and Order containing its findings of fact and conclusions of law. The compliance tariffs were filed in response to the Commission's directions in the Report and Order. Aquila requested that the compliance tariffs become effective in less than 30 days. The challenged orders issued by the Regulatory Law Judge in this case approved the tariffs submitted in compliance with the Report and Order and granted Aquila's request for approval of the tariffs in less than thirty days. Even if the challenged orders had not been issued, however, the tariffs would have gone into effect after the normal thirty-day period prescribed by statute. Here, Aquila filed one set of compliance tariffs on May 21, 2007 and a second set of compliance tariffs on June 18, 2007. Under the normal 30-day statutory procedure, the first set of tariffs would have gone into effect on June 20 and the second set on July 18, 2007. As a result of the order approving the first set of compliance tariffs, those tariffs went into effect on May 31, 2007. As a result of the second order approving the tariffs and granting expedited treatment, the second set of compliance tariffs went into effect on July 5, 2007, a difference of only 13 days from the regular 30-day effective date. The Commission took no action to suspend either set of the challenged compliance tariffs.

Because the tariffs would have become effective thirty days after they were filed, in the absence of any action by the Commission, Appellants cannot obtain effective relief through this appeal and the challenged orders must be affirmed.

**Conclusion**

**FOR THE ABOVE REASONS**, the Commission requests that this Court affirm the Commission's orders approving the compliance tariffs and granting expedited treatment in all respects.

Respectfully submitted,

\_\_\_\_\_  
Jennifer Heintz, No. 57128

Attorney for the  
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](mailto:jennifer.heintz@psc.mo.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, first-class mail, postage prepaid to the following counsel of record this 8<sup>th</sup> day of October, 2010:

Lewis Mills  
Office of Public Counsel  
200 Madison Street, Ste 650  
P.O. Box 2230  
Jefferson City, MO 65102-0360  
T – 573-751-1304  
F – 573-751-5562  
[lewis.mills@ded.mo.gov](mailto:lewis.mills@ded.mo.gov)

David Woodsmall  
Finnegan, Conrad & Peterson  
428 E. Capitol Ave., Ste 300  
Jefferson City, MO 65101  
T – 573-635-2700  
F – 573-635-6998  
[dwoodsmall@fcplaw.com](mailto:dwoodsmall@fcplaw.com)

Stuart Conrad  
Finnegan, Conrad & Peterson  
3100 Broadway, Ste. 1209  
Kansas City, MO 64111  
T - 816-753-1122  
F - 816-756-0373  
[stucon@fcplaw.com](mailto:stucon@fcplaw.com)

Karl Zobrist  
Roger Steiner  
Sonnenschein, Nath & Rosenthal  
4520 Main St., Ste 1100  
Kansas City, MO 64111  
T – 816-460-2400  
F – 816-531-7545  
[kzobrist@sonnenschein.com](mailto:kzobrist@sonnenschein.com)  
[rsteiner@sonnenschein.com](mailto:rsteiner@sonnenschein.com)

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply 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 3,715 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 8<sup>th</sup> day of October, 2010.

\_\_\_\_\_  
Jennifer Heintz  
Attorney for Respondent