

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

In the Matter of Evergy Missouri West,)
Inc. d/b/a Evergy Missouri West's Request)
for Authority to Implement a General Rate)
Increase for Steam/Heat Service)

Case No. HR-2026-0109

**PUBLIC COUNSEL'S SUGGESTIONS
IN SUPPORT OF STAFF'S RESPONSE TO FILING**

COMES NOW the Office of Public Counsel ("Public Counsel") and offers the following suggestions in support of Staff's *Response to Filing*:¹

1. In its Response Staff's states that Evergy Missouri West's filing a settlement agreement (its *Stipulation and Agreement*) is insufficient for initiating a rate case. Public Counsel concurs.

2. The statutory avenue available to Evergy Missouri West to propose changes to its rates is the statutory file-and-suspend tariff sheets method extensively discussed in [*State ex rel. Jackson Cty. v. Pub. Serv. Com.*, 532 S.W.2d 20 \(Mo. 1975\)](#). While the Court in *State ex rel. Jackson Cty.* was discussing electric rates, the same file-and-suspend statutes apply to steam heating. § 393.290, RSMo.

3. Rather than filing new rate schedule tariff sheets, Evergy Missouri West has filed as part of its settlement agreement exemplar rate schedule tariff sheets. For this reason alone the Commission should reject its deficient rate increase filing.

¹ Rule 20 CSR 4240-2.080(13) provides: "Parties shall be allowed ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission." Without any stated reason for doing so, early on December 17, 2025, the Commission shortened to December 19, 2025, the time to respond to Staff's December 16, 2025, *Response to Filing*. Only because Public Counsel is able to file its suggestions in support of Staff's *Response to Filing* within the shortened two-days Public Counsel is not seeking reconsideration of the Commission's order shortening the time to respond to Staff's response.

4. Further, agreement between a utility and its customers as to appropriate rates alone is not a sufficient basis for the Commission to adopt those rates. The settlement agreement Evergy Missouri West filed is a contract. See [*State ex rel. Riverside Pipeline Co., L.P. v. PSC of Mo.*, 215 S.W.3d 76, 84 \(Mo. 2007\)](#). Many times the Commission has ordered new rates where utilities and customer representatives contractually had negotiated and agreed to different rates. See for example, [*State ex rel. Wash. Univ. v. Pub. Serv. Com.*, 308 Mo. 328, 272 S.W. 971 \(1925\)](#) and [*Kan. City Power & Light Co. v. Midland Realty Co.*, 338 Mo. 1141, 93 S.W.2d 954 \(1936\)](#).

5. While it is not *stare decisis*, in an unpublished decision the Missouri Western District of Appeals persuasively opined that a contested case cannot be initiated by filing a settlement agreement. A copy of the unpublished decision is attached.

Wherefore, the Office of Public Counsel offers the foregoing suggestions in support of *Staff's Response to Filing*.

Respectfully,

/s/ Nathan Williams

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 17th day of December 2025.

/s/ Nathan Williams

State ex rel. Sierra Club v. Mo. PSC

Supreme Court of Missouri

June 26, 2007, Decided

SC88530

Reporter

2007 Mo. LEXIS 121 *

State of Missouri ex rel. Sierra Club and Concerned Citizens of Platte County, Appellants, vs. Missouri Public Service Commission and Kansas City Power and Light Co., Respondents.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [State ex rel. Sierra Club v. Mo. PSC, 2007 Mo. App. LEXIS 333 \(Mo. Ct. App., Feb. 27, 2007\)](#)

Opinion

[*1]

Respondent Kansas City Power and Light Company's application for transfer from the Missouri Court of Appeals, No. WD66893, sustained and cause ordered transferred.

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End of Document

State ex rel. Sierra Club v. Mo. PSC

Court of Appeals of Missouri, Western District

February 27, 2007, Opinion Filed

WD66893

Reporter

2007 Mo. App. LEXIS 333 *; 2007 WL 581652

STATE OF MISSOURI EX REL. SIERRA CLUB AND CONCERNED CITIZENS OF PLATTE COUNTY, Appellants, v. MISSOURI PUBLIC SERVICE COMMISSION; KANSAS CITY POWER AND LIGHT, Respondents.

Notice: [*1] NOT FINAL UNTIL EXPIRATION OF THE REHEARING PERIOD.

Subsequent History: Transferred by, Vacated by [State ex rel. Sierra Club v. Mo. PSC, 2007 Mo. LEXIS 121 \(Mo., June 26, 2007\)](#)

Prior History: Appeal from the Circuit Court of Cole County, Missouri. Honorable Thomas Joseph Brown, III, Judge.

Counsel: Attorneys: Henry B. Robertson, St. Louis, MO, Counsel for Appellants.

Attorneys: Steven R. Dottheim, Jefferson City, MO, Counsel for Respondent, Public Serv. Comm.

Karl Zobrist, Kansas City, MO. Counsel for Respondent, K.C. Power & Light.

James M. Fischer, Jefferson City, MO and Co-Counsel for Respondent, K.C. Power.

William G. Riggins, Kansas City, MO, Co-Counsel for Respondent, K.C. Power.

Dean L. Cooper, Jefferson City, MO, Counsel for Defendant, Empire.

Mark W. Comley, Jefferson City, MO, Counsel for Defendant, City of K.C. MO.

James C. Swearengen, Jefferson City, MO, Counsel for Defendant, Aquila, Inc.

Stuart W. Conrad, Kansas City, MO, Counsel for Defendant, Praxair, Inc.

James B. Lowery, Columbia, MO, Counsel for Defendant, Union Electric.

Judges: Before: Robert G. Ulrich, P.J., Harold L. Lowenstein, and James M. Smart, Jr., JJ. All concur.

Opinion by: Robert G. Ulrich

Opinion

Sierra Club and Concerned Citizens of Platte County appeal the decision of the Public Service Commission (the [*2] Commission) approving an experimental regulatory plan proposed by Kansas City Power & Light (KCPL). Sierra Club and Concerned Citizens of Platte County present five points on appeal. Their first point, asserting the Commission lacked jurisdiction, is granted, and the decision is reversed.

Facts

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On May 6, 2004, KCPL filed its Application to Establish Investigatory Docket and Workshop Process Regarding Kansas City Power & Light Company. The Commission created Case No. EO-2004-0577 to consider the application. KCPL requested that the Commission issue an order (a) opening an investigatory docket regarding the future supply and pricing of the electric service provided by KCPL and (b) authorizing the use of the Commission's workshop process to address certain issues related to the future supply and pricing of electricity for KCPL and its customers, and any other issues affecting KCPL that might arise from discussion among the [*3] interested parties. On May 25, 2004, the Commission issued an Order Directing Notice and Setting Intervention Deadline. Several parties intervened. On June 3, 2004, the Commission issued an Order Establishing Case granting KCPL's application and establishing an informal, investigatory case designated as Case No. EW-2004-0596. In the June 3 order, the intervenors in Case No. EO-2004-0577 were also made participants in Case No. EW-2004-0596. On July 1, 2004, the Commission issued its Notice Closing Case in Case No. EO-2004-0577, formally closing that proceeding.

The Commission held a prehearing conference in Case No. EW-2004-0596 on June 30, 2004. Presentations were held on June 21, June 30, July 21, July 30, August 10-11, August 19, August 24-26, September 7, September 15, September 29, and October 29, 2004. During this period, KCPL conducted numerous informal meetings with a variety of interested groups and individuals to discuss the many issues raised by the proceeding.

The workshop process was divided into two teams. Team A reviewed Integrated Resource Planning-related issues, including load forecasting, generation planning, demand side management, environmental issues, and distribution [*4] and transmission technologies. A subteam within Team A reviewed affordability, efficiency, and conservation programs. Team B reviewed the financial issues associated with KCPL's various plans, including maintaining KCPL's current investment grade rating on its securities. These teams were led jointly by KCPL and Staff representatives.

¹ Portions of the Commission's Report and Order are quoted without attribution.

On February 18, 2005, the Commission issued its Order Closing Case No. EW-2004-0596. In the Order Closing Case, the Commission stated:

The Commission agrees that it is time to close this case. It appears that the general discussion has led to the specific give-and-take of settlement-style negotiations. If KCPL develops a regulatory plan (with or without consensus) for which it wants Commission approval, it can request that approval in a new case.

On March 28, 2005, KCPL, Staff of the Missouri Public Service Commission, Office of the Public Counsel,² Missouri Department of Natural Resources, Praxair, Inc., Missouri Industrial Energy Consumers, Ford Motor Company, Aquila, Inc., Empire District Electric Company, and Missouri Joint Municipal Electric Utility Commission (collectively referred to as signatory parties) submitted a Stipulation [*5] and Agreement to the Commission. The agreement included an experimental regulatory plan. The case caption on the Stipulation and Agreement was: In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company. The Stipulation and Agreement stated it was the "result of discussions" among numerous parties and was submitted to the Commission "for its consideration and approval." It also stated:

Having considered the Application that KCPL submitted in Case No. EW-2004-0596, and having participated in workshops, discovery and settlement negotiations, the Signatory Parties agree on certain premises, fundamental concepts, and factual conclusions, as set forth hereafter, and recommend that the Commission adopt as its Order Approving Stipulation and Agreement in this Case No. EO-2005-__ these agreements and an Experimental Regulatory Plan ("Regulatory Plan") for KCPL as set forth in detail below.

The Stipulation and Agreement requested "that the Commission approve this Agreement to be effective by May 15, 2005, if possible."

[*6] Concerned Citizens of Platte County and Sierra Club opposed the agreement. The Commission held an evidentiary hearing on June 23-24, 27 and July 12, 2005. The Commission issued its Report and Order in Case No. EO-2005-0329 on July 28, 2005. It determined "it should approve Kansas City Power & Light Company's Experimental Regulatory Plan, which includes construction of coal-fired generating plant to be known as Iatan 2." The Commission determined the proposed regulatory plan is in the public interest, and should result in lower rates.

Because KCPL operates as a regulated utility in both Missouri and Kansas, the Commission agreed to review the Stipulation and Agreement once it was approved by the Kansas Corporation Commission and to consider any amendments that might be appropriate. After the Kansas Corporation Commission approved a similar stipulation, KCPL filed the Kansas Order with the Commission. Various signatories filed their proposed amendments to the Stipulation and Agreement on August 12, 2005. KCPL concurred with the proposed amendments. The Commission issued its Order Approving Amendments to Experimental Regulatory Plan on

² As set forth in [4 CSR 240-2.040\(1\)-\(2\)](#), the general counsel acts as attorney and counsel for the Commission while the public counsel represents the interests of the public before the Commission.

August 23, 2005. Concerned Citizens of Platte County [*7] and Sierra Club objected to the Order and amendments; the Commission denied the objection.

Concerned Citizens of Platte County and Sierra Club filed a Petition for Review in the Cole County Circuit Court on September 22, 2005. Judgment was entered in favor of the Commission. Concerned Citizens of Platte County and Sierra Club's timely appeal followed.³ Additional facts will be set forth in the opinion as needed.

Standard of Review

The decision of the Commission, and not that of the trial court, is reviewed. *Union Elec. Co. v. Pub. Serv. Comm'n*, 136 S.W.3d 146, 151 (Mo. App. W.D. 2004). The scope of judicial review is restricted; the Commission's order is presumed valid and the challenger bears a heavy burden to demonstrate invalidity. *Id.* Review is two-pronged as reviewing authority determines: [*8] (1) whether the Commission's order is lawful and (2) whether the Commission's order is reasonable and based on competent and substantial evidence upon the whole record. *Id.* "Lawfulness turns on whether the Commission had the statutory authority to act as it did." *Id.* at 152. All legal issues are reviewed *de novo*. [*State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 \(Mo. banc 2003\)](#). "Reasonableness depends on whether the order is arbitrary or capricious or is against the overwhelming weight of the evidence." *Union Elec. Co.*, 136 S.W.3d at 152.

Analysis

In its first point, Sierra Club and Concerned Citizens of Platte County argue the Commission erred in approving the Stipulation and Agreement comprising an experimental regulatory plan in a case commenced by the filing of the Stipulation and Agreement. They contend the Commission's order was unlawful because it lacked statutory authority to initiate a contested case on the filing of a nonunanimous stipulation arising from confidential negotiations in an uncontested workshop docket. They further contend the Commission lacked [*9] authority to depart from the statutorily prescribed procedures for approval of a new electric plant or the features of future rate cases.

This case has a unique procedural background. A workshop docket was opened and closed wherein numerous parties held discussions and negotiations on a variety of topics. The workshop proceeding was not a contested case. Ultimately, the workshop led to the Stipulation and Agreement, which was filed with the Commission to initiate a contested case. The Stipulation and Agreement relates, *inter alia*, to rates and the building of a new electric plant. KCPL acknowledges it obtained its desired result in an innovative manner by stating in its brief that it "shunned the traditional rate case mechanism that would likely have led to an immediate downgrade in its credit rating."

³ Sierra Club and Concerned Citizens of Platte County filed a joint appellant brief with the court. Independent respondent briefs were filed by KCPL and by the Commission.

KCPL characterizes the filing of the Stipulation and Agreement as "an entirely separate proceeding" from the workshop docket. Thus, it seems to imply that the workshop is unrelated to the filing of the Stipulation and Agreement and should not be considered on appeal. While it is true that the workshop was formally closed before the Stipulation and Agreement was filed, no party [*10] disputes that the workshop negotiations resulted in the Stipulation and Agreement. Further, the Regulatory Law Judge took official notice of transcripts of two on-the-record conferences held during the workshop docket. ⁴

The sole issue for consideration in this point is whether a contested case may be initiated by the filing of the Stipulation and Agreement. If so, the point must be denied. If the answer is no, however, a contested case was never properly initiated, and the Commission lacked jurisdiction to enter its Report and Order.

The Commission "is a creature of statute and can function only in [*11] accordance with the statutes." [*State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 796 \(Mo. banc 1986\)](#). "Where a procedure before the Commission is prescribed by statute, that procedure must be followed." *Id.* "No deference is accorded the order of the Commission on the issue of lawfulness of the order." *Id.* "The question of lawfulness turns on whether or not the Commission had statutory authority to act as it did." *Id.*

No party disputes that Case No. EO-2005-0329 was a contested case. [Section 536.010\(4\), RSMo Cum. Supp. 2004](#), defines "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." [Section 536.063](#) ⁵ states:

In any contested case:

- (1) The contested case shall be commenced by the filing of a writing by which the party or agency instituting the proceeding seeks such action as by law can be taken by the agency only after opportunity for hearing, or seeks a hearing for the purpose of obtaining a decision reviewable upon the record of the [*12] proceedings and evidence at such hearing, or upon such record and additional evidence, either by a court or by another agency. . . .
- (2) Any writing filed whereby affirmative relief is sought shall state what relief is sought or proposed and the reason for granting it, and shall not consist merely of statements or charges phrased in the language of a statute or rule. . . .

All statutory references to stipulations or settlements indicate they may resolve a contested case. They imply a contested case must already be in existence. [Section 536.060](#) states "[c]ontested cases . . . may be informally resolved by consent agreement for agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is

⁴ The Commission also asserts that the process respecting the KCPL experimental regulatory plan was "transparent" and was conducted consistent with [section 386.210, RSMo Cum. Supp. 2005](#), which allows the Commissioner to confer with members of the public and public utilities on any matter relating to the performance of its duties. No party argues the workshop proceedings were improper.

⁵ All statutory citations are to **RSMo 2000** unless otherwise stated.

permitted by law." The Stipulation and Agreement filed in this case did not resolve a contested case. Instead, it initiated one.

The Commission's [*13] Report and Order stated that the case was considered using the procedures set forth in [4 CSR 240-2.115\(2\)](#) ⁶ relating to Non-Unanimous Stipulations and Agreements. [4 CSR 240-2.115](#) states:

(1) Stipulations and Agreements.

(A) The parties may at any time file a stipulation and agreement *as a proposed resolution of all or any part of a contested case*. A stipulation and agreement shall be filed as a pleading.

(B) The commission may resolve all or any part of a contested case on the basis of a stipulation and agreement.

(2) Nonunanimous Stipulations and Agreements.

(A) A nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all of the parties.

(B) Each party shall have seven (7) days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement. Failure to file a timely objection shall constitute a full waiver of that party's right to a hearing.

(C) If no party timely objects to a nonunanimous stipulation and agreement, the commission may treat the nonunanimous stipulation [*14] and agreement as a unanimous stipulation and agreement.

(D) A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.

(E) A party may indicate that it does not oppose all or part of a nonunanimous stipulation and agreement.

(Emphasis added.) Again, stipulations may resolve a contested case. No statutory authority provides for initiating a contested case by stipulation.

The Stipulation and Agreement filed for approval is a complex document. It provides KCPL will invest money toward the completion or substantial progress on: (1) a new coal-fired electric plant (referred to as Iatan 2); (2) compliance with environmental [*15] regulations, including compliance after Iatan 2 is built; (3) installation of a facility designed to maintain ozone standards; (4) installation of wind power generating facilities; (5) implementation of a number of customer programs; and (6) investment into transmission and distribution infrastructure. The signatories agree that, absent a "significant change" as defined in the Stipulation and Agreement, they will not seek rate changes through December 31, 2006. Over the course of the experimental regulatory plan, four rate case filings are contemplated. The first is to be filed in 2006 and the last is to be filed in 2009. KCPL agreed to develop and have a cost control system in place that

⁶ All citations to the Code of State Regulations refer to the version in effect on March 28, 2005, when the Stipulation and Agreement was filed with the Commission.

identifies and explains any cost overruns above the definitive estimate during the construction period of the Iatan 2 project, the wind power generating projects, and the environmental investments. KCPL has further agreed that before June 1, 2015, it will not seek to use any mechanism allowing riders or surcharges or changes in rates outside of a general rate case based upon a consideration of less than all relevant factors. Moreover, KCPL can propose an Interim Energy Charge in a general rate case [*16] filed before June 1, 2015, with certain parameters.

In order to maintain KCPL's debt at an investment grade rating during the period of the construction expenditures contained in the Stipulation and Agreement, the signatory parties agreed to support the "Additional Amortizations to Maintain Financial Ratios," as defined in the Stipulation and Agreement, in KCPL general rate cases filed prior to June 1, 2010. According to the Stipulation and Agreement, KCPL will consider Empire and Aquila preferred potential partners in the Iatan 2 plant with at least a 30 % combined share, so long as they can demonstrate that they have a commercially feasible plan for meeting the necessary financial commitments. Under the same conditions, KCPL will also consider Missouri Joint Municipal Electric Utility Commission as a preferred potential partner in the Iatan 2 plant with at least 100 MW of the plant's capacity.

The Commission found that the experimental regulatory plan embodied in the Stipulation and Agreement is in the public interest. It further found that the experimental regulatory plan should include the construction of a coal-fired baseload plant at Iatan 2. In addition, the Commission found [*17] that the experimental regulatory plan provides a framework that should lead to reasonable rates during the expected five-year duration of the construction period for the projects included in the experimental regulatory plan. The Commission also concluded the Stipulation and Agreement contains provisions that facilitates lower rates for customers in the future that would not exist absent the Stipulation and Agreement.

The Stipulation and Agreement does not limit any signatory party's ability to challenge KCPL when it proposes to recover its costs in future rate cases. However, the signatory parties have agreed not to argue that the proposed investments were not necessary or timely, or that alternative technologies or fuels should have been used, so long as KCPL implements the Resource Plan and the continuous monitoring of the Resource Plan in accordance with the Stipulation and Agreement's provisions.

The salient aspects of the Stipulation and Agreement for purposes of this point pertain to the construction of Iatan 2 and future rates. As to the construction of Iatan 2, the Commission stated its approval of the Stipulation and Agreement "is similar to the Commission's action in finding [*18] that a water utility's plan to build a new treatment plant was 'a reasonable alternative' when it granted that utility a certificate of convenience and necessity for that purpose, and when it approved the utility's financial plan to support that construction as 'reasonable and not detrimental to the public interest.'" The Stipulation and Agreement calls for the Commission to continuously monitor the construction process respecting Iatan 2. As to future rates, it was noted by Staff and the Commission that various items pertaining to amortization and a decrease in the equity portion of the allowance for funds used during construction rate applicable to Iatan 2

would together have the effect of a reduction in rates to ratepayers than would otherwise be the case. This is not an assertion that rates will decrease, however. Instead, it is a conclusion that rates charged the consumer will not increase as much as they would absent the Stipulation and Agreement.

As noted by Sierra Club and Concerned Citizens of Platte County, statutory provisions regulate rate increases and construction of a new electric plant. [Section 393.170.1](#) provides "no . . . electrical corporation [*19] . . . shall begin construction of a . . . electric plant . . . without first having obtained the permission and approval of the commission." [Section 393.170.3](#) provides:

The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

[Section 393.150](#) states:

1. Whenever there shall be filed with the commission by any . . . electrical corporation . . . any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either [*20] 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, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the . . . electrical corporation . . . affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as [*21] would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective.

2. If any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. 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.

The Stipulation and Agreement contains provisions pertaining to the building of a new electric plant and rate increases. While the rate increases are not approved and requests must be made pursuant to the statutory framework, the Stipulation and Agreement references rate increases. The statutory framework, set forth by the legislature, for obtaining permission to build a new electric plant and increasing rates must be followed.

The Stipulation [*22] and Agreement resulted from KCPL's desire to streamline the approval process and avoid the established more cumbersome statutory framework. Stipulations are conceptualized in the statutory scheme as a resolution to a contested case - as a method of simplifying the process of litigating a contested case. They are also conceptualized as a method of avoiding a contested case. They are not, however, conceptualized as a tool by which to initiate a contested case.

The Commission asserts that, while there is no explicit statutory authority allowing a contested case to be initiated by the filing of the Stipulation and Agreement, such authority is implied. It notes that [section 386.040](#) creates the Commission and states it "shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of [the Public Service Commission Law]." Pursuant to [section 386.250\(1\)](#), (7), the Commission's jurisdiction, supervision, powers and duties extend to "the manufacture, sale or distribution of . . . electricity for light, heat and [*23] power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; . . . to . . . electric plants, and to persons or corporations owning, leasing, operating or controlling the same" and "[t]o such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly."

The Commission also notes that the experimental regulatory plan addresses a number of resource adequacy issues. It relied upon KCPL's duty to "furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable" as set forth in [section 393.130.1](#) to conclude "KCPL and the other signatory parties have invoked the Commission's jurisdiction plainly."

The Commission determined its exercise of jurisdiction was consistent with [section 393.140](#). [Section 393.140\(1\)](#) states the Commission shall "[h]ave general supervision of all . . . electrical corporations." [Section 393.140\(3\)](#) states, "for the purpose of determining whether [*24] the efficiency of the electric supply system, of the current supplied and of the lamps furnished, . . . the commission shall have power, of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering and supplying . . . electricity . . . , and shall have access, through its members or persons employed and authorized by it, to make such examinations and investigations to all parts of the manufacturing plants owned, used or operated for the manufacture, transmission or distribution of . . . electricity by any such person or corporation. . . ." [Section 393.140\(5\)](#) states the Commission shall "[e]xamine all persons and

corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business . . ." and "[w]henever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaints, that the property, equipment or appliances of any such person or corporation are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances [*25] thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters." The Commission relied upon these provisions to conclude: "Because the Commission has the power on its own motion to engage in such regulatory oversight, it follows that Commissioners may examine a Stipulation dealing with all these issues and approve it in a formal proceeding initiated by the filing of the Stipulation."

In essence, the Commission argues it has jurisdiction over the subject matter of the Stipulation and Agreement. This is not disputed. However, the procedures set forth in the statutes provide the mechanism for prosecuting substantive rights and must be followed, and the Commission is without statutory authority to initiate a contested case via the filing of the Stipulation and Agreement.

KCPL notes that nothing in Missouri law explicitly prohibits parties from submitting a stipulation arising from other proceedings. It further observes the rule that "[t]he power of the Commission to make rules includes the power to determine any reasonable interpretation and application of such rules. [*26] " [*Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 609 \(Mo. App. W.D. 1999\)](#). It contends that [4 CSR 240-2.115](#) provides guidance regarding stipulations but does not limit their use to contested cases. ⁷ KCPL ignores, however, the fact that stipulations are conceptualized as resolving contested cases - not as methods of initiating contested cases.

The Commission also argues that any failure to comply with statutory requirements is minimal and technical. It notes [section 386.410.1](#) provides, in part, that "in all investigations, inquiries or hearings the commission or commissioner [*27] shall not be bound by the technical rules of evidence." Further, [section 386.410.2](#) states that "[n]o formality in any proceeding nor in the manner of taking testimony before the commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission." [Section 386.610](#) provides:

A substantial compliance with the requirements of this chapter shall be sufficient to give effect to all the rules, orders, acts and regulations of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.

⁷ KCPL also states that [4 CSR 240-2.115](#) "does not prohibit parties from filing a stipulation in proceedings other than contested cases." There is no dispute that the case at issue was a contested case. The Stipulation and Agreement was not filed in a proceeding other than a contested case, and this argument is irrelevant.

These do not impact the present point, however. As the Commission lacked authority to initiate a contested case through the filing of the Stipulation and Agreement, a contested case was never initiated. Thus, there was nothing to which these statutory provisions applied.

The Commission also relied upon [4 CSR 240-2.015](#) [*28], which states "[a] rule in this chapter may be waived by the commission for good cause." It concluded that "[t]he parties' unprecedented efforts to timely address the multitude of complex issues respecting KCPL's resources needs in Case No. EW-2004-0596, and the agreement upon the comprehensive framework embodied in the Stipulation, are good cause. To the extent the Commission's rules require formal application, the Commission waived those rules." Again, this provision is of no impact. The Commission lacked jurisdiction. It had no authority to act. It lacked authority to waive its rules.

The Commission also asserts that "[t]o conclude that a pre-existing contested case is a prerequisite to a resolution of serious and well-known issues would be contrary to the regulation's purpose itself of promoting settlements, as well as contrary to Missouri law which permits settlements in other contexts shortly after the filing of an action." It cites [sections 536.060 and 416.061.4](#) (pertaining to consent judgments or decrees entered into by the Attorney General) for this proposition. This acknowledges that the statutory scheme, by which [*29] the Commission is bound, permits stipulations *after* an action has been initiated. Further, resolution of this point on appeal does not require or result in a determination that stipulations may not be utilized to avoid, as opposed to initiate, a contested case.

The Commission notes that no rules exist for rate decrease cases, interim rate cases, or interim test or experimental rate cases, but that Missouri courts have found that the Commission is empowered to process these cases. [State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n, 535 S.W.2d 561 \(Mo. App. 1976\)](#), cited by the Commission in its brief for this proposition, is distinguishable and illustrates the difference between these cases and the case initiated by the Stipulation and Agreement. Laclede filed an application with the Commission for an increase in rates. [Id. at 563](#). While that application was pending, Laclede filed a second application, seeking to increase revenues during the interim period until the Commission acts on the initial application. [Id. at 563-64](#). The Commission denied the interim rate increase and subsequently granted the rate increase [*30] sought in the first application. [Id. at 564](#). Laclede appealed the denial of its interim rate increase application. *Id.* One of the issues before the court was whether the Commission had the power to grant interim rate increases. [Id. at 565](#). It was argued that the Commission only has those powers specifically or necessarily by implication conferred upon it by statute, that no statute gave the Commission power to grant interim rate increases, and, accordingly, that there is no authority in the absence of statutory authority. *Id.* The Commission argued its authority was inferred from the provisions of [sections 393.140\(11\) and 393.150](#). *Id.* [Section 393.140\(11\)](#) provides that every gas utility may file with the Commission rates to be changed and, unless the Commission orders otherwise, no rate change shall be made except after thirty days' notice to the Commission and thirty days' publication plainly stating the proposed changes in the schedule and the time when the changes will go into effect. *Id.* It further provides that the Commission [*31] may, for good cause, allow changes without the thirty days' notice. *Id.* [Section 393.150](#) provides that whenever a gas corporation shall file a new rate or change with the Commission, the

Commission may, while a hearing is pending, suspend the operation of such schedule and defer the use of such rate. *Id.* at 565-66. The suspension may not be for a longer period than one hundred and twenty days beyond the time when such rate would otherwise go into effect. *Id.* at 566. After a full hearing, whether completed before or after the rate goes into effect, the Commission may make such order in reference to such rate as would be proper in a proceeding initiated after the rate had become effective. *Id.* If a hearing cannot be concluded within the period of suspension, the Commission may extend the suspension for up to six months. *Id.* The court concluded:

The 'file and suspend' provisions of the statutory sections quoted above lead inexorably to the conclusion that the Commission does have discretionary power to allow new rates to go into effect immediately or on a date sooner than that [*32] required for a full hearing as to what will constitute a fair and reasonable permanent rate. This indeed is the intended purpose of the file and suspend procedure. Simply by non-action, the Commission can permit a requested rate to go into effect. Since no standard is specified to control the Commission in whether or not to order a suspension, the determination as to whether or not to do so necessarily rests in its sound discretion.

Id. It also noted that "[a] somewhat analogous question is whether the Commission has authority to grant interim test or experimental rates. The Missouri Supreme Court has long held that the Commission does have this power as a matter of necessary implication from practical necessity." *Id.* at 567 n.1. The court concluded: "We hold that the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation." *Id.*

In *Laclede* and like cases, the court looked at the statutory scheme and determined what the statutory provisions necessarily implied. In the case [*33] *sub judice*, the statutory scheme does not necessarily imply that a contested case may be initiated by filing the Stipulation and Agreement. Numerous arguments to the contrary have been asserted by KCPL and the Commission and have been disposed of already in this opinion. The Commission observes that the Stipulation and Agreement was not negotiated with the Commissioners. It also notes that no limitations were placed on the evidentiary proceedings in Case No. EO-2005-0329, the contested case. Further, no parties were limited while calling witnesses or during cross-examination. The Commission did not proceed with a predetermined schedule and looked to the parties to provide guidance as to what would be required regarding the proceedings. KCPL and the Commission argue that the Commission determined that the experimental regulatory plan is in the public interest, not by looking at the four corners of the Stipulation and Agreement, but rather by evaluating the evidence presented. Whether the hearing provided by the Commission was thorough and fair and whether the Commission's decision is supported by the evidence presented by the hearing is irrelevant. The nature of a subsequent hearing [*34] cannot serve to confer jurisdiction on the Commission.

Finally, the Commission looks at caselaw and states that "[n]umerous proceedings before the Commission have been initiated by the filing of a stipulation and agreement, or other motion to open an investigatory docket rather than a formal Application." It cites the following cases.⁸

In re Stipulation and Agreement Reducing the Annual Missouri Retail Electric Revenues of Kansas City Power & Light Company, Order Denying Intervention And [*35] Approving Stipulation And Agreement, Case No. ER-99-313, 8 Mo.P.S.C.3d 113 (1999), Staff, Public Counsel, and KCPL filed a nonunanimous Stipulation and Agreement with the Commission requesting an order approving the Stipulation and Agreement. The Stipulation and Agreement provided for a 3.2 percent reduction of KCPL's annual Missouri electric revenues. The signatories agreed that they would not file any case requesting (1) a general increase or decrease in KCPL's Missouri retail electric rates, or (2) rate credits or rate refunds prior to the earlier of September 1, 2001, or the closing of the Western Resources-KCPL merger, unless an exceptional event occurs as defined by the Stipulation and Agreement. The signatories further agreed that they would not request (1) a general increase or decrease in KCPL's Missouri retail electric rates, or (2) rate credits or rate refunds that would be effective for service rendered prior to March 1, 2002, or prior to one year after the closing of the Western Resources-KCPL merger, whichever occurs first. The Stipulation and Agreement clarified various instances where the agreement applied and where exceptions existed. The Commission [*36] denied a party's application to intervene and approved the Stipulation and Agreement. Notably, this case involved a rate decrease. Further, the Stipulation and Agreement appear to have been reached in the context of a merger. The Commission's order references the separate case involving the application for approval of the merger.

In re Customer Class Cost of Service and Comprehensive Rate Design Investigation of Kansas City Power & Light Company, Order Approving Stipulation and Agreement, Case No. EO-94-199, 5 Mo.P.S.C.3d 76 (1996), a Stipulation and Agreement was filed. It required a reduction in KCPL's revenue requirement and a reallocation of revenue sources among customer classes. The rate reductions were to occur in two phases. The Commission noted the new pricing structure may result in increased costs for some residential customers, depending on the customer's usage. It ordered KCPL to send notice to its customers, stating: "The new pricing structure may result in increased costs for some residential customers, depending on the customer's usage." Again, this case involved a rate decrease. Moreover, the first sentence of the Commission's order states [*37] that "a Stipulation and Agreement was filed *in this case*." This suggests the case was already in existence at the time the Stipulation was filed, consistent with the statutory framework.

In addition, the Commission, both in its decision and in its brief, and KCPL rely upon ***Union Electric Co. v. Public Service Commission***, 136 S.W.3d 146 (Mo. App. W.D. 2004), wherein

⁸ The Commission also cites ***In re Commission Inquiry Into Retail Electric Competition, Order Establishing Task Force, Case No. EW-97-245***, 6 Mo.P.S.C.3d 302 (1997), wherein a task force examining the risks and benefits that would face the State of Missouri in the event that retail competition occurred was created. With respect to this case, it should be noted that disposition of this point on appeal does not turn on the procedural background of the workshop proceedings or their propriety.

Union Electric appealed from Reports and Orders of the Commission interpreting and adjudicating the terms of an experimental alternative regulation plan (EARP) used to calculate credits by which Union Electric's customers shared in its earnings. *Id.* at 148. The two EARPs were created by Stipulations and Agreements signed by Union Electric, the Office of Public Counsel, the Staff of the Commission (Staff), and representatives Union Electric's major industrial customers. *Id.* "The EARPs were alternative regulation plans designed to reduce the need for formal regulatory proceedings and streamline the process of dealing with excessive earnings and rate issues." *Id.* A Staff audit indicated Union Electric's revenues and rate required a reduction in order to [*38] accurately reflect its cost of service. *Id.* The EARPs resulted from negotiations attempting to resolve the issues raised by the audit. *Id.* To "avoid a contested rate case," an agreement was reached providing, *inter alia*, that Union Electric's retail electric customers would receive a one-time credit and an annual rate reduction. *Id.* at 148-49.

The agreement also established the first EARP. *Id.* at 149. Each EARP existed for a period of three years. *Id.* The Commission approved the first EARP by an order on July 21, 1995, and it functioned from August 1, 1995, through June 30, 1998. *Id.* The Commission approved the second EARP on February 21, 1997, and it encompassed the period from July 1, 1998, through June 30, 2001. *Id.* The Commission opened a case to monitor each EARP and to resolve any disputes that might arise in their operation. *Id.* Once the second EARP expired, Union Electric reverted to tradition utility regulation. *Id.*

Under the EARP, each year constituted a sharing period. *Id.* Differences arose regarding the correct quantification of credits owed [*39] to customers for all six sharing periods of the two EARPs. *Id.* The disagreements about five of the sharing periods were resolved by Stipulations and Agreements approved by orders of the Commission. *Id.* The parties were unable to resolve all of the disputes regarding one of the sharing periods, however. *Id.* The dispute was litigated before the Commission, and it issued a Report and Order making adjustments to Union Electric's accounting for various expenses and thereby increased the consumer credit. *Id.* Union Electric sought relief in circuit court by filing two Petitions for Review addressing the various Commission orders it disputed. *Id.*

On appeal, Union Electric argued the Commission misapplied and/or misinterpreted the 1995 Stipulation and Agreement that created the first EARP. *Id.* at 150. First, it argued that the Commission lacked authority to make the adjustments. *Id.* at 152. It asserted that neither the Commission's enabling statute nor any provision of the EARP authorized it to order the contested adjustments, in that each adjustment was in direct conflict with or unilaterally changed [*40] the terms of the EARP. *Id.* Thus, Union Electric concluded the adjustments were not lawful. *Id.* It contended that the EARP was a contract that binds the Commission relative to its authority to supervise rates. *Id.* The court noted that while the EARP does set forth negotiated guidelines to be followed by the parties and the Commission and the Commission did approve and adopt the EARP, the Commission was not a signatory to the EARP and never relinquished its role as arbiter. *Id.* It stated:

That the Commission is charged with statutory obligations and duties regarding utility regulation is beyond question. We construe the EARP, not as an abdication of the Commission's responsibility to regulate, but as embodiment of it. It was an attempt to streamline the rate monitoring process and provided a means to resolve issues in lieu of the formal complaint process. The EARP contemplated extensive and continuous monitoring and embraced the recognition that not all items could be anticipated and addressed and that disputes could arise. The Commission's role is grounded in this recognition. That being said, we find that the Commission, in making the [*41] disputed adjustments, did not change or violate the terms of the EARP or its role thereunder. The terms of the EARP permitted the Commission's intervention into the areas of dispute between the parties.

Id. This case, too, involved a rate reduction. Further, the stipulations were utilized to *avoid* a contested case. The contested case arose only after the terms of the stipulation were disputed.

The commonalities revealed in these cases are telling. First, they involved rate reductions. This is significant because it is highly unlikely that any party, with the exception of the utility, would oppose a rate reduction. Second, it is not apparent that the filing of the stipulations was used to initiate contested cases. The cases indicate the stipulations were presented to the Commission in the context of seeking approval for a merger, in a pre-existing case, or in an effort to avoid a contested case. If so, the approval of the stipulations was within the statutory framework. In contrast, the Stipulation and Agreement at issue in the present case involved the building of a new electric plant, foreseeable rate increases, and was used to initiate a contested case. Thus, [*42] these cases are not in conflict with this opinion.

The decision of the Commission is reversed. ⁹

Robert G. Ulrich, Presiding Judge

All concur.

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⁹ Discussion of Points II-V is unnecessary.