IN THE SUPREME COURT 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.	)	

ORIGINAL PROCEEDING IN MANDAMUS

RESPONSIVE BRIEF OF THE MISSOURI PUBLIC SERVICE COMMISSION AND COMMISSIONERS DAVIS, MURRAY, GAW, CLAYTON, AND APPLING

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JURISDICTIONAL STATEMENT

Respondents agree that this Court has jurisdiction over this matter, as alleged in the Jurisdictional Statement of Relator's Brief, pursuant to Mo. Const. Art. V, Sec. 4 (1945, as amended 1976). Respondents, however, as more fully explained below, dispute the numerous other factual and legal assertions contained within Relator's Jurisdictional Statement.

ARGUMENT

A. Introduction

This Court should not make absolute its preliminary writ of mandamus issued herein on May 1, 2007. Respondents, the Missouri Public Service Commission (the "Commission") and its duly appointed and confirmed members, Jeff Davis, Connie Murray, Steve Gaw, Robert Clayton, and Linward Appling (collectively, the "Respondents"), complied with all applicable laws, and Relator, the Office of the Public Counsel ("Public Counsel") is not entitled to an order in mandamus that directs the Commission to rescind its December 29, 2006 order approving the compliance tariffs of The Empire District Electric Company ("Empire").

Respondents will not restate the underlying factual background of this matter. Respondents generally concur in the Statement of Facts presented by Public Counsel. Respondents note, however, that due to the Commission Rule on waivers, it would be possible for a rehearing motion filed after 5:00 p.m. on December 29, 2007, to be deemed filed with the Commission prior to Tuesday, January 2, 2007. Respondents would also like to note that they did **not** admit that the time Public Counsel had to file a rehearing

motion was insufficient, as asserted by Public Counsel in paragraph (a) on page 39 of its Brief. Respondents denied paragraph 13 of Public Counsel Petition (the paragraph containing said allegation), and, as explained herein, Respondents strenuously deny that, under the circumstances, an insufficient amount of time was allotted for the filing of rehearing applications and other motions.

On December 21, 2006, the Commission issued its Report and Order addressing all contested issues in Commission Case No. ER-2006-0315, to be effective December 31, 2006 (the "Report and Order"). Certain parties, including Public Counsel, filed applications for rehearing regarding the Report and Order. Having found the tariff sheets submitted by Empire to be in compliance with the Report and Order, on December 29, 2006, the Commission issued its Order Granting Expedited Treatment and Approving Tariffs ("Tariff Order"), to be effective January 1, 2007. With its Tariff Order, the Commission approved the compliance tariffs for service rendered by Empire on and after January 1, 2007, and further concluded that any additional delay or further suspension beyond January 1, 2007 would not be reasonable and would preclude Empire from earning the just and reasonable return the Commission authorized through the Report and Order.

Public Counsel seeks a writ of mandamus with regard to the Tariff Order issued by the Commission on December 29, 2006. The Tariff Order is ancillary to the Report and Order issued on December 21, 2006, and any judicial review of the Report and Order will necessarily implicate the tariffs authorized by the Report and Order and approved by the

Tariff Order. Further, there does exist a means to seek judicial review of the Tariff Order independent of the Report and Order.

B. Standard of Review

"Mandamus is a discretionary writ, and there is no right to have the writ issued." *State ex rel. Missouri Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo. 1999) (internal citations omitted). Mandamus is only appropriate to require the performance of a ministerial act, and mandamus "cannot be used to control the judgment or discretion of a public official." *Id.* (internal citations omitted). The Courts have held that the purpose of mandamus is "to execute and not to adjudicate; it coerces performance of a duty already defined by law." *Williams v. Gammon*, 912 S.W.2d 80, 83 (Mo.App. W.D. 1995). Respondents complied with all applicable laws and have not failed or refused to perform any ministerial act which they were obligated by law to perform.

Further, pursuant to the standard set out in RSMo. §386.510 and applicable case law, the Tariff Order is both lawful and reasonable. An order is lawful when authorized by statute. *State ex rel. Coffman v. Public Service Commission*, 121 S.W.3d 534, 541 (Mo.App. W.D. 2003). A court exercises independent judgment in determining an order's lawfulness. *State ex rel. Associated Natural Gas Company v. Public Service Commission*, 37 S.W.3d 287, 292 (Mo.App. W.D. 2000). To determine reasonableness, a court looks to whether the order is arbitrary or capricious or was an abuse of discretion. *Coffman*, 121 S.W.3d at 541.

C. An Order in Mandamus Should Not be Issued Because the Commission Provided a Reasonable Opportunity for the Filing of Applications for Rehearing or Reconsideration (Responds to Public Counsel's Point I)

The Tariff Order is lawful and reasonable and did not violate Public Counsel's right to seek judicial review, in that the Commission provided a reasonable opportunity, under the circumstances, for Public Counsel to prepare and file an application for rehearing with the Commission. In Points I(A) and I(B), Public Counsel argues that it had only ninety minutes to file an application for rehearing, and that, thereby, the Commission violated its duty to provide a reasonable opportunity to seek judicial review. In Points I(C) and I(D), Public Counsel argues that the Commission violated Public Counsel's vital right to appeal and that the Commission abused its discretion in setting the effective date of the Tariff Order. Each of these arguments is without merit. Further, Public Counsel helped to create the very situation of which Public Counsel now complains. Public Counsel, after advising the Commission that it would file a motion to suspend or reject Empire's compliance tariffs if the same were not in conformity with the underlying Report and Order, failed to make any such filing.

1. Public Counsel was permitted to file anytime prior to January 1, 2007.

Public Counsel did not have only ninety minutes to file an application for rehearing or reconsideration regarding the Tariff Order. The Tariff Order was issued the afternoon of Friday, December 29, 2006, bearing an effective date of Monday, January 1, 2007. Pursuant to the terms of RSMo. §386.500, in order to be in a position to seek judicial review, Public Counsel was required to file an application for rehearing and/or

reconsideration at any time *before* January 1, 2007. In other words, Public Counsel needed to file its pleading on Friday, Saturday, or Sunday. Filing with the Commission after standard business hours is possible through the Commission's electronic filing and information system (EFIS) – a system frequently used by Public Counsel.

Public Counsel points to Commission Rules 4 CSR 240-2.045(2) and 4 CSR 240-2.080(11) for the premise that any filing made "after hours" would be deemed to be filed on the next business day, thereby allegedly giving Public Counsel less than two hours to make its filing. Public Counsel, however, conveniently fails to mention Rule 4 CSR 240-2.015 which states that the Commission's rules on practice and procedure may be waived by the Commission for good cause. Public Counsel could have filed an application for rehearing and/or reconsideration on Friday, Saturday, or Sunday – prior to the effective date of the Tariff Order – along with a motion asking the Commission to waive its procedural rules regarding the time a document is deemed filed. Public Counsel, of course, made no such filing.

2. The time allotted was reasonable and sufficient under the circumstances.

Under the circumstances of this case, the window for filing an application for rehearing or reconsideration was particularly reasonable and sufficient. Empire's filing of compliance tariffs to implement the Commission-approved rate increase did not initiate a new "contested case," as defined by the Missouri Administrative Procedure Act, and the new rates could have been allowed to take effect immediately and by operation-of-law under the Public Service Commission Law. As the Commission explained in a recent

decision involving another regulated utility, the inquiry conducted on tariffs that initiate a case and are subsequently suspended provides "the full panoply of due process to permit the Commission to determine just and reasonable rates," but the inquiry to determine whether compliance tariffs comport with a Commission report and order is different and much more limited.

With a decision such as the underlying Report and Order, the Commission decides the contested issues before it in the rate case proceeding. The only question before the Commission regarding a compliance tariff filing, such as the one at issue, is whether that filing actually complies with the Report and Order. Who better than the Commissioners to make that determination? The Commission is entitled to interpret its own order and ascribe to that order a proper meaning. *State ex rel. Beaufort Transfer Company v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo.App. W.D. 1980); *State ex rel. Missouri Pacific Freight Transport Company v. Public Service Commission of Missouri*, 312 S.W.2d 363, 365 (Mo.App. 1958). "Denial of the power of the commission to ascribe a proper meaning to its orders would result in confusion and deprive it of power to function." *State ex rel. Orscheln Brothers Truck Lines v. Public Service Commission of Missouri*, 110 S.W.2d 364, 366 (Mo.App. 1937).

The Commission was not required to hold a hearing prior to issuing the Tariff Order or prior to otherwise allowing the compliance tariff sheets to go into effect. In fact, the Commission may permit new rates to take effect based on a mere tariff filing by a utility – without a hearing and without the issuance of an order. *See* RSMo. §393.140(11); *State ex rel. Laclede Gas Company v. Public Service Commission*, 535

S.W.2d 561 (Mo.App. 1976). In *Laclede*, the Court of Appeals held that "the Commission does have discretionary power to allow new rates to go into effect immediately . . . Simply by non-action, the Commission can permit a requested rate to go into effect." 535 S.W.2d at 566. This principle was affirmed by this Court several years later. *See State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979).

Further, the Commission and the public had been put on notice and been made aware of Empire's request for a rate increase for almost one year. The Commission, through the rate case proceedings, with the full panoply of due process, was able to consider all aspects of Empire's request and the possible impact of a rate increase on Empire's customers. As Public Counsel noted in the Statement of Facts section of its Brief, with the Report and Order, the Commission decided the substantive rate case issues for Empire's required revenue and resultant rate structure. And, as the Commission noted in its Tariff Order, any additional delay or further suspension beyond January 1, 2007, would be unreasonable and would preclude Empire from earning the just and reasonable return the Commission authorized through the Report and Order.

Additionally, and quite significantly, Public Counsel was familiar with Empire's compliance tariffs, and all parties to the case were in the habit of making filings with alacrity. Sixteen filings were made with the Commission (by Empire, the Staff of the Commission, Public Counsel, and Praxair/Explorer) between the issuance of the Report and Order on December 21, 2006, and 5:00 p.m. on December 29, 2007. As noted by Public Counsel in its Statement of Facts, Public Counsel filed two pleadings with the

Commission regarding Empire's compliance tariffs – one on December 28, 2006, and one on December 29, 2006.

The Tariff Order contains only three findings of fact: (1) that certain assumptions made by the Staff of the Commission in their favorable recommendation are a reasonable interpretation of the Report and Order; (2) that Empire's compliance tariff sheets are consistent with the Report and Order; and (3) that any further delay or suspension would not be reasonable and would preclude Empire from earning the just and reasonable rates authorized by the Report and Order. The scope of the Tariff Order is quite narrow. The Commission considered only whether Empire's proposed tariff sheets were in compliance with the Report and Order and should, therefore, be approved. No new issues arose with the Tariff Order. Public Counsel could have prepared and filed a rehearing request within the time allotted and adequately preserved its issues for judicial review. 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.

It should be noted that while Public Counsel had the opportunity to seek rehearing and/or reconsideration with regard to the Tariff Order, but ignored that option, this does not mean that the impact of the tariffs escapes judicial review. This is because the Tariff Order issued December 29, 2006, and the Report and Order issued December 21, 2006, are inextricably intertwined, with the Report and Order being the primary or principal document. It is apparent that Public Counsel is displeased with the Commission's decisions set out in the Report and Order. There appears to be no authority which

requires Public Counsel – or any other party – to appeal the Tariff Order, an order ancillary to the Report and Order, in order to preserve jurisdiction for the courts to review the issues decided by the Report and Order. Although this precise issue appears to be one of first impression in Missouri appellate courts, analogous case law requires that Public Counsel's Petition for Writ of Mandamus be denied. *See State ex rel. Fischer v. Public Service Commission*, 670 S.W.2d 24 (Mo.App. W.D. 1984).

3. Public Counsel's rights were not impaired, the Commission did not abuse its discretion, and Public Counsel helped to create the very situation of which Public Counsel now complains.

The Commission did not impair Public Counsel's right to appeal. Public Counsel was not prevented from filing an application for rehearing and/or a motion for reconsideration with regard to the Tariff Order within the time allotted. Instead, Public Counsel elected not to file a motion to suspend or reject the compliance tariffs and further elected not to file an application for rehearing and/or reconsideration with regard to the Tariff Order. Interestingly, in its December 28, 2006, Response to Motion for Expedited Consideration and Approval of Tariff Sheets, Public Counsel stated as follows: "Unless Empire files proposed tariffs that incorporate Public Counsel's input and comply with the Report and Order, Public Counsel will file a motion to suspend or reject the proposed tariffs." Public Counsel, however, made no such motion, and the Commission approved the tariffs as being in compliance with the Report and Order. Respondents suggest that public policy does not favor the issuance of a discretionary writ in this case, because

Public Counsel helped to create the very situation of which Public Counsel now complains.

Public Counsel asserts that it has broader rights to appeal than other litigants and possesses an unfettered right to appeal any and all Commission orders. This, however, is simply not the case. Public Counsel, pursuant to §386.710, is permitted the "right of review **just as any other interested party** to Commission proceedings is permitted to do by following procedural methods." *State ex rel. Missouri Power & Light Company v. Riley*, 546 S.W.2d 792, 797 (Mo.App. 1977) (emphasis added). Nothing in §386.710 may reasonably be read to exempt Public Counsel from the procedural requirements applicable to parties seeking review of Commission decisions or to otherwise bestow upon Public Counsel some superior right of appeal.

In any event, the Commission did not abuse its discretion in setting the effective date of the Tariff Order. RSMo. §386.490.3 states that an order of the Commission shall "become operative thirty days after the service thereof, except as otherwise provided," and "the commission may fix a reasonable time in lieu of the said thirty day period." *State ex rel. Alton Railroad Co. v. Public Service Commission*, 155 S.W.2d 149, 154 (Mo. 1941). Respondents submit that the three-day period – or even the ninety minute period – constitutes a "reasonable time" under the instant circumstances.

Public Counsel contends that the Court in *State ex rel. St. Louis County v. Public Service Commission*, 228 S.W.2d 1 (Mo. 1950), held that an order was unlawful and a nullity because it was issued too close to its effective date. The Missouri Supreme Court, however, made no such determination. Before dismissing the appeal for lack of a final

order, the Court simply noted the holding of the trial court. It appears that there is no appellate decision which provides guidance regarding the time to be authorized pursuant to §386.490.3 in lieu of the default thirty day period. As noted above, the time allotted by the Commission in the instant case was reasonable under the particular circumstances.

D. An Order in Mandamus Should Not be Issued Because Public Counsel has Other Adequate and Efficient Remedies, and this Matter Does Not Meet the Criteria for a Writ of Mandamus (Responds to Public Counsel's Point II)

As explained above, and contrary to the allegation in Public Counsel's Point II(A), the Commission did provide a meaningful opportunity for judicial review with regard to the Tariff Order and the particular circumstances of this case. With Point II(B), Public Counsel asserts that the Commission refuses to retract the Tariff Order, but this too is incorrect. The Commission has been given no opportunity to act on the pleadings pending before it or to act on its own accord pursuant to RSMo. §386.490.3.

1. The Commission has not been allowed to act.

After the various rehearing applications and other pleadings were filed with the Commission regarding the Report and Order and the Tariff Order, the Commission issued its Order Setting Conference (attached hereto). That order, issued by the Commission on January 24, 2007, noted the procedural concerns expressed regarding the Report and Order, the compliance tariffs, and the Tariff Order and set a conference to discuss the same for February 2, 2007. Possible results of such a conference included a settlement of all issues, a rehearing or reconsideration of the Report and Order, and/or a rehearing or reconsideration of the Tariff Order. On January 31, 2007, however, Praxair, Inc. and

Explorer Pipeline, two other parties to Commission Case No. ER-2006-0315, prematurely filed a Petition for Writ of Review in the Cole County Circuit Court with regard to the Report and Order, the Tariff Order, and the other orders issued in Commission Case No. ER-2006-0315.

Notwithstanding the fact that the applications for rehearing of Praxair, Inc. and Explorer Pipeline were still pending before the Commission, the Cole County Circuit Court issued its Writ of Review to the Commission (Cole County Case No. 07AC-CC00125) and directed the Commission to take no further action in the case, save compliance with the Writ. Due to the premature filing of this Petition for Writ of Review, the conference scheduled for February 2 did not take place, and the Commission has been unable to act on or otherwise address the concerns expressed in the various rehearing applications and other pleadings.

The actions of the Public Counsel in this proceeding, and the unlawful and premature actions of Praxair and Explorer Pipeline with regard to the Cole County Circuit Court proceeding, have prevented the Commission from taking up the various rehearing applications and other motions and have prevented the Commission from addressing the concerns expressed in those pleadings. Judicial review of Commission decisions should be reserved to cases in which the Commission has had an opportunity to correct its mistakes. *See State ex rel. County of Jackson v. Public Service Commission,* 14 S.W.3d 99, 102 (Mo.App. W.D. 2000). The Commission has been provided with no such opportunity in the case at hand.

2. Mandamus is not proper in this case, because Public Counsel has other, sufficient remedies available.

Rule 84.22(a) reads that "(n)o original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal . . ." A writ such as is being sought by Public Counsel should only be issued when "no appeal or writ of error or other available mode of review is afforded." *State ex rel. The Missouri Pacific Railway Company v. Edwards*, 16 S.W. 117, 126 (Mo. 1891). Much like a writ cannot issue upon an interlocutory order, a writ should not issue upon an order which is merely ancillary to a final, appealable report and order of the Commission. In the case at hand, Public Counsel may obtain "adequate relief" by following the procedures set forth in Chapter 386 with regard to the Report and Order.

As noted, Public Counsel filed an Application for Rehearing with regard to the Report and Order, and Public Counsel's Application for Rehearing is pending before the Commission at this time. In the event the Public Counsel desires further review following consideration of its Application for Rehearing by the Commission, Public Counsel will be able to seek judicial review of the Report and Order pursuant to Chapter 386. Any review of the Report and Order will necessarily implicate the tariffs authorized by the Report and Order and approved by the Tariff Order. All substantive and procedural matters at issue in the case at hand and preserved for review will be addressed in the administrative review (and likely subsequent judicial appeal) of the Report and Order.

Further, as explained above, Public Counsel could have filed – but did not file – a motion to suspend or reject the compliance tariffs and/or a motion for rehearing or reconsideration with regard to the Tariff Order. If Public Counsel is now of the opinion that the compliance tariffs are in violation of the Report and Order, Public Counsel may challenge the tariffs approved by the Tariff Order by filing a complaint with the Commission pursuant to RSMo. §386.390 and/or by taking action pursuant to RSMo. §§ 393.130 and 386.490. In its brief, Public Counsel advances the argument that the complaint process is not an adequate remedy because it would require the rate case proceeding completed in December 2006 to be relitigated. The complaint process assures Public Counsel a chance to bring its concerns before the Commission, and this must be considered a legally sufficient remedy.

In any event, the entire rate case need not be relitigated in a complaint proceeding – Public Counsel may simply argue that Empire's tariffs are not in compliance with the Report and Order. Section 386.390.1 reads that a complaint may be made by the Public Counsel, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public utility, including any charge established or fixed by the public utility, in violation, or claimed to be in violation, of any order or decision of the Commission. The complaint process established by statute is available for the situation at hand. Also, §393.130.1 provides that all rates must be just and reasonable and in conformity with Commission decisions, and Public Counsel could move the Commission to set aside its Tariff Order under §386.490(3) on the grounds that the rates are not in conformity with the decision of the Commission, as set out in the Report and Order.

Mandamus does not lie where one has another adequate remedy. *State ex rel. J.C. Nichols Company v. Boley*, 853 S.W.2d 923, 924 (Mo. banc 1993).

3. Mandamus is not proper in this case, because the *Furlong* criteria have not been satisfied.

Public Counsel points to *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157 (Mo. 2006), and argues that the facts and law in this case meet the *Furlong* criteria and standards. These factors, however, are not all present, and, accordingly, the requested writ should not be granted.

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. The Public Service Commission has not refused to perform any ministerial duty. First, a ministerial duty is not at issue. The Commission is vested by statute with discretion in setting the effective date of its orders, and, thus, the action Public Counsel complains of is an alleged abuse of discretion. Section 386.490.3 states that an order of the Commission shall "become operative thirty days after the service thereof, except as otherwise provided." The Court in *State ex rel. Alton Railroad Co. v. Public Service Company*, 155 S.W.2d 149, 154 (Mo. 1941), noted that the Commission "may fix a reasonable time in lieu of the said thirty day period." Discretion certainly must be exercised in determining this other "reasonable time." Public Counsel even alleges that the Commission abused its discretion in setting the effective date of the Tariff Order.

Second, the Commission has been prevented from taking up the various rehearing applications and other motions and has not been allowed to address the concerns

expressed in those pleadings. There is simply no purpose behind the issuance of an extraordinary writ of mandamus in this case and at this time. There is no need for a writ to compel the Respondents to act – the Respondents have not failed to act when they were required to do so. Under the circumstances, the Commission's actions were reasonable, just and lawful.

Next, as noted, Public Counsel had the opportunity to seek suspension or rejection of the compliance tariffs and/or rehearing or reconsideration of the Tariff Order. It appears that Public Counsel intentionally decided not to file a motion for rehearing or reconsideration regarding the Tariff Order or another filing regarding the compliance tariffs, and, instead, elected to come to this Court seeking an extraordinary remedy. Although Public Counsel may pursue judicial review of the Report and Order, the issuance of a writ would confer upon Public Counsel new authority with regard to the Tariff Order.

Given the facts and law set out above, Public Counsel has not shown a clear and unequivocal right to mandamus. Public Counsel had an opportunity to seek rehearing or reconsideration of the Tariff Order. Although Public Counsel was put under time constraints by the effective date of the Tariff Order, those constraints were both necessary and reasonable under the circumstances. Further, as noted above, Public Counsel has other, adequate remedies available.

CONCLUSION

With its Tariff Order, the Commission approved the compliance tariffs submitted by Empire as being consistent with the Report and Order. By approving the compliance

tariffs and issuing its Tariff Order, the Commission simply confirmed the state of the law at the time and exercised its discretion in establishing a reasonable effective date.

The Tariff Order is lawful and reasonable, and its issuance by the Commission did not violated Public Counsel's right to seek judicial review. Public Counsel could have sought rehearing or reconsideration of the Tariff Order but elected not to do so within the time permitted by law and allotted by the Commission. At this time, however, Public Counsel may seek judicial review of the Report and Order, which review will necessarily implicate the tariffs authorized by the Report and Order and approved by the Tariff Order. The Commission complaint process established by §386.390 is also readily available to Public Counsel.

WHEREFORE, Respondents respectfully request the Order of this Court dissolving its preliminary writ and denying Public Counsel's Petition for Writ of Mandamus. Respondents request such other and further relief as the Court deems just and proper under the circumstances.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Supreme Court Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 5,076 words (exclusive of the cover, certificates of compliance and service, and signature block), as calculated by Microsoft Word, the software used to prepare this brief.

The undersigned further certifies that a three-and-one-half inch diskette containing an electronic copy of this brief is in compliance with Supreme Court Rule 84.06(g), has been scanned for viruses, and is virus-free.

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rules 84.07(a) and 84.06(g), the undersigned hereby certifies that a copy of this brief and a disk containing an electronic version of the brief complying with Supreme Court Rule 84.06(g), were hand-delivered or sent by U.S. Mail, postage prepaid, on this 27th day of July, 2007, to the following counsel of record:

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APPENDIX TO THE
RESPONSIVE BRIEF OF THE MISSOURI PUBLIC SERVICE COMMISSION AND COMMISSIONERS DAVIS, MURRAY, GAW, CLAYTON, AND APPLING

APPENDIX

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