

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Cancellation of the)
Certificate of Convenience and Necessity) **File No. ED-2019-0309**
Originally Approved in File No. EA-2005-0180)
and the LTS Rate Schedule)

**STAFF RESPONSE TO MIDWEST ENERGY CONSUMERS GROUP
OBJECTION TO AFFIDAVIT**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through Staff Counsel’s Office, and responds to the June 24, 2019 *Objection To Affidavit* of Midwest Energy Consumers Group (“MECG”). In support thereof, Staff states as follows:

1. On June 24, 2019 MECG filed an *Objection To Affidavit*¹ of Sarah L.K. Lange.² In paragraph 1, page 1, the *Objection To Affidavit* asserts that a 33 page legal pleading signed by undersigned counsel is the “Staff Recommendation” and attached to said “Staff Recommendation” is an Affidavit of Sarah L.K. Lange. Additionally in paragraph 1, page 1, the *Objection To Affidavit* states the “affidavit sets forth numerous facts supporting Staff’s opinion that cancellation of the New Madrid smelter certificate is not detrimental to the public interest.”

2. On April 12, 2019, the same day Union Electric Company d/b/a/ Ameren Missouri established File No. ED-2019-0309 by filing its *Application And Request For*

¹ The *Objection To Affidavit* is not joined in by Midwest Industrial Energy Consumers (“MIEC”) or the Office of the Public Counsel (“OPC”) which entities joined in the *Motion For Hearing* with MECG. Said *Motion For Hearing* was filed on June 5, 2019.

² Also on June 24, 2019, MECG filed an *Objection To Ameren Affidavit* in response to *Ameren Missouri’s Verified Response In Opposition To The “Consumers” Motion For Hearing*.

Waiver requesting the Commission to cancel the CCN and LTS rate schedule originating in Case No. EA-2005-0180, the Commission issued an *Order Directing Notice, Establishing Time To Intervene, And Directing Staff Recommendation*. In “Ordered” item “3,” the Commission’s Staff was ordered to file a recommendation regarding Ameren Missouri’s *Application And Request For Waiver*. Sarah L.K. Lange is the author of the affidavit which is in the form of a memorandum and the subject of which is stated to be *Recommendation To Cancel The CCN Granted In File No. EA-2005-0180 And To Direct The Filing Of Tariff Sheets To Cancel The LTS Rate Schedule And Remove References In Table of Contents And Listing Of Service Territory*.

3. In paragraph 2, page 1, the *Objection To Affidavit* invokes Section 536.070(12) RSMo. However, Section 536.070(12) is applicable only in contested cases and File No. ED-2019-0309 is a noncontested case. MCEG does not make File No. ED-2019-0309 a contested case merely by citing Section 536.070(12) or noting that there is an affidavit or affidavits in the pending case. The case must meet the criteria of being a contested case in order for Section 536.070(12) to apply and as explained in the Staff’s filing on June 17, 2019, *Staff Recommendation and Response to Consumers’ Motion for Hearing*, File No. ED-2019-0309 does not meet the definition of a contested case since no hearing is required by law in File No. ED-2019-0309.

4. Staff did not specifically address Section 536.070(12) RSMo. in the Staff’s filing on June 17, 2019, *Staff Recommendation And Response To Consumers’ Motion For Hearing*, File No. ED-2019-0309, because MCEG, MIEC, and OPC (collectively the “Consumers”) did not raise Section 536.070(12) in their June 5, 2019, *Motion For Hearing*. Consumers in their *Motion For Hearing*, or MCEG alone, could have raised

Section 536.070(12) on June 5, 2019 because Ameren Missouri's *Application And Request For Waiver* initiating this proceeding on April 12, 2019, was verified by Mr. Warren Wood, Vice President of Legislative and Regulatory Affairs, Ameren Missouri, who duly sworn and upon his oath stated that the foregoing *Application And Request For Waiver* is true and correct to the best of his knowledge, information, and belief.

5. The most immediate relevant provisions in Chapter 536 to MCEG's contentions follow, such as the definition of "contested case," a proceeding in which legal determinations are to be made regarding specific parties by an agency after a hearing that is required by law:

536.010. Definitions:

For the purpose of this chapter:

* * * * *
(4) "Contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing. [Emphasis supplied.]

Section 536.070(12), which as previously noted was not addressed by any party in this proceeding until MCEG's June 24, 2019 *Objection To Affidavit* and *Objection To Ameren Affidavit*, may be in entirety relevant if a hearing is required by law, but that is not the case here. Section 536.070(12) states in part:

536.070. Evidence – witnesses – objections – judicial notice – affidavits as evidence – transcript:

In any contested case:

* * * * *
(12) Any party or the agency desiring to introduce an affidavit in evidence at a hearing in a contested case may serve on all other parties (including, in a proper case, the agency) copies of such affidavit in the manner hereinafter provided, at any time before the hearing, or at such later time as may be stipulated. . . . Nothing herein contained shall prevent the cross-examination of the affiant if he or she is present in obedience to a subpoena or otherwise and if he or

she is present, he or she may be called for cross-examination during the case of the party who introduced the affidavit in evidence. . . . [Emphasis supplied.]

6. MECG's June 24, 2019 use of objections to affidavits citing as authority Section 536.070(12) is not the first time that MECG has sought to turn a noncontested case into a contested case simply by raising Section 536.070(12). (See *Re Kansas City Power & Light Co.*, 2015 WL 5785591, File No. ER-2014-0370, *Order Denying MECG Objections And Requests For Hearing* (September 29, 2015)). Commission File No. ER-2014-0370 was a KCPL general electric rate increase case filed on October 30, 2014. On September 2, 2015, the Commission issued a *Report And Order* disallowing KCPL from collecting the proposed revenues which it had filed tariff sheets to collect, but authorized KCPL to file new tariff sheets to collect annual revenues as determined appropriate by the Commission in its *Report And Order*. KCPL filed compliance tariff sheets on September 8, 2015, to become effective on October 8, 2015. 2015 WL 5785591.

7. Also on September 8, 2015, KCPL filed a motion for clarification or reconsideration concerning the two provisions in its fuel adjustment clause ("FAC") tariff. The *Report And Order* directed the Staff to file a recommendation regarding the compliance tariff sheets by September 14, 2015 and directed any other party choosing to file a recommendation to do so by September 14, 2015 also. Staff filed on September 14, 2015, a recommendation suggesting that the compliance tariff sheets were not consistent with the Commission's *Report And Order* regarding two (2) provisions of the FAC tariff, and that the Commission should reject or suspend the tariff sheets. 2015 WL 5785591.

8. After negotiations among the parties, Staff and KCPL on September 15, 2015, filed a *Joint Motion For Approval Of Compliance Tariff Sheets* (“*Joint Motion*”), verified with affidavits from three members of Staff, which supported compromise language respecting the FAC tariff provisions that were in dispute. KCPL that date withdrew the compliance tariff sheets which were in dispute and submitted tariff sheets consistent with the *Joint Motion*. Also on September 15, 2015, MEGC filed *Objections To Tariffs, Objections To Affidavits, And Request For Hearing* respecting the filings that date by KCPL and Staff. On September 16, 2015, the Commission approved the substituted and revised compliance tariff sheets to become effective on September 29, 2015. 2015 WL 5785591; *See also Re Kansas City Power & Light Co.*, 2015 WL 5644072, File No. ER-2014-0370, *Order Regarding Compliance Tariff Sheets* (September 16, 2015).

9. On September 29, 2015, the Commission issued an *Order Denying MEGC Objections And Request For Hearing*. The Commission noted that MEGC argued, among other things, that there was insufficient evidence under Section 536.140 RSMo. to support the Commission Order approving the compliance tariffs, since the Staff affidavits were objected to by MEGC; the Staff affidavits could not constitute competent and substantial evidence under Section 536.070(12) so the affidavits could not support approval of the compliance tariffs in a contested case; and MEGC was not provided sufficient notice.³ 2015 WL 5785591.

³ MEGC in its *Objections To Tariffs, Objections To Affidavits, And Request For Hearing* referred to there being insufficient time for notice and publication. The compliance tariffs addressed by MEGC were those approved by the Commission’s September 16, 2015, *Order Regarding Compliance Tariff Sheets*, to be effective on and after September 29, 2015. The Commission directed in its September 16, 2015, *Order Regarding Compliance Tariff Sheets* that said Order should become effective on September 29, 2015.

10. As a noncontested case, the Commission determined in File No. ER-2014-0370 that no hearing was required for the matters raised in MECG's *Objections To Tariffs, Objections To Affidavits, And Request For Hearing*. Therefore, the Commission stated in its September 29, 2015 *Order Denying MECG Objections And Request For Hearing* that the legal requirements of a contested case found in Sections 536.140 and 536.070(12) were not applicable.⁴ 2015 WL 5785591.

11. The Western District Court of Appeals heard MECG's appeal of the Commission's decision on the noncontested-contested case issue and certain ratemaking issues appealed by KCPL in *Re Kansas City Power & Light Company*, 509 S.W.3d 757 (Mo.App. W.D. 2016). The Court in its opinion explained that the Missouri Administrative Procedures Act ("MAPA"), Chapter 536, applies to proceedings before the Commission where there is a procedural gap in Chapter 386. *Id.* at 783. The Court stated that whether a matter before the Commission is contested or noncontested depends upon whether by law the Commission is required to hold a hearing. The Court related that the requirement to hold a hearing may be imposed by statute or ordinance⁵ or by due process principles where the agency decision concerns a protected property interest.⁶ *Id.* at 784.

⁴ The Commission in File No. ER-2014-0370 in an October 22, 2015, *Order Denying Applications For Rehearing Regarding Approval Of Compliance Tariff Sheets* noted that on September 28, 2015, MECG filed an *Application For Rehearing* and on September 30, 2015, MECG filed another substantially similar *Application For Rehearing*. The Commission denied both of MECG's *Applications For Rehearing* respecting the compliance tariff sheets on October 22, 2015.

⁵ *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 566 (Mo.App. K.C. 1976); *State ex rel. Utility Consumers Council, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo.banc 1979).

⁶ *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 31 (Mo.banc 1975), *cert. denied*, 429 U.S. 882, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976).

12. The Court stated that MECG had not identified any statute or rule that would require contested proceedings to consider a challenge to compliance tariffs filed to effectuate the Commission's just issued Report And Order. 509 S.W.3d at 784-85. The Court analogized the compliance tariff situation/procedure to the Sections 393.140(11) and 393.150.1 "file and suspend" situation/procedure where the Commission has the discretion to approve a filed tariff without a hearing:

This result aligns with the "file and suspend" procedure adopted by the PSC and utilized in this case, in which the PSC is granted the discretion, in the first instance, to decide whether to approve a filed tariff without a formal hearing. See Sections 393.150.1 and 393.140(11); *State ex rel. Coffman*, 121 S.W.3d at 541 (review of PSC's decision to approve a tariff under a file and suspend case is for abuse of discretion). . . .

509 S.W.3d at 785.⁷ Having established that no statute or rule required a hearing prior to approval of a filed tariff, the Court stated that the next issue was whether due process required a hearing. The Court related that prior Missouri courts had held that due process does not require a hearing because there is no protected property interest in a particular

⁷ The Court in *State ex rel. Public Counsel v. Public Serv. Comm'n*, 210 S.W.3d 344, 355 (Mo.App. W.D. 2006) (*Public Counsel I*) stated that to the extent its prior decision (*State ex rel. Coffman v. Public Serv. Comm'n*, 121 S.W.3d 534 (Mo.App. W.D. 2003)) required the Commission to make findings of fact in a noncontested case, its prior decision should not be followed. Thus, the Court held in *Public Counsel I*:

. . . review in a noncontested [case] typically probes only the lawfulness of an agency's order without consideration of its reasonableness and without need for review of competent and substantial evidence. Thus, as is the case in MO. CONST. art. V, Section 18, the "competent and substantial evidence" would not apply to the commission's cases in which a hearing was not required by law.

Id. at 354.

* * * *

Because this is a noncontested case, we will judge only whether or not the commission abused its discretion in denying a hearing and whether or not the commission's order was lawful. . . .

Id. at 355. See Staff's June 17, 2019 *Staff Recommendation And Response To Consumers' Motion For Hearing*, starting at page 15, paragraph 26.

utility rate, and as there is no protected property interest in a particular utility rate, due process does not require a hearing. *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 31 (Mo.banc 20, 31 (1975)).

13. The Western District Court of Appeals further stated that Commission Orders to ensure compliance with a Commission Report And Order are Orders in a noncontested case, and such Orders are not subject to reasonableness review since the Commission is not required to issue findings of fact. 509 S.W.3d at 785; 210 S.W.3d 344, 354-55 (Mo.App. W.D. 2006)(See Footnote 7); *In Re KCP&L Greater Missouri Operations Co.*, 408 S.W.3d 175, 190 n.19 (Mo.App. W.D. 2013)(See Footnote 7).

14. The Court ultimately found that MECG's appeal was moot. The Court held that the issues raised by MECG were not likely to evade appellate review. Finally, the Court declined to exercise its discretion to consider MECG's moot appeal. 509 S.W.3d at 786.

WHEREFORE, based on the foregoing and Staff's filing on June 17, 2019 of *Staff Recommendation and Response to Consumers' Motion for Hearing*, Staff requests that the Commission overrule MECG's June 24, 2019 *Objection To Affidavit of Sarah L.K. Lange*.

Respectfully submitted,

/s/ Steven Dottheim

Steven Dottheim, Mo. Bar No. 29149

Chief Deputy Staff Counsel

E-mail: steve.dottheim@psc.mo.gov

Phone: 573-751-7489

Fax: 573-751-9285

Attorney for Staff of the

Missouri Public Service Commission

P. O. Box 360

200 Madison St., Ste. 800

Jefferson City, MO 65102

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Staff Response To Commission Order Directing Filing has been transmitted electronically to all counsel of record this 3rd day of July, 2019.

/s/ Steven Dottheim