IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE BRIEF OF INTERVENOR-RESPONDENT KCP&L GREATER MISSOURI OPERATIONS COMPANY, f/k/a AQUILA, INC.

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JURISDICTIONAL STATEMENT

Intervenor-Respondent KCP&L Greater Missouri Operations Company, formerly Aquila, Inc.,[1] accepts the Jurisdictional Statement of Appellants Ag Processing, Inc. and Sedalia Industrial Energy Users Association (collectively "Ag Processing").

STANDARD OF REVIEW

All orders of the Missouri Public Service Commission ("Commission" or "PSC") are prima facie lawful and reasonable until found otherwise, pursuant to Section 386.270.[2] On review, the Commission's orders are presumed to be valid, and anyone seeking to set aside an order has the burden of showing that it is unreasonable or unlawful. State ex rel. Kansas City Power & Light Co. v. PSC, 76 S.W.2d 343, 350 (Mo. 1934); State ex rel. Midwest Gas Users' Ass'n v. PSC, 976 S.W.2d 470, 476 (Mo. App. W.D. 1998).

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[1] Aquila, Inc. changed its name to KCP&L Greater Missouri Operations Co. after it was acquired in 2008 by Great Plains Energy Inc., the parent company of Kansas City Power & Light Co. See State ex rel. Praxair, Inc. v. Missouri PSC, 2010 WL 3218887 (Mo. App. W.D., Aug. 17, 2010) (motions for rehearing pending). However, because the record in this case and the proceedings below at the Public Service Commission refer to the company as "Aquila," this brief will continue to use the previous name unless the context requires otherwise.

[2] Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2000), as amended.

In reviewing an order of the Commission, courts use a two-part test. First, the court first determines if the order is lawful, i.e., whether there is statutory authority for its issuance. Second, the court must determine if the order is reasonable. State ex rel. GS Tech. Operating Co. v. PSC, 116 S.W.3d 680, 687 (Mo. App. W.D. 2003). In this appeal, only questions of law have been raised.

STATEMENT OF FACTS

This case involves the judicial review of decisions by the Commission in a general rate case initiated by Aquila on July 3, 2006. Parties to the Commission case included Appellant Ag Processing, as well as the Office of the Public Counsel. On May 17, 2007, the Commission issued its 72-page Report and Order in Case No. ER-2007-0004, to be effective May 27, 2007. (L.F. 1039-1126). It decided all contested issues, rejected the proposed tariff sheets that had been filed by Aquila to initiate the rate case, approved a fuel adjustment clause ("FAC") pursuant to Section 386.266, and directed Aquila to file revised tariff sheets or "compliance tariffs" to implement the decision.

Aquila, Ag Processing, and the Office of the Public Counsel each filed an Application for Rehearing with the Commission with regard to the Report and Order. Ag Processing requested rehearing on the issues of the FAC and return on equity.

On May 25, 2007 the Commission through the action of a Regulatory Law Judge issued an Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets (L.F. 1381) ("May 25 Order"). This order approved the majority of Aquila's compliance tariff sheets for service rendered on and after May 31,

2007. However, the Commission did not approve three compliance tariff sheets designed to implement the FAC. It directed Aquila to file further revised tariff sheets in compliance with the Report and Order. Ag Processing and Public Counsel each filed an Application for Rehearing of this May 25 Order. (L.F. 1442, 1409).

On June 14, 2007, the Commission issued its Order Rejecting Tariff, Granting Clarification, Directing Filing and Correcting Order Nunc Pro Tunc. (L.F. 1506). The Commission further clarified the terms of its Report and Order with regard to the FAC, made a minor factual correction, and directed Aquila to file revised tariff sheets to implement the FAC in compliance with the Report and Order and the orders clarifying the same.

On June 29, 2007, the Commission, again through the action of the Regulatory Law Judge, issued an Order Granting Expedited Treatment and Approving Tariff Sheets ("June 29 Order") (L.F. 1534), and approved Aquila's revised compliance tariff sheets implementing the FAC, effective July 1, 2007. Ag Processing filed an Application for Rehearing of the June 29 Order. (L.F. 1550).

The Commission issued its Order Denying Applications for Rehearing on July 10, 2007 (L.F. 1571) which denied all pending motions, including the requests for rehearing of the May 25 and June 29 Orders. This concluded the proceedings at the PSC.

Ag Processing and other parties filed petitions for a writ of review to the Circuit Court of Cole County. Judge Jon E. Beetem affirmed the PSC Report and Order in its entirety on Feburary 2, 2009 in Case No. 07AC-CC00630. Thereafter, Ag Processing

and the Office of the Public Counsel filed timely appeals at the Western District of the Court of Appeals on March 12, 2009.

While matters were pending at the Court of Appeals, a superseding rate case was filed at the Commission by Aquila's successor, KCP&L Greater Missouri Operations Company. After lengthy settlement discussions, new rates were implemented pursuant to a Stipulation and Agreement that was approved by the PSC effective September 1, 2009. See Appendix at 35.

The Court of Appeals affirmed the PSC Report and Order regarding Aquila's 2007 rate case on April 20, 2010 in Case No. WD70788. Motions for rehearing and applications for transfer were denied June 1, 2010. Ag Processing filed with this Court an Application for Transfer, although the Office of the Public Counsel did not. On August 31, 2010, this Court granted Ag Processing's Application for Transfer.

POINTS RELIED UPON

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT IS MOOT

In re Southwestern Bell Tel. Co.'s Proposed Revision to General Exch. Tariff, 18 S.W.3d 575 (Mo. App. W.D. 2000).

State ex rel. Kansas City Power & Light Co. v. PSC, 615 S.W.2d 596 (Mo. App. W.D. 1981).

State ex rel. Empire Dist. Elec. Co. v. PSC, 615 S.W.2d 598 (Mo. App. W.D. 1981)

II. THE MAY 25 AND JUNE 29 ORDERS ARE LAWFUL BECAUSE SECTION 386.240 PERMITS THE COMMISSION TO DELEGATE THE AUTHORITY TO ISSUE ORDERS.

Section 386.240.

Philipp Transit Lines, Inc. v. PSC, 552 S.W.2d 696 (Mo. en banc 1977).

Edwards v. St. Louis County, 429 S.W.2d 718, 721 (Mo. en banc 1968).

State ex rel. Missouri Gas Energy v. PSC, 186 S.W.3d 376, 389 (Mo. App. W.D. 2005).

III. THE MAY 25 AND JUNE 29 ORDERS ARE LAWFUL BECAUSE THE COMMISSION EXPRESSLY APPROVED THE ORDERS

Section 386.240.

4 CSR 240-2.120(1).

Nichols v. Prudential Ins. Co., 851 S.W.2d 657, 661 (E.D. Mo. App. 1993).

Barton v. Snellson, 735 S.W.2d 160, 162 (E.D. Mo. App. 1987).

Rosenblum v. Jacks or Better of America West, Inc., 745 S.W.2d 754, 760 (Mo. App. E.D. 1988).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT IS MOOT

On May 25, 2007, the Regulatory Law Judge Officer issued the Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets. (L.F. at 1381) ("May 25 Order"). In that order Aquila's rate tariffs were approved for service effective May 31, 2007. However, tariffs related to implementation of a fuel adjustment clause were rejected.

On June 29, 2007, the Regulatory Law Judge issued the Order Granting Expedited Treatment and Approving Tariff Sheets. (L.F. 1534) ("June 29 Order"). In that order Aquila's fuel adjustment clause tariff sheets were approved effective July 5, 2007. The Commission issued its Order Denying Applications for Rehearing on July 10, 2007 (L.F. 1571), and this appeal was taken.

Subsequent to the filing of this appeal, KCP&L Greater Missouri Operations Company (the successor to Aquila) filed a new rate case on September 5, 2008. See Appendix at 1, 19. The company settled the case with certain other parties in a Non-Unanimous Stipulation and Agreement (Appendix at 1-17), which was approved by the Commission in its Order Approving Non-Unanimous Stipulations and Agreements and Authorizing Tariff Filings on June 10, 2009. Id. at 18-34. Service under the tariffs filed in compliance with the Commission's order became effective on September 1, 2009. Id. at 35-37.

A. The May 25 and June 29 Orders Were Superseded by a New Order in a Subsequent Rate Case That Became Effective in 2009.

Because the rates and tariffs approved in this proceeding which concerns Aquila's 2007 rate case were superseded by rates and tariffs that became effective in 2009, this appeal is moot and should be dismissed.

A case is moot when an event occurs that makes a court's decision "unnecessary or makes it impossible for the court to grant effectual relief" and there is "no practical effect on an existent controversy." In re Southwestern Bell Tel. Co.'s Proposed Revision to General Exch. Tariff, 18 S.W.3d 575, 577 (Mo. App. W.D. 2000); State ex rel. Jackson County v. PSC, 985 S.W.2d 400, 403 (Mo. App. W.D. 1999). See In re B.T., 186 S.W.3d 276, 277 (Mo. en banc 2006). The general policy behind dismissing a case on grounds of mootness is that the court will not issue an advisory opinion declaring who was right in a past dispute. Id.

In applying this policy to public utility commission orders, courts have generally held that when a previous order setting rates is replaced with a subsequent order implementing new tariffs and rates, the previous order is moot.

In State ex rel. Kansas City Power & Light Co. v. PSC, 615 S.W.2d 596 (Mo. App. W.D. 1981), the Court of Appeals declined to address issues related to rates where the utility had received interim and permanent rate increases which superseded the rates that were in question. The issues that the appellant utility sought to raise related to rate of return, an attrition allowance, advertising expenses, and the inclusion of coal inventory levels in the rate base. Despite the weighty nature of the issues, the Court stated: "None

of the issues posed would declare a principle of law that was novel; each issue would be resolved upon the basis of existing law and the application of those principles to the facts of the instant case." Id. at 598. The appeal was dismissed. Accord State ex rel. Mo. Pub. Serv. Co. v. Fraas, 615 S.W.2d 587, 589 (Mo. App. W.D. 1981). See State ex rel. Southwestern Bell Tel. Co. v. PSC, 645 S.W.2d 44, 51 (Mo. App. W.D. 1982) (holding that the effectiveness of new tariffs rendered moot questions concerning the former tariff); State ex rel. Mo. Pub. Serv. Co. v. Pierce, 604 S.W.2d 623, 624–25 (Mo. App. W.D. 1980) (holding that the appeal of a PSC order regarding tariffs implementing a rate increase was mooted by subsequent rate increases approved by the Commission).

Other states have followed this reasoning in declining to hear moot appeals where superseding utility rates have become effective. In City of Oberlin v. State Corp. Comm'n, 516 P.2d 596, 597 (Kan. 1973), industrial and irrigation customers attempted to appeal an order granting a rate increase to a natural gas utility and issuing directives with respect to the design of the tariffs. The Kansas Supreme Court ruled that because the challenged order was superseded by a new rate case order, the appeal of the prior order was moot. Id. See also Alaska Consumer Advocacy Program v. Alaska Pub. Utils. Comm'n, 793 P.2d 1028, 1032–33 (Alaska 1990) (holding that a permanent rate design superseding a prior interim rate design rendered appeals on the interim rate design moot).

In this case, the May 25 and June 29, 2007 Orders were replaced by the Commission's order in a subsequent rate case issued on July 30, 2009. See Appendix at 35. The tariffs filed in compliance with the terms of that subsequent order have been in

effect for over a year. Because the orders on appeal have been replaced by a superseding order, this appeal is moot and should be dismissed.

There is a "very narrow" exception to the general rule of dismissing moot cases. When the court finds that an issue is a "recurring unsettled legal issue of public interest and importance that will escape review unless the court exercises its discretionary jurisdiction," courts have declined to dismiss an appeal as moot. State ex rel. County of Jackson v. Missouri PSC, 985 S.W.2d 400, 403 (Mo. App. W.D. 1999). For example, in State ex rel. Monsanto Co. v. PSC, 716 S.W.2d 791 (Mo. en banc 1986), certain industrial customers were charged more than the actual cost to serve them as compared to other customer classes, and appealed issues related to the design of the rates. Although this Court noted that rate design issues had been approved in a superseding PSC order, it found that the customers had preserved the rate design issues in the earlier proceeding. Id. at 793–94. The Court, therefore, proceeded to review the case and held that the earlier order had been based on insufficient factual findings to support the Commission's conclusions. Id. at 795–96. See State ex rel. City of Joplin v. PSC, 186 S.W.3d 290, 300–02 (Mo. App. W.D. 2005)(ordered further findings of fact and conclusions of law regarding claims of discriminatory rates).

The issues in this case are clearly distinguishable from the Monsanto and Joplin cases. First, this appeal does not involve an issue of the sufficiency of the Commission's findings of fact. Second, because Section 386.240, as well as the Commission's Rule 4 CSR 240-2.120(1) expressly permit the Commission to delegate its authority to issue

orders, there is no recurring or unsettled legal controversy of public interest and importance for this Court to review.

In State ex rel. Empire Dist. Elec. Co. v. PSC, 615 S.W.2d 598, 599 (Mo. App. W.D. 1981), the utility argued that the Court of Appeals should retain jurisdiction because the issues of (1) accrued interest on bonds as an offset to the utility's working capital and (2) the Commission's use of outdated average bond yields in computing the rate of return were matters of general public interest. The court held that these issues were not of general public interest because they were not "in and of themselves methods which heretofore have not been utilized as part of the overall determination of the rate base design." Id. Since the issues presented by the appellant "relate to matters which do not rise to questions of general public interest," and were not otherwise unique or novel, they presented no viable issue and the Court of Appeals found them to be moot. Id. at 600.

Similarly, there is nothing about the instant appeal that presents an unsettled legal issue of public interest or importance to the Court. Indeed, from the period May 21 through May 25, 2007 when the May 25 Order was signed, the Commission issued 28 orders by delegation, including three other orders approving tariffs. See Appendix 38-39.[3] In the 4-day time span from June 25 through June 29, 2007 when the June 29 Order

[3] Tariffs were approved by delegation in Case No. XN-2007-0425, AmeriVision Commun., Inc., d/b/a Affinity 4 (May 22, 2007), Case No. XN-2007-0426, BellSouth

was signed, the Commission issued 16 orders by delegation, including one other order that approved a tariff. See Appendix 40-41.[4] These cases demonstrate a practice which has been and continues to be utilized frequently by the Commission. The issue of delegation of authority, therefore, does not meet the narrow exception to the mootness doctrine. Coupled with the superseding order, this appeal is moot and should be dismissed.

B. The Tariffs Implementing the May 25 and June 29 Orders Became Effective By Operation of Law Pursuant to Section 393.140(11).

Even if the May 25 and June 29 Orders were not properly issued by delegation, the tariffs that were the subject of the orders became effective by operation of law in 2007 pursuant to Section 393.140(11).

Each of the tariffs sheets that were the subject of the May 25 and June 29 Orders contained proposed effective dates. The May 25 Order considered over 60 pages of tariffs filed by Aquila with a proposed effective date of May 31, 2007. See L.F. 1127–88; Appendix 42-44 (attached as examples). Similarly, the June 29 Order pertained to four pages of tariffs that Aquila filed with a proposed effective date of July 18, 2007. See L.F. 1516-19, Appendix at 45-49.

Long Distance, Inc., d/b/a AT&T Long Distance Service (May 24, 2007), and Case No. HR-2007-0399, Aquila, Inc., d/b/a Aquila Networks-L&P (May 24, 2007).

[4] Tariffs were approved by delegation in Case No. TO-2002-185, Southwestern Bell Tel. Co., L.P. d/b/a AT&T Missouri (June 29, 2007).

None of these tariffs was suspended by the Commission and so, by operation of law, became effective. The relevant statute is Section 393.140(11), which states in pertinent part:

> Unless the commission otherwise orders, no change shall be made in any rate or charge … except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect [emphasis added].

Therefore, unless the Commission issues an order that suspends a tariff, as specifically provided in Section 393.150.1, the tariff or rate goes into effect by operation of law. State ex rel. Laclede Gas Co. v. PSC, 535 S.W.2d 561, 565–66 (Mo. App. K.C. 1976) ("Simply by non-action, the Commission can permit a requested rate to go into effect.").

In this case the Presiding Officer's May 25, 2007 Order stated that the majority of Aquila's rate case tariffs were approved effective May 31, 2007.[5] The tariffs that had been rejected regarding the implementation of the fuel adjustment clause were approved

[5] The Commission has the authority to allow tariffs to become effective on less than 30 days' notice. Section 393.140(11), in the sentence following the passage quoted above, states: "The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe."

in her June 29, 2007 Order, effective July 5, 2007. Even if these Orders were the subject of an improper delegation of authority, they became effective upon 30 days' notice, pursuant to Sections 393.140(11) and 393.150.1.

This fact is recognized by the Appellants, given their citation to the statements offered by the Office of the Public Counsel when the delegation of authority rule was first being considered in the mid-1990s. See Initial Substitute Brief of Appellants at 15; Appendix to Initial Substitute Brief of Appellants at 5 (". . . the Commission has the authority, by inaction, to allow tariffs to become effective after 30 days' notice and publication . . . .").

As a result, the tariffs clearly became effective 30 days after they were filed with the Commission by operation of law. Regardless of whether the Commission unlawfully delegated its authority in allowing the Presiding Officer to issue the rate orders, the tariffs have been in effect and lawful until they were superseded by the Commission's 2009 orders accepting the terms of the Stipulation and Agreement, and ordering new tariffs to go into effect September 1, 2009. See Appendix 18-34, 35-37.

This appeal is therefore moot and should be dismissed.

II. THE MAY 25 AND JUNE 29 ORDERS ARE LAWFUL BECAUSE SECTION 386.240 PERMITS THE COMMISSION TO DELEGATE THE AUTHORITY TO ISSUE ORDERS

Following the issuance of the Report and Order on May 17, 2007, Aquila filed tariff sheets as directed by the Commission. (L.F. 1110). The Commission approved the

tariff sheets in the May 25 Order (L.F. 1381) and the June 29 Order (L.F. 1534) which were issued by the Regulatory Law Judge under a delegation of authority pursuant to Section 386.240. Both orders contain the notation "BY THE COMMISSION" and bear the signature and seal of the Commission's Secretary.

Appellant Ag Processing argues that that the Commission cannot lawfully delegate the authority to issue orders, citing State ex rel. Philipp Transit Lines, Inc. v. PSC, 552 S.W.2d 696 (Mo. en banc 1977). However, Ag Processing's overly broad reading of Philipp Transit is directly contradicted by the plain language of Section 386.240 of the Public Service Commission Law.

In Philipp Transit this Court considered whether the Commission could adopt a Report and Order using a system of notational voting, whereby one commissioner drafted an order and circulated it among the other commissioners for their approval. Id. at 698. Interpreting Section 386.130, the Court disapproved of this particular method because it did not "appear that [the order] had been adopted by the commission, acting at least by a majority, and at a stated meeting, or a meeting properly called." Id. at 700. The Court neither addressed Section 386.240, nor even hinted that the Commission could not delegate the authority to issue orders under that statute.

Ag Processing's reading of Philipp Transit would place the opinion in direct conflict with the plain language of Section 386.240, which reads, in its entirety, as follows:

> 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 [emphasis added].

The statute does not prohibit the Commission from delegating the authority to issue orders. In fact, it clearly states the opposite by defining the conditions for doing so.

The Philipp Transit Court's interpretation of Section 386.130 regarding the conduct of Commission meetings cannot be read to render Section 386.240 meaningless. Missouri courts have long recognized the general principle of statutory construction that "[s]tatutes which appear to be conflicting should be harmonized, if at all possible, so that they may stand together." Edwards v. St. Louis County, 429 S.W.2d 718, 721 (Mo. en banc 1968). See South Metropolitan Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659, 666 (Mo. en banc 2009). It is highly improbable that in interpreting Section 386.130, this Court intended to strip the Commission entirely of its ability to delegate the authority to issue orders under Section 386.240.

Ag Processing also claims that the delegation of authority to a presiding officer somehow violates the Missouri Sunshine Law. See Appellants' Brief at 16–18. However, since the appellants did not assert such claim in their application for rehearing as a reason why the Order was unlawful, unjust, or unreasonable (L.F. 1442–45), the issue was not preserved for appeal under Section 386.500.2 and need not be considered

by this Court. See State ex rel. Missouri Gas Energy v. PSC, 186 S.W.3d 376, 389–90 (Mo. App. W.D. 2005).

III. THE MAY 25 AND JUNE 29 ORDERS ARE LAWFUL BECAUSE THE COMMISSION EXPRESSLY APPROVED THE ORDERS

Assuming that the Commission did have the power to delegate authority to the Regulatory Law Judge under Section 386.240, Ag Processing finally argues that the Commission failed to expressly authorize or approve such action. This argument fails for several reasons.

First, the May 25 Order (L.F. 1381) and the June 29 Order (L.F. 1534) on their face demonstrate that the Commission expressly authorized Regulatory Law Judge Cherlyn D. Voss to take the action which she did. The orders were issued in the standard form of all Public Service Commission orders, with the proper heading, style of the case, and docket numbers. The date of each order is displayed not only on the first page as an "Issue Date," but also on the final page of the order, indicating when the orders were released at the Commission's headquarters in Jefferson City. Finally, each order states that it was issued "BY THE COMMISSION," noting its seal, and bears the signature and certification of Colleen M. Dale, the Secretary of the Commission, pursuant to Section

386.290.[6] Consistent with its regular practice, the Commission issued public announcements of these orders as well as other delegated orders that were issued for the weeks of May 21–25 and June 25–29 on May 29 and July 3, 2007, respectively. See Appendix at 38-41.

In addition, Commission Rule 4 CSR 240-2.120(1) provides a standing express delegation of authority to regulatory law judges (also referred to as "presiding officers"). The rule states:

> A presiding officer shall have the duty to conduct full, fair and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of cases, to maintain order, and shall possess all powers necessary to that end. The presiding officer may take action as may be necessary and appropriate to the discharge of duties, consistent with the statutory authority or other authorities under which the commission functions and with the rules and polices of the commission.

[6] The duties of the Commission's Secretary are set forth in Section 386.090 which states, in part: "It shall be the duty of the secretary to keep a full and true record … of all orders made by the commission or approved and confirmed by it and ordered filed …."

"Presiding officer" is defined at Rule 4 CSR 240-2.010(15):

> Presiding officer means a commissioner, or a law judge licensed to practice law in the state of Missouri and appointed by the commission to preside over a case.

The Commission's approval of Aquila's tariffs by means of a Regulatory Law Judge's order can certainly be seen as an action to avoid unnecessary delay in the disposition of the case and to properly discharge the duties of the Commission.

As the cases cited by Ag Processing indicate: "Express authority is created when the principal explicitly tells the agent what to do." Nichols v. Prudential Ins. Co., 851 S.W.2d 657, 661 (Mo. App. E.D. 1993). Accord Barton v. Snellson, 735 S.W.2d 160, 162 (Mo. App. E.D. 1987). The record in this case plainly demonstrates that the Commission, as principal, told Regulatory Law Judge Voss what to do.

However, Ag Processing continues to rely on a 100-year-old New York state case to support its argument that the Regulatory Law Judge lacked express authority or approval by the Commission to issue the May 25 and June 29 Orders. In People v. Whitridge, 129 N.Y.S. 295, 297–98 (N.Y. App. Div. 1911), the Appellate Division of the New York Supreme Court reviewed an order purportedly issued by the New York Public Service Commission against the receiver of the Union Railway Company, citing it for failure to equip its cars with wheel guards. Noting that the "secretary of the Commission produced a paper which he stated was the order in question," the Appellate Division observed:

> . . . there is certainly nothing upon its face to import its verity. It consists of two typewritten sheets of paper without signature, initials, or even a file mark. Its date has evidently been changed. The date when the order was to take effect, the date on which plans and specifications were to be submitted, and the date on or before which the cars were to be equipped are all changed in handwriting. The secretary was not able to testify positively in whose handwriting the changes were . . . and he did not know when they were made . . . . 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 ever in fact been adopted.

129 N.Y. S. at 298.

The deficiencies in the order that the New York Commission supposedly issued stand in stark contrast to the dates, signature, and general regularity of the orders that were issued in this case by the Regulatory Law Judge and endorsed by the Secretary of the Missouri Commission. Consequently, the Whitridge case provides no authority to overturn the May 25 and June 29 Orders.

Moreover, if there is any question whether the Commission expressly delegated authority to the Regulatory Law Judge to issue these orders, such uncertainty was

dispelled by the Commission's actions in its subsequent Order Denying Applications for Rehearing, issued on July 10, 2007 (L.F. 1571) ("July 10 Order").

On page 1 of the July 10 Order, the Commission stated: "On May 25, 2007, the Commission issued an Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets." It noted that this order "became effective on May 31, 2007." Such reference to the May 25 Order constitutes plain and undisputed evidence that the Commission expressly delegated authority to the Regulatory Law Judge to issue that order.

Similarly, on page 2 of its July 10 Order, the Commission stated: "On June 29, 2007, the Commission issued an Order Granting Expedited Treatment and Approving Tariff Sheets." It noted that the June 29 Order "became effective on July 5, 2007." This reference also constitutes uncontroverted evidence that the PSC expressly delegated authority to the Regulatory Law Judge to issue the order.

Under Missouri law, "[e]xpress authority can be created by knowing acquiescence of the principal in the conduct of his agent." Rosenblum v. Jacks or Better of America West, Inc., 745 S.W.2d 754, 760 (Mo. App. E.D. 1988). Accord 12 Williston on Contracts § 35.10 (4th ed.). Moreover, "if it appears that the principal sought to be charged has, orally or in writing, delegated authority to another by words which authorize such other to do a certain act . . ., then the authority of the agent in that respect is express authority." 3 Am. Jur. 2d Agency § 70 (2010).

Taking together the delegation language in the May 25 and June 29 Orders with the subsequent July 10 Order issued by the Commission itself, it is clear that express

authority was given to the Regulatory Law Judge. Section 386.240 provides that orders are binding upon express authorization or approval by the Commission. The statements in the July 10 Order that was issued by the commissioners at a session of the Commission held in Jefferson City on July 10, 2007 provide unquestionable support for the proposition that the Commission expressly authorized, approved, and ratified the authority of the Regulatory Law Judge to issue the May 25 and June 29 Orders, consistent with Section 386.240.

CONCLUSION

Based on the foregoing, this Court should affirm the Commission's Report and Order.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of Respondent KCP&L Greater Missouri Operations, Co., f/k/a Aquila, Inc., and a disk containing an electronic version of the Brief was sent by U.S. mail postage prepaid this 11th day of October, 2010 to the following attorneys of record:

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CERTIFICATE PURSUANT TO RULE 84.06(c) and 84.06(g)

I hereby certify that the foregoing Brief of Respondent Aquila, Inc. includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and, according to the word count of the word-processing system used to prepare the brief (excepting therefrom the cover, certificate of service, this certificate, the signature block, and the appendix), contains 5,605 words and 510 lines of monospaced type. I hereby further certify that the disk containing this brief and submitted to the Court has been scanned for viruses and that the scan indicated that it is virus free.

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