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

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| State of Missouri ex rel. Aquila, Inc, et al. | ) | |
| Appellants, | ) | |
| v. | ) | Case No. SC90982 |
| Public Service Commission of the State of Missouri, | ) | |
| Respondents. | ) | |

# INITIAL SUBSTITUTE BRIEF OF APPELLANT

# AG PROCESSING, INC. ET AL.


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## JURISDICTIONAL STATEMENT

This appeal involves the judicial review of the Public Service Commission's decision in Commission Case No. ER-2007-0004. Appellants appeal from the Cole County Circuit Court's February 2, 2009 Judgment concluding that the Commission's decision was lawful and reasonable. Pursuant to Missouri Rule of Civil Procedure 81.05(a)(1), that judgment became final on March 4, 2009. On March 13, 2009, Appellants timely filed their Notice of Appeal pursuant to Missouri Rule of Civil Procedure 81.04(a).

The issues raised on appeal are not within the exclusive jurisdiction of the Missouri Supreme Court as set forth in Article V, Section 3 of the Missouri Constitution as amended. Nevertheless, pursuant to Rule 83.04, this Court ordered transfer of this matter from the Western District Court of Appeals following the issuance of an opinion by that Court on April 20, 2010.

## STANDARD OF REVIEW

A decision rendered by the Public Service Commission is presumed to be valid, and the burden of attacking the validity of the decision is on the party challenging the Commission's decision.[1] The reviewing court must give due deference to the agency's decision, and may reverse a decision only where the Court finds the Commission's decision to be unlawful or unreasonable.[2] The Commission's order was lawful if it is authorized by statute. In determining this prong of the review, the Court exercises **independent judgment** and should "correct erroneous interpretations of the law."[3]

[1] *State ex rel. Midwest Gas Users Association v. Public Service Commission*, 976 S.W.2d 470 (Mo.App.W.D. 1998).

[2] *Id.* at page 476.

[3] *Id.* (citing to *Burlington N.R.R. v. Director of Revenue*, 785 S.W. 2d 272, 273 (Mo. banc 1990)).

## STATEMENT OF FACTS

On July 3, 2006, Aquila, Inc. filed proposed rate schedules designed to implement a general rate increase of $94.5M in its MPS and $24.4M in L&P service areas. In addition, Aquila filed rate schedules, pursuant to Section 386.266,[4] to implement a fuel adjustment clause. Consideration of those rate schedules was assigned to Case No. ER-2007-0004. On July 5, 2006, the Commission issued its Order and created a contested case by suspending those tariffs until May 31, 2007.

Following the pre-filing of testimony, the Commission conducted an evidentiary hearing. In its May 17, 2007 Report and Order, the Commission rejected both Aquila's proposed rate schedules and fuel adjustment tariff, but authorized Aquila to file both new rate and fuel adjustment tariff sheets in compliance with the Report and Order.

Beginning on May 18, 2007, Aquila filed a series of proposed compliance tariffs and requested expedited treatment of those tariffs. On May 25, 2007, the Presiding Officer, under a purported delegation of authority pursuant to Section 386.240, issued her Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets ("May 25 Order").[5] In that

[4] All statutory citations are to RSMo 2000 unless otherwise noted.

[5] The May 25 Order, issued by a purported delegation of authority, is attached hereto as Appendix A.

Order, the Presiding Officer approved Aquila's rate tariffs, but rejected the fuel adjustment tariffs. On May 30, 2007, Applications for Rehearing of the Presiding Officer's May 25 Order were filed by the Industrial Intervenors and the Office of the Public Counsel.

On June 18, 2007, Aquila again filed fuel adjustment tariff sheets which it believed complied with the Report and Order. On June 29, 2007, the Presiding Officer, again under a purported delegation of authority, issued her June 29 Order Granting Expedited Treatment and Approving Tariff Sheets ("June 29 Order").[6] In that Order, the Presiding Officer approved Aquila's fuel adjustment tariff sheets.

On July 3, 2007, the Industrial Intervenors filed their Application for Rehearing of the Presiding Officer's June 29 Order. On July 10, the Commission issued its Order Denying Applications for Rehearing. Petitions for Writs of Review were filed in Cole County Circuit Court by Appellants,[7] the Office of the Public Counsel;[8] and Aquila, Inc.[9] After briefing and oral argument, the Cole County Circuit Court issued its Judgment on February 2, 2009. Notices of Appeal

[6] The June 29 Order, issued by a purported delegation of authority, is attached hereto as Appendix B.

[7] Cole County Circuit Court Case No. 07AC-CC00698.

[8] Cole County Circuit Court Case Nos. 07AC-CC00619 and 07AC-CC00620.

[9] Cole County Circuit Court Case Nos. 07AC-CC00587 and 07AC-CC00630.

were filed by the Office of the Public Counsel on March 12, 2009[10] and the Industrial Intervenors on March 13, 2009.[11] On March 23, 2009, these appeals were consolidated by order of the Court of Appeals. On April 20, 2010, the Court of Appeals issued its opinion finding that the Presiding Officer's May 25 and June 29 Orders were lawful.[12] On June 1, 2010, the Court of Appeals denied pending Motions for Rehearing and Applications for Transfer. On June 16, 2010, an Application for Transfer was filed with the Supreme Court and that Application was granted on August 31, 2010.

[10] Western District Court of Appeals Case No. WD70798.

[11] Western District Court of Appeals Case No. WD70788.

[12] *State ex rel. Aquila, Inc. et al. v. Public Service Commission*, 2010 Mo.App. Lexis 499 (Mo.App. 2010).

## POINTS AND AUTHORITIES RELIED ON

### POINT ONE

THE MAY 25 AND JUNE 29 ORDERS, ISSUED UNDER A PURPORTED DELEGATION OF AUTHORITY, ARE UNLAWFUL BECAUSE THE AUTHORITY TO ISSUE THOSE ORDERS ***CANNOT BE DELEGATED*** BY THE COMMISSION IN THAT "THE FINAL ACT MUST BE THAT OF THE COMMISSION AS A BODY."

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

►Section 386.240

### POINT TWO

THE MAY 25 AND JUNE 29 ORDERS, ISSUED UNDER A PURPORTED DELEGATION OF AUTHORITY, ARE UNLAWFUL BECAUSE THE AUTHORITY TO ISSUE THOSE ORDERS ***HAD NOT BEEN PROPERLY DELEGATED*** BY THE COMMISSION IN THAT SECTION 386.240 REQUIRES THAT SUCH DELEGATION BE "EXPRESSLY AUTHORIZED OR APPROVED."

► *Nichols v. Prudential Insurance Co.*, 851 S.W.2d 657 (Mo.App. 1993).

►Section 386.240

## ARGUMENT

## POINT ONE

**THE MAY 25 AND JUNE 29 ORDERS, ISSUED UNDER A PURPORTED DELEGATION OF AUTHORITY, ARE UNLAWFUL BECAUSE THE AUTHORITY TO ISSUE THOSE ORDERS *CANNOT BE DELEGATED* BY THE COMMISSION IN THAT "THE FINAL ACT MUST BE THAT OF THE COMMISSION AS A BODY."**

As indicated in the Statement of Facts, the May 25, 2007 Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets ("May 25 Order")[13] as well as the June 29, 2007 Order Granting Expedited Treatment and Approving Tariff Sheets ("June 29 Order")[14] were issued by the Presiding Officer pursuant to a purported delegation of authority under Section 386.240.[15] In this section of the Argument, Appellants demonstrate that

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[13] The May 25 Order, issued by a purported delegation of authority, is attached hereto as Appendix A.

[14] The June 29 Order, issued by a purported delegation of authority, is attached hereto as Appendix B.

[15] Section 386.240 RSMo provides that "[t]he commission may authorize any person employed by it to do or perform any action, 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

the Commission ***cannot*** lawfully delegate the authority to approve tariff sheets. In the next section of their Argument, Appellants establish the fact that, even if the Commission could lawfully delegate such authority, there is no record evidence to support a finding that the Commission has "expressly authorized or approved" the issuance of such orders by the Presiding Officer. As such, the orders are void.

In the case of *State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*,[16] the Missouri Supreme Court considered the legality of the Commission's use of notational voting. In that case, the Supreme Court interpreted Section 386.130. Relying on pre-existing case law of the jurisdiction from which this statute was borrowed, the Court held that notational voting violated the requirement that final orders ***must*** be issued by the Commission acting as "a collegial body or body corporate".[17]

> [W]hile individual commissioners may hold "investigations, inquiries and hearings, ***the final act must be that of the commission as a body at a meeting attended by a quorum*** * * *. In order that there should have been a valid order, it was necessary that it should

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any public utility or any person ***unless expressly authorized or approved by the commission***." (emphasis added).

[16] 552 S.W.2d 696 (Mo. banc 1977).

[17] *Id.* at page 701 (citing to *State ex inf. Mooney ex rel. Stewart v. Consolidated School Dist. No. 3*, 281 S.W.3d 511 (Mo.App. 1955).

> appear that it had been adopted by the commission, acting at least by a majority, and at a stated meeting, or a meeting properly called and of which all the commissioners had been notified and had an opportunity to be present.[18]

Because that Commission failed to adopt the order as a "collegial body," the Court found that the order is "voidable."[19]

The *Philipp* case, then, establishes the requirement that "the final act must be that of the commission as a body at a meeting."[20] The *Philipp* Court concluded, therefore, that the Commission's use of notational voting was unlawful in that it allowed the Commission to take action without meeting as a body. For the same reason that the Commission's Order was void in the *Philipp* case, the May 25 and June 29 Orders in this case are similarly unlawful. These orders, since they were issued by the presiding officer, do not comply with the requirement that they be

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[18] *Id.* at page 700 (citing to *People v. Whitridge*, 129 N.Y.S. 295, 298 (N.Y. 1911) (emphasis added).

[19] *Id.* at page 701. While not the basis of its decision, the *Philipp* Court also raised the question of whether an order adopted through notational voting would violate the open meeting requirements of Chapter 610. Concerns regarding whether orders issued by notational voting violate the open meeting requirements are equally applicable to orders issued by a purported delegation of authority.

[20] *Id.* at page 700.

issued by the Commission acting as a body. The purported orders, since they were not voted on by the Commission, are *void ab initio* in that they do not meet the fundamental requirements (i.e., voted on by the Commission) to even be considered orders. As such, both orders are void on their face.

Interestingly, Respondent – Aquila has previously recognized the unlawful nature of any attempt to delegate the authority to approve tariff sheets. In comments filed on May 12, 1995, Aquila questioned whether the Commission could lawfully delegate the authority to approve tariff sheets. The following quote, while lengthy, is amazingly prophetic of the current issue.

> The Utility Group is concerned about a potential legal challenge to the Commission's delegation of authority in the proposed rule. While the Group believes that delegation of certain "interlocutory" or "procedural" matters (such as resolving discovery disputes, granting applications to intervene and ordering the filing of briefs) may not present a problem, the more "substantive" aspects which the Commission seeks to delegate, such as the approval of tariffs, may present a legal problem.
>
> Section 386.240 RSMo says that no "order . . . of any person employed by the commission shall be binding on any public utility or any person unless <u>expressly</u> authorized or approved by the commission." (emphasis in original).

> It is entirely possible that someone could challenge the action of a presiding officer in approving a tariff as not being "expressly" authorized or approved by the commission. Approval of a tariff is a "final" action since it disposes of all issues in a case. The final act must be that of the Commission as a body at a meeting attended by a quorum. See State ex rel. Philipp Transit Lines v. P.S.C., 552 S.W.2d 696 (Mo. banc 1977). A challenge to the delegation could take place after the fact, and after other parties have relied upon the existence of the tariff. A court could rule that because the duty of the Commission in that matter was non-delegable, the presiding officer's action was void. In such a situation, it is the utility that suffers because of its reliance on the purported action of the Commission, albeit delegated to a presiding officer.[21]

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[21] Case No. AX-95-250, *Initial Comments of The Utility Group*, filed May 12, 1995, at pages 16-17. (Appendix C). As pointed out in the title of these Comments, the Utility Group consisted of The Empire District Electric Company; Missouri Public Service; United Cities Gas Company; St. Joseph Light & Power Company; Missouri Gas Energy; and Associated Natural Gas Company. Missouri Public Service and St. Joseph Light and Power Company were the predecessor companies to Respondent - Aquila, Inc.

The conclusion that the Commission could not delegate the authority to approve tariff sheets was not unique to the Utility Group. Rather, similar expressions of concern were voiced by virtually every stakeholder group.

> Public Counsel believes that the approval of a tariff is a final determination of a proceeding before the Commission and, as such, is a power that the Commission should not fully delegate to its presiding officers. Although the Commission has the authority, by inaction, to allow tariffs to become effective after 30 days' notice and publication, the affirmative approval of a filed tariff is an action that constitutes a final determination.[22]
>
> * * * * *
>
> I have serious reservations about the wisdom or legitimacy of appointed officials delegating such substantive responsibilities as the approval and suspension of tariffs, for example. In addition, however, it has been my observation in recent months that the use of this delegation also permits the Commission to take actions without regard to Sunshine Law requirements. No Commission Agenda

[22] Case No. AX-95-250, *Initial Comments of the Office of the Public Counsel*, filed May 12, 1995, at page 5. Attached hereto as Appendix D.

reflects the matters that Examiners may unilaterally rule upon on a given day. Examiner orders come out of the blue.[23]

* * * * *

By these proposed changes, the Commission would be authorized to delegate such authority, in somewhat blanket fashion, thereby creating the risk that some such delegated actions might be found unauthorized by reason of Section 386.240. If this type of delegation is desired, consideration should be given to obtaining legislative action in this regard.[24]

The rationale underlying the requirement that a final action be taken by the commission acting as a collegial body is two-fold. ***First***, presiding officers have not demonstrated the same qualifications as Commissioners. ***Second***, any broad-brush delegation of authority, such as that addressed here, allows the Commission to escape the statutory requirements of the Missouri Sunshine Law.

Missouri law provides specific criteria that must be met by any Commissioner. Each Commissioner is appointed by the Governor and confirmed

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[23] Case No. AX-95-250, *Comments of William D. Steinmeier* (former Chairman of the Missouri Public Service Commission), filed May 18, 1995, at page 2. Attached hereto as Appendix E.

[24] Case No. AX-95-250, *Initial Comments of Laclede Gas Company*, filed May 12, 1995, at page 15. Attached hereto as Appendix F.

by the Senate.[25] Each Commissioner must be specifically qualified as a resident of the state for a period of at least five years.[26] Commissioners may not have any "official relation" to a public utility or "own stocks or bonds" in any regulated public utility.[27] Commissioners are beholden to the Governor and the Senate and may be removed for inefficiency, neglect of duty, misconduct in office, dereliction of duty, corruption or incompetence.[28] Recognizing that others, including Presiding Officers, have not met similar qualifications, it is nonsensical to believe that the Commission could abdicate its ultimate responsibility to individuals that are not similarly qualified, appointed, and confirmed.

Similarly, it is nonsensical to believe that the General Assembly would enact an open meetings law and then allow an agency to engage in procedural machinations designed to avoid the requirements of that law.[29] Section 610.011

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[25] Section 386.050.

[26] *Id.*

[27] Section 386.110.

[28] Section 386.060.

[29] While the Missouri Courts have, thus far, refrained from addressing the issue, they have acknowledged concerns that conduct such as notational voting, or even action by delegation, may violate the Missouri Open Meetings Law, specifically Section 610.015. See, *Philipp* at 703; *State ex rel. Churchill Truck Lines v. Public Service Commission*, 555 S.W.2d 328, 336-337 (Mo.App. 1977)

provides a clear statement of public policy that agency meetings be open to the public. Similarly, that section provides that any exceptions should be "***strictly construed*** to promote this public policy." (emphasis added).

Section 386.130 provides that the Commission may only act at a public meeting attended by a quorum. Section 610.020 provides that such a meeting can only occur on twenty-four hours advanced notice.[30] Envisioning agency action, Section 610.015 requires that all votes be recorded. In the case at hand, all of these Sunshine Law requirements were conveniently avoided by having the Presiding Officer approve such tariffs by a presumed delegation of authority. Such action, while unlawful under the Supreme Court's holding in *Philipp Transit*, also directly contravenes the expressed public policy that such actions occur in a properly noticed public meeting.[31]

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[30] The Commission has conceded that the requirements of Section 610.010(2) are applicable. "We do note that the PSC acknowledges in its brief that the Open Meetings Law does apply to it, saying, 'The Commission fully concedes that it is a 'public governmental body' and thus subject to the Sunshine Law (610.010(2)).' We agree with that conclusion." *Philipp* at 703.

[31] The most blatant example of the Commission using its alleged delegation authority to circumvent the open meetings requirement is contained in an order from Commission Case No. EO-2010-0263. In that order, attached hereto as Appendix G, the Presiding Officer under another purported delegation of

The Public Service Commission Act is designed to assure that the Commission may only act through the majority of the qualified commissioners acting as a "collegial body" at a properly called meeting attended by a quorum. Just as the order of a single commissioner acting individually has been found to be inconsistent with this requirement of the Public Service Commission Act, the abdication of responsibility to any other single individual should be found to be equally unlawful under the Act.

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authority, denied a dismissed party's Motion for Reconsideration of the Commission's dismissal decision. That Reconsideration Order was issued by a delegation of authority because the Commission did not have a regularly scheduled public meeting to take up this matter. "The Commission agrees that a prompt ruling is appropriate, but the Commission will not have an agenda meeting before the beginning of the hearing. Therefore, the Commission delegates authority to issue this order to its Chief Regulatory Law Judge."

## POINT TWO

**THE MAY 25 AND JUNE 29 ORDERS, ISSUED UNDER A PURPORTED DELEGATION OF AUTHORITY, ARE UNLAWFUL BECAUSE THE AUTHORITY TO ISSUE THOSE ORDERS HAD NOT BEEN PROPERLY DELEGATED BY THE COMMISSION IN THAT SECTION 386.240 REQUIRES THAT SUCH DELEGATION BE "EXPRESSLY AUTHORIZED OR APPROVED."**

In the previous section Appellants demonstrated that the Public Service Commission Act does not allow the Commission to abdicate certain responsibilities to other individuals. Rather, such responsibilities must be exercised by the Commission acting as a body. Assuming *arguendo* that the Act does permit such a delegation of authority, however, it is clear that such a delegation may only be made where it has been "expressly authorized or approved" by the Commission.[32]

Fundamental to any delegation analysis is the fact that Section 386.240 provides that the authorization underlying any delegation must be "express". As such, any purported delegation may not be apparent; nor may such delegation be implied.

> Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's

[32] Section 386.240.

manifestations of consent to him. ***Actual authority may be express or implied. Express authority is created when the principal explicitly tells the agent what to do.*** Implied authority consists of those powers incidental and necessary to carry out the express authority.

On the other hand, apparent authority is created by the conduct of the principal which causes a third person reasonably to believe that another has the authority to act for the principal. A finding of apparent authority requires evidence that a principal has communicated directly with the third party or has knowingly permitted its agent to exercise authority. Thus actual authority is created by the principal's manifestations to the agent, whereas apparent authority is created by the principal's manifestations to a third party.[33]

Authority, therefore, may be either actual or apparent with actual authority being either express or implied. By requiring that any delegation of authority be "express," the General Assembly has limited any delegation to actual, express

[33] *Nichols v. Prudential Insurance Co.*, 851 S.W.2d 657, 661 (Mo.App. 1993) (citing to *Dickinson v. Bankers Life & Casualty Co.*, 283 S.W.2d 658, 662 (Mo.App. 1955); Restatement (Second) of Agency §7 (1957); *Barton v. Snellson*, 735 S.W.2d 160, 162 (Mo.App. 1987) (emphasis added).

authority and has foreclosed the possibility that delegation may be exercised through implied authority or apparent authority. Moreover, Missouri Courts have held that express authority is "created by the principal telling his agent what to do in express terms."[34]

The requirement that such a delegation be expressed (i.e., where the principal explicitly tells the agent what to do) has previously been admitted by Respondent - Aquila. In the same comments previously referenced, Aquila interprets the requirements of Section 386.240.

> "Expressly" certainly carries the connotation of "plainly", "definitely", and "particularly". A general delegation in a rule is certainly questionable as to whether it is "express, plain, definite and particular" since it is more of a "blanket" grant of authority than a specific ruling on a specific set of facts.[35]

Interestingly, the Commission has previously recognized its duty to delegate through "express terms." Recently, in another case, the Commission appointed a Discovery Dispute Judge. Consistent with that appointment, the Commission made the following ***express*** delegation.

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[34] *Barton v. Snellson*, 735 S.W.2d 160, 162 (Mo.App. 1987) (citing to *Hyken*

[35] Case No. AX-95-250, *Initial Comments of The Utility Group*, filed May 12, 1995, at page 17. (Appendix C).

> The Commission hereby delegates to Judge Stearley the authority to resolve discovery disputes which may arise during the course of the depositions, data requests, requests for production of documents, or other discovery disputes. Judge Stearley may appoint any other Regulatory Law Judge to preside over discovery disputes in his absence.[36]

Given the requirement that the Commission "expressly" delegate authority, as well as the Commission's apparent understanding of what is required to delegate authority, there must be some record evidence to indicate that the Commission granted authority to the Presiding Officer to issue the May 25 and June 29 Orders. The record, however, is noticeably lacking in any evidence supporting a finding that the Presiding Officer has been "expressly authorized" to approve tariffs. In fact, as support for their issuance, the orders themselves merely reference Section 386.240 and not to any express authorization pursuant to that Section.[37] Therefore, in the logic expressed by the New York Supreme Court and adopted by the Missouri Supreme Court, the order is invalid.

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[36] *In re: Joint Application of Great Plains Energy et al.*, Case No. EM-2007-0374, Order Appointing Discovery Dispute Judge and Waiving 4 CSR 240-2.090(8)(B), issued March 20, 2008, at page 1.

[37] Appendices A and B.

> The order, in our opinion, is wholly insufficient as a self-proving document, and is of such a character that by itself it raises no presumption that it had even in fact been adopted. Furthermore, the case is devoid of legal proof that any such order had even been adopted. . . . Thus, as the case was finally presented, there was absolutely no legal evidence, or any evidence at all, that the Commission had even adopted the order.[38]

Given that the May 25 and June 29 Orders are invalid and lack any evidence to support a finding that they had been "expressly authorized or approved," it follows that they are not "binding on any public utility or any person."[39]

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[38] *People v. Whitridge*, 129 N.Y.S. 295 (N.Y. 1911). Recall that since Section 386.240 was borrowed from New York in 1913 and the *Whitridge* decision preceded the adoption of the statute, the Missouri Supreme Court has found that Missouri, in borrowing the statute from New York, "enacted it with the meaning ascribed thereto in *Whitridge*." *State ex rel. Philipp Transit Lines v. Public Service Commission*, 552 S.W.2d 696 (Mo. 1977).

[39] Section 386.240.

## CONCLUSION

As demonstrated, Missouri law precludes the Commission from delegating certain authority. Rather, such authority may only be exercised by the Commission acting as a body. Among the authority reserved solely for the Commission is the authority to approve tariffs.

The May 25 and June 29 Orders were not issued by the Commission. Rather, those "orders" were issued by the Presiding Officer under a purported delegation of authority. While acting under a purported delegation of authority, the record in this case lacks any evidence to show that the Commission has "expressly" delegated such authority. Such a delegation would have been meaningless, however, since such authority is reserved solely for the Commission. For these reasons, the May 25 and June 29 Orders do not even constitute orders.

For all these reasons, this Court should find that the May 25 and June 29 Orders are unlawful and not binding on any person.

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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 3,968 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.

_____
David Woodsmall

## CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rules 84.07(a) and 84.06(g), the undersigned hereby certifies that two copies of this brief, along with 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 20th day of September, 2010, to the following counsel of record:

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