

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

In the Matter of Union Electric Company,)
d/b/a AmerenUE's Tariffs to Increase Its)
Annual Revenues for Electric Service)

Case No. ER-2010-0036
Tracking Nos. YE-2010-0054
and YE-2010-0055

**CONCURRENCE OF COMMISSIONER JEFF DAVIS TO THE
"ORDER FURTHER SUSPENDING INTERIM RATE TARIFF AND
SCHEDULING EVIDENTIARY HEARING,"
AND DISSENT REGARDING PROCEDURE AND STANDARD**

I concur with the Missouri Public Service Commission's order¹ ("the order") as to its ruling to further suspend, and order a hearing on, AmerenUE's MO PSC Schedule No. 5, Sheet No. 98.14, tracking no. YE-2010-0055 ("the disputed tariff").² The disputed tariff is subject to the "just and reasonable" standard, as determined after a full evidentiary hearing, as Section 393.150.2³ expressly provides. Nevertheless, the order implies expedited procedures and higher standards without authority, so I must respectfully dissent from the order in part and to that extent.

I. Procedural Background

On July 24, 2009, Union Electric Company, d/b/a AmerenUE ("AmerenUE"), filed two tariffs. One tariff consists of 36 tariff sheets describing a rate increase of approximately \$402 million.⁴ The other is the disputed tariff, consisting of a single tariff sheet describing a

¹ Dated October 7, 2009.

² I use the term "disputed" for tariff tracking no. YE-2010-0055 to better distinguish it from tracking no. YE-2010-0054. Tracking no. YE-2010-0054—on becoming effective—replaces tracking no. YE-2010-0055, so the parties view tracking no. YE-2010-0055 as temporary, and tracking no. YE-2010-0054 as permanent. Yet, ultimately, all tariffs are equally temporary and permanent as they replace one another, as the statutes provide.

³ RSMo 2000.

⁴ Tracking No. YE-2010-0054.

rate increase of approximately 1.67 percent, or \$37 million, subject to refund.⁵ On September 14, 2009, the Commission heard the parties' argument on the procedure and standard for approving or rejecting the disputed tariff. On September 24, 2009, the Commission suspended the tariff. On October 7, 2009, the Commission issued the order extending the suspension pursuant to Section 393.150.⁶

II. The Statutes

The Commission is a legislative creation, so it has only such power as the legislature has given it by statute.⁷ The statutes set forth procedures and standard for approving or rejecting a tariff. Such provisions include the following.

A filed and effective tariff governs an electric corporation's rate:

No corporation shall charge . . . different compensation for any service rendered . . . than the rates . . . applicable to such services as specified in its [tariff] **filed and in effect** at the time [.⁸]

Under that provision, and the following provision, the corporation may initiate a change to its rate by filing another tariff giving notice of such change:

Unless the commission otherwise orders, no change shall be made in any [tariff], 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. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe.[⁹]

⁵ Tracking No. YE-2010-0055.

⁶ Section 393.150.1, RSMo 2000.

⁷ ***State Bd. of Regis'n for the Healing Arts v. Masters***, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974).

⁸ Section 393.140(11), RSMo 2000 (emphasis added).

⁹ *Id.*

Under that language, filing a tariff may lead to a rate change either within the 30-day notice and publication period, or without such period if the Commission so orders. Such order stands upon “good cause [.]”

Further, filing a tariff may also lead to specified proceedings:

Whenever there shall be filed with the commission by any . . . electrical corporation [a tariff], the commission [may] enter upon a **hearing concerning the propriety** of such [tariff].¹⁰

The issue at the hearing—the tariff’s propriety—includes a standard for the rate described:

At any hearing involving a rate sought to be increased, the burden of proof to show **that** the increased rate or proposed increased rate is **just and reasonable** shall be upon the . . . electrical corporation . . . , and the commission shall give to the **hearing and decision of such questions** preference over all other questions pending before it and decide the same as speedily as possible.¹¹

Hence, any tariff is subject to the “just and reasonable” standard after a “hearing and decision [.]”

Because such hearing and decision may require more time than the 30-day minimum notice and publication period allows, the Commission may extend that period:

Whenever there shall be filed with the commission by any . . . electrical corporation . . . any [tariff], the commission [may] enter upon a hearing concerning the **propriety** of such [tariff], and pending **such hearing and the decision** thereon, the commission . . . may **suspend** the operation of such [tariff] and **after full hearing**, . . . the commission may make **such order** in reference to such [tariff].¹²

That is the authority that the Commission exercised in the order.

¹⁰ Section 393.150.1, RSMo Supp. 2008 (emphasis added). Such hearing may commence “upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested . . . electrical corporation . . . , but upon reasonable notice[.]” *Id.*

¹¹ Section 393.150.2, RSMo Supp. 2008 (emphasis added).

¹² Section 393.150.1, RSMo Supp. 2008 (emphasis added).

The order suspended the disputed tariff, which the Commission may do only pending a “decision” on whether the tariff describes a rate that is just and reasonable. Such decision may only occur “after a full hearing.” The full, pre-decision hearing provisions signify that this action is now a “contested case.”¹³ Contested case procedure allows for waiver of procedural formalities¹⁴ and a decision without a hearing,¹⁵ including by stipulation and agreement,¹⁶ but otherwise entitles the parties to a formal hearing procedure.¹⁷

III. The Order

Those provisions of chapters 386 and 393, RSMo cited above constitute the “file-and-suspend” procedure for rate-making. There is no ambiguity in them. The order includes no authority contrary to the reading of their plain language. Nevertheless, the order suggests the Commission can invoke “expedited” procedure and standards of review not found in the statute. It does so upon the premise that the temporary tariff is somehow a different type of tariff: an “interim” tariff.

a. Statutory Usage

That usage is contrary to the statutes. The statutes use the term “interim” in conjunction with rates, charges or tariffs in only one section:

1. [A]ny electrical corporation may make an application to the commission to approve [tariffs] authorizing an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation[.]

¹³ Section 536.010(4), RSMo Supp. 2008.

¹⁴ Sections 536.060(3) and 536.063(3), RSMo 2000.

¹⁵ Sections 536.060, RSMo 2000.

¹⁶ 4 CSR 240-2.115.

¹⁷ Section 536.060 to 536.095, RSMo.

2. [A]ny electrical . . . corporation may make an application to the commission to approve [tariffs] outside of general rate proceedings to reflect increases and decreases in its prudently incurred costs, whether capital or expense, to comply with any [law¹⁸].

That does not describe the disputed tariff, so that statute—and the statutory term “interim”—do not apply to the disputed tariff.

b. Case Law

The order also cites *State ex rel. Laclede Gas Co. v. Public Serv. Com'n of Mo.*,¹⁹ which used the term “interim,” 29 years before the statutes made that usage a term of art for rates. The court uses the term “interim” to describe an earlier tariff and its rate, which a later tariff replaces when the other takes effect. Of course, every tariff is “interim” in the sense that a later tariff replaces it as the statutes provide. The tariff at issue in *State ex rel. Laclede Gas Co.* shares a distinguishing feature with the disputed tariff: the later tariff is filed contemporaneously with the earlier.

The issue in *State ex rel. Laclede Gas Co.* was simply the procedure for “accelerated action”²⁰ “in a purposefully shortened interim rate hearing”²¹ on the earlier tariff. As to approval, the court endorsed the Commission’s authority to make such tariff effective with less than the 30-day notice and publication period.²² As to rejection, the court held that the appellant utility did not show that such decision was unreasonably or unlawfully²³ confiscatory²⁴ on the record made in the expedited proceeding.²⁵

¹⁸ Section 386.266, RSMo Supp. 2008.

¹⁹ 535 S.W.2d 561 (Mo. App., K.C.D. 1976).

²⁰ *Id.* at 569.

²¹ *Id.* at 574.

²² *Id.* at 566.

²³ *Id.* at 574.

²⁴ *Id.* at 569.

²⁵ *Id.*

But those holdings have no application to the disputed tariff for two reasons. First, the disputed tariff carried an effective date 68 days after its filing date, so AmerenUE does not offer good cause to reduce the 30-day period. Second,—unlike the tariff at issue in ***State ex rel. Laclede Gas Co.***—the Commission has suspended the disputed tariff, requiring a full hearing on the propriety of the tariff, including whether it is just and reasonable under Section 393.150.2.

In ***State ex rel. Laclede Gas Co.***, the court stated that Section 393.140(5)'s complaint procedure, which includes the just and reasonable standard, does not apply to the expedited procedure for an unsuspended tariff. That holding does not negate the application of such standard under Section 393.150.2 after suspension. On the contrary, it distinguished “a special hearing for the limited purpose of considering an interim increase, since the setting of fair rates is the purpose and subject of the full rate hearing.”²⁶

Thus, ***State ex rel. Laclede Gas Co.*** does not support the order.

c. Commission Rulings

The order also cites Commission decisions and orders applying ***State ex rel. Laclede Gas Co.*** But those rulings cannot expand the facts of ***State ex rel. Laclede Gas Co.*** to include a suspended tariff or alter the statutes requirements for a suspended tariff. This Commission's rulings are of no precedential authority.²⁷

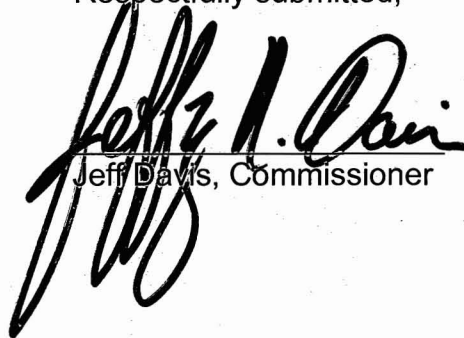
²⁶ *Id.* The reason for allowing summary approval or rejection, while requiring a full hearing upon suspension, appears clearly in ***State ex rel. Laclede Gas Co.*** Such provisions balance two legitimate interests. The first is “the practical need for this power” to rule expeditiously. *Id.* at 566. The second is “. . . the desirability of leaving the whole question of just and reasonable rate (unless imperative facts require to the contrary) to the permanent rate proceeding in which all the facts can be developed more deliberately with full opportunity for an auditing of financial figures and a mature consideration by the Commission of all factors and all interests.” *Id.* at 574. Suspension delays an expeditious ruling, so it leans toward the second interest.

²⁷ ***Central Hardware Co. v. Director of Revenue***, 887 S.W.2d 593, 596 (Mo. banc 1994).

Conclusion

Like appellant in *State ex rel. Laclede Gas Co.*, the order cites no other procedure other than file-and-suspend,²⁸ and merely calling the disputed tariff "interim" does not support a departure from such statutes. Those statutes prescribe a contested case to determine whether the disputed tariff describes a just and reasonable rate, and departure from those provisions stands on no authority cited in the order. Therefore, I dissent and urge my colleagues to carefully review the express language of the applicable statute in this context.

Respectfully submitted,



Jeff Davis, Commissioner

Dated at Jefferson City, Missouri
On this 19th day of October, 2009.

²⁸ 535 S.W.2d at 567.