

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Consideration of Adoption)
of the PURPA Section 111(d)(16) Integrated)
Resource Planning Standard as Required by) **Case No. EO-2009-0247**
Section 532 of the Energy Independence and)
Security Act of 2007.)

In the Matter of the Consideration of Adoption)
of the PURPA Section 111(d)(17) Rate Design)
Modifications to Promote Energy Efficiency) **Case No. EO-2009-0248**
Investments Standard as Required by Section)
532 of the Energy Independence and Security)
Act of 2007.)

In the Matter of the Consideration of Adoption)
of the PURPA Section 111(d)(16) Consideration)
of Smart Grid Investments Standard as Required) **Case No. EO-2009-0249**
by Section 1307 of the Energy Independence and)
Security Act of 2007.)

In the Matter of the Consideration of Adoption)
of the PURPA Section 111(d)(17) Smart Grid)
Information Standard as Required by Section) **Case No. EO-2009-0250**
1307 of the Energy Independence and Security)
Act of 2007.)

ORDER AND NOTICE REGARDING CLASSIFICATION OF DOCKETS AND EX PARTE RULE

Issue Date: February 6, 2009

Effective Date: February 6, 2009

The Missouri Public Service Commission is changing the case numbers for these dockets to reflect their legal classification as workshops and not contested cases.

On December 17, 2008, the Commission granted its Staff's motions requesting that the Commission establish these dockets. Staff's requests designated these dockets with the letters EO, implying that they were contested cases or that a contested case may materialize.

The Missouri Administrative Procedures Act defines a contested case as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.”¹ Contested cases involve the Commission’s adjudicative power, applying existing law to past facts. Workshops do not constitute contested cases, even if they result in a determination that the Commission will engage in rulemaking. Rulemaking is an exercise of the Commission’s legislative power, making new law applying to future events.²

In contrast to an adjudicatory trial-like contested case, workshops and rulemakings contemplate that the Commission will meet interested members of the public face to face providing an opportunity for oral presentation and comment without the formality of a trial procedure.³ Consequently, the Commission’s *ex parte* contact rules do not apply in these workshops.

On December 22, 2008, the Commission directed its Staff to explain why it had classified these workshops as “EO” cases, a designation reserved for contested cases or non-contested cases requiring a decision that affects the legal rights, duties, or privileges of specified persons. Staff responded that consequences could follow these workshops other than a rulemaking. However, Staff fails to explain how any of the possible scenarios it anticipated are in any way relevant to the proper classification of these workshops.

In Staff’s motions to open these dockets, Staff offered three possible results of the workshops: (1) no further action; (2) opening a rulemaking; and (3) directing individual

¹ Section 536.010(2), RSMo Supp. 2008.

² “The identifying badge of a modern administrative agency is the combination of judicial power (adjudication) with legislative power (rulemaking).” *McNeil-Terry v. Roling*, 142 S.W.3d 828, 835 (Mo. App. 2004).

³ *State ex rel. Atmos Energy Corp. v. Public Service Com’n of State*, 103 S.W.3d 753, 759-760 (Mo. banc 2003).

electric utilities to include testimony in a general rate case. However, none of those possible results constitutes a legal right, duty, or privilege that the law requires the Commission to determine only after hearing. A contested case or rulemaking commences only upon prescribed notice and there is a separate record upon which the Commission renders a decision.

In support of the current contested case designation, Staff cites *State ex rel. Sierra Club v. Missouri Public Service Com'n*.⁴ In that case, the Commission held a workshop,⁵ which resulted in a stipulation, which the parties filed to initiate a contested case.⁶ The contested case resulted in a decision, which the Court of Appeals reversed. Staff argues that holding a workshop led to the reversal. The Commission disagrees. The basis for the reversal was that the document initiating the contested case was titled a “Stipulation and Agreement,” not that a workshop preceded the contested case.⁷ Also, the Missouri Supreme Court granted transfer of that decision.⁸ Therefore, the history of *State ex rel. Sierra Club v. Missouri Public Service Com'n* does not support classifying these workshops as contested cases.

At the June 20, 2004 prehearing conference held in EW-2004-0596, Regulatory Law Judge Lewis Mills acknowledged some of the challenges the Commission could face in a workshop when he stated that if the docket arrived at a point in “which there are disputed issues that need to be resolved by the Commission, those will have to be brought

⁴ Case No. WD66893, 2007 WL 581652 (Mo. App., W.D. 2007), Ulrich, P.J.

⁵ EW-2004-0596.

⁶ EO-2005-0329.

⁷ *State ex rel. Sierra Club*, 2007 WL 581652 at 9.

⁸ Case No. SC88530.

up in a different case . . . ”⁹ Judge Mills correctly recognized that in workshop docket there is no resulting Commission Order, and there are “no ex parte rules, there are no parties, there are no contested issues.”¹⁰ “It’s [the workshop docket is] designed as information gathering, information exchange, rather than a dispute resolution or a contested issue resolution case.”¹¹ The Commissioners themselves even participated at various levels in the KCPL workshop, something which would be inappropriate if the process were intended to resolve, or settle a matter.

Among multiple points of error alleged in Sierra Club’s petition for review of contested Case No. EO-2005-0329 with the circuit court were the following allegations concerning the prior workshop case:

16. The Order is unlawful, unjust and unreasonable because it is the result of an informal workshop process that did not create a record capable of being reviewed, and that was not reviewed, by the PSC in the manner required by § 536.080, RSMo. The Order is therefore not supported by substantial and competent evidence.

28. The Order is unjust, unlawful and unreasonable because the PSC had no jurisdiction or authority to approve as a whole a stipulation which is the outcome of an informal workshop process. No statute or rule prescribes a workshop or defines or limits its content or procedure. This resulted in a process that was contrary to law, arbitrary, capricious, not in the public interest, and a denial of due process, notwithstanding the more circumscribed hearing before the Commission.¹²

⁹ EW-2004-0596, Prehearing Conference, T. 7-8, June 30, 2004.

¹⁰ *Id.*

¹¹ *Id.*

¹² Case No. 05AC-CC00917: *State ex rel. Sierra Club and Concerned Citizens of Platte County v. Missouri Public Service Commission*, Petition for Review, Paragraphs 16, 28, filed September 22, 2005.

The circuit court understood the difference between workshops and adversarial contested cases and astutely discredited Sierra Club's allegations in its judgment stating:

11. The Commission did not base its decision to approve the Experimental Regulatory Plan embodied in the Stipulation on the workshops. Rather, its decision was based on the competent and substantial evidence submitted on the record [in the contested case], which consisted of the pre-filed testimony of seven KCPL and one Public Counsel witnesses, the live testimony of numerous other witnesses, and over 50 exhibits. **While the workshop process was a constructive, nonadversarial way for KCPL to present issues for discussion and to obtain the views of various parties (including Appellants who attended many of the sessions), it was only a prologue to the Stipulation,** and the specific resource, financial and customer-related proposals which it contains.

30. Therefore, contrary to the Appellants' suggestion, **the Commission conducted a comprehensive, adversarial hearing** where it considered all of the pertinent issues at a time proximate to KCPL's plan to construct on latan 2. The Commission considered all appropriate issues within its jurisdiction and issued a specific order confirming that the plans to proceed with latan 2 were in the public interest. No more is required by Missouri law. KCPL has exercised its authority at the latan Generating Station continuously since the issuance of the 1973 CCN, and it needs no further permission from the Commission to begin work on latan 2. Cf. *In re Kansas City Power & Light Co.*, 1981 Mo. PSC LEXIS at 13-18 (Case No. ER-81-42) (1981).¹³

Though EO-2005-0329 proceeded to the Western District, the issue decided there had nothing to do with the workshop classification of EW-2004-0596 and whether the Commission's *ex parte* rules apply to workshops.

Further, the Western District's holding is not good law because the Missouri Supreme Court accepted transfer of this case on June 26, 2007. Ultimately the Supreme Court case was dismissed on July 11, 2007 pursuant to a joint motion to dismiss filed by

¹³ Case No. 05AC-CC00917: *State ex rel. Sierra Club and Concerned Citizens of Platte County v. Missouri Public Service Commission*, Findings of Fact, Conclusions of Law and Judgment, Paragraphs 11, 30, issued on March 16, 2006. (Emphasis added.)

appellants and respondents leaving the Western District's decision of questionable legal precedent.¹⁴

Recently, the Commission considered a different set of Public Utility Regulatory Policies Act ("PURPA") standards in a workshop.¹⁵ The Commission held On-the-Record proceedings in those workshops and even elicited the sworn testimony of subject matter experts to assist them with evaluating the standards and with determining whether any other type of proceeding would need to follow those workshops. No cross-examination of those witnesses was allowed, nor would it have been appropriate to do so in the posture of those workshops. Consequently, such testimony had no evidentiary value for deciding any specified party's legal rights, duties, or privileges.¹⁶ Even the taking of testimony from subject matter experts in a workshop does not convert the workshop into a contested case.

While the Commissioners have many opportunities, through conferences and educational seminars, to gather information, the free flow of information and ideas is always educational and essential for the Commissioners to be able to exercise their duties in a totally informed capacity; especially in the highly specialized subject matter arena of public utilities that interweaves complex issues of law, accounting and engineering. Obtaining

¹⁴ See Supreme Court Case Docket of case number SC 88530.

¹⁵ See Case Nos. EO-2006-0493, 0494, 0495, 0496, and 0497.

¹⁶ Fundamental aspects of due process include the ability to cross-examine witnesses and to present evidence and cross examination is required in administrative cases once they involve the agency's quasi-judicatory authority for deciding contested issues. *Colyer v. State Bd. of Registration For Healing Arts*, 257 S.W.3d 139, 146 (Mo. App. 2008); [See also *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Jamison v. State, Department of Social Services*, 218 S.W.3d 399, 405-415 (Mo. banc 2007); *Mikel v. Pott Industries/Saint Louis Ship*, 910 S.W.2d 323, 327 (Mo. App. 1995). "The purpose of cross-examination is to sift, modify or explain what has been said, to develop new or old facts in a view favorable to the examiner, and to test the correctness of the information from the witness with an eye to discrediting the accuracy or truthfulness of the witness. **When the evidence is critical to the issues and necessary to sustain a proponent's burden of proof, cross-examination is essential to testing the reliability of evidence.**" (Emphasis added and internal citations omitted). *State ex rel. Utility Consumers Council v. Public Service Commission*, 562 S.W.2d 688, 694 (Mo. App. 1978).

information in non-adjudicatory matters, such as workshops, is appropriate even if a contested case, involving an issue discussed in the workshop, later commences. Obtaining information in this fashion does not create an issue of bias in future cases. “Administrative decisionmakers *are expected to have* preconceived notions concerning policy issues within the scope of their agency's expertise.”¹⁷ “Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker, in the absence of a showing that the decisionmaker is not capable of judging a particular controversy fairly on the basis of its own circumstances.”¹⁸ An administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence. “Conversely, any administrative decisionmaker who has made an unalterable prejudgment of operative adjudicative facts is considered biased.”¹⁹

THE COMMISSION ORDERS THAT:

1. Commission docket numbers EO-2009-0247, EO-2009-0248, EO-2009-0249, and EO-2009-0250 are classified as workshops.
2. The Commission's Data Center shall change the docket numbers of EO-2009-0247, EO-2009-0248, EO-2009-0249, and EO-2009-0250 to reflect the appropriate classification in the Commission's Electronic Information and Filing System by changing the “EO” designation in the docket numbers of these matters to “EW”.

¹⁷ *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990) (emphasis added) (citing *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assoc.*, 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976)).

¹⁸ *Id.* (citing *Wilson v. Lincoln Redevelopment Corp.*, 488 F.2d 339, 342-43 (8th Cir. 1973)); *Hortonville*, 96 S.Ct. at 2314.

¹⁹ *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984); *Shepard v. South Harrison R-II School District*, 718 S.W.2d 195, 199 (Mo. App. 1986).

3. The Commission's *ex parte* rule, Commission Rule 4 CSR-240.4.020 is inapplicable to these dockets.

4. This order shall become effective immediately upon issuance.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Harold Stearley, Senior Regulatory Law Judge,
by delegation of authority pursuant to
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 6th day of February, 2009.