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Citizens' Utility Ratepayer Board

Kansas Corporation Commission

/s/ Susan K. Duffy

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State of Kansas

Mark Parkinson, Governor

January 12, 2010

STATE CORPORATION COMMISSION

Attention:

Kansas Corporation Commission
Thomas E. Wright, Chairman
Michael C. Moffet, Commissioner
Joseph F. Harkins, Commissioner

JAN 12 2010

Handwritten signature of Susan K. Duffy in cursive.

10-ATMG-133-TAR

Re: In the Matter of the Application of Atmos Energy for Approval of the Commission for Gas System Reliability Surcharge per K.S.A. 66-2201 through 66-2204.

Letter of Additional Authority

Dear Chairman Wright and members of the Commission:

Through continued efforts at research, counsel for the Citizens' Utility Ratepayer Board has located authority for its position that the Kansas Corporation Commission lost jurisdiction over the issue of how the return on equity is to be determined for calculating the return on Atmos Energy's Gas Safety and Reliability Surcharge when CURB filed its appeal of the Commission's previous order on that issue in Docket No. 08-ATMG-280-RTS. Although none of the cases are Kansas cases, the opinions discussed below are founded on the principle that an appellate court assumes exclusive jurisdiction over the subject matter of the order being reviewed, and until the judgment of the appellate court becomes final, the agency may not enter a modified, extended or new order on that subject.

So far as counsel can determine, there is no relevant difference in the statutory schemes of Missouri or Montana that should lead a court in Kansas to come to a different conclusion. Had counsel discovered these cases sooner, the discussion below would have been included as authority in CURB's petition for reconsideration at the beginning of paragraph 7.

The Missouri Court of Appeals in *State ex rel. Missouri Cable Telecomm. Ass'n v. Missouri Public Service Comm'n*, 929 S.W.2d 768 (Mo.App. 1996), held that the Public Service Commission had no jurisdiction to modify a previous order while an appeal was pending. The commission had approved a regulatory plan for a telephone company, which the company and two other parties appealed to the circuit court. While the court's opinion was pending, the commission entered into a settlement agreement with the company and the public counsel that provided an alternative plan and purportedly resolved the disputes then before the circuit court. Other parties to the case appealed the settlement, raising, among other complaints, the allegation

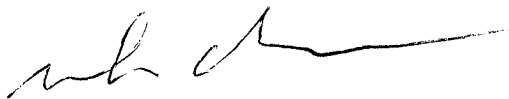
approving the plan was pending review by the circuit court. The Court of Appeals agreed, holding that the commission would only regain its jurisdiction to act in the matter when the judgment of the circuit court became final.

The Missouri Court of Appeals, in articulating its holdings, referred to two previous Missouri cases that provided the basis for its two-part holding that (1) an agency loses jurisdiction over the subject matter of its order while an appeal of that order is on appeal, and (2) regains jurisdiction when the judgment of the appellate court becomes final. The first proposition was articulated in *State ex rel. Campbell Iron Co., et al., v. Public Service Comm'n*, 317 Mo. 724, 296 S.W. 998 (1927), where the court held that an extension order concerning rates set in a previous order was issued without jurisdiction, because the extension order was issued after a writ of review had been filed. The second proposition was articulated in *State ex rel. Kansas City v. Public Service Comm'n, et al.*, 360 Mo. 339, 228 S.W.2d 738 (1950), where the court held the commission had jurisdiction to issue an entirely new second order, because it was issued after the circuit court had remanded the successful appeal of the first order back to the commission.

In Montana, a utility successfully sought an order from the state supreme court to enjoin the Montana Public Service Commission from issuing further orders in a rate case after the utility had appealed the commission's order in the case. *Montana Consumer Counsel v. Public Service Commission*, 168 Mont. 177, 541 P.2d 769 (1975). The court ordered the commission to vacate the second order and ordered the commission to "refrain from further actions which may tend to interfere with this Court's jurisdiction on appeal of this matter." *Id.*, at 179.

These cases provide guidance for the present docket, and support CURB's contention that the KCC had no jurisdiction to issue an order modifying the method for determining the rate of return for Atmos Energy's GSRs tariff with a subsequent order while CURB's appeal of the original order is pending before the Kansas Supreme Court in Case No. 101452, and that it will only regain jurisdiction after the supreme court's opinion is final.

Respectfully submitted,



Niki Christopher #19311
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Attachment: One copy each of: *State ex rel. Missouri Cable Telecomm. Ass'n v. Missouri Public Service Comm'n*, 929 S.W.2d 768 (Mo.App. 1996), and *Montana Consumer Counsel v. Public Service Commission*, 168 Mont. 177, 541 P.2d 769 (1975).

VERIFICATION

STATE OF KANSAS)
COUNTY OF SHAWNEE) ss:

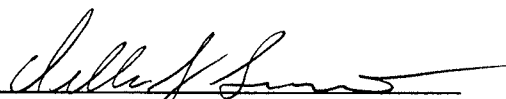
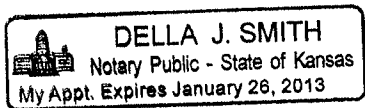
I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the Citizens' Utility Ratepayer Board, that she has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.



Niki Christopher

SUBSCRIBED AND SWORN to before me this 12th day of January, 2010.



Notary Public

My Commission expires: 01-26-2013.

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(Cite as: 929 S.W.2d 768)

▷

Missouri Court of Appeals,
Western District.

STATE ex rel. MISSOURI CABLE TELECOM-
MUNICATIONS ASS'N, et al., MCI Telecommuni-
cations, Inc., AT&T Communications of the South-
west, Inc., and Midwest Independent Coin Payphone
Ass'n, Appellants-Respondents,

v.

MISSOURI PUBLIC SERVICE COMMISSION,
and Southwestern Bell Telephone Co., Respondents-
Appellants.

No. WD 51798.

July 2, 1996.

Motion for Rehearing and/or Transfer to **Supreme-
Court** Denied Aug. 27, 1996.

Application to Transfer Denied Oct. 22, 1996.

Cable telecommunications corporation, long-distance telephone companies, and pay telephone association petitioned for judicial **review** of settlement agreement between Public Service **Commission** (PSC) and telephone local exchange carrier (LEC) establishing alternative regulation plan for carrier. After consolidation of proceedings, the Circuit Court, Cole County, Thomas J. Brown, II, J., entered **order** declaring settlement agreement unlawful. On appeal, the Court of Appeals, Edwin H. Smith, P.J., held that: (1) appeal was not rendered moot by **state** legislature's passage of bill which would alter **Commission's** regulation of carrier's rates if signed by Governor; (2) case was ripe for **review**; and (3) **Commission** acted without **jurisdiction** by entering into settlement agreement during **pendency** of appeal from **Commission order** requiring carrier to set date by which it could accept **Commission's** proposed regulation plan.

Affirmed.

West Headnotes

[1] Telecommunications 372 ↻977

372 Telecommunications
372III Telephones

372III(G) Rates and Charges

372k974 Judicial **Review** or Intervention

372k977 k. Decisions and **OrdersRe-**

viewable. Most Cited Cases

(Formerly 372k337.1)

Appeal, from circuit court **order** declaring unlawful settlement agreement between Public Service **Commission** (PSC) and telephone local exchange carrier (LEC) establishing alternative regulation plan for carrier, was not rendered moot by **state** legislature's passage of bill which would alter **Commission's** regulation of carrier's rates if signed by Governor; if signed, legislation would not take effect immediately, there were preconditions in bill before **Commission's** ratemaking authority would be altered, and moratorium provision of settlement agreement was not sole **issue** raised on appeal.

[2] Appeal and Error 30 ↻781(4)

30 Appeal and Error

30XIII Dismissal, Withdrawal, or Abandonment

30k779 Grounds for Dismissal

30k781 Want of Actual Controversy

30k781(4) k. Effect of Delay or Lapse

of Time in General. **Most Cited Cases**

Case on appeal becomes moot when circumstances change so as to alter position of parties or subject **matter** so that controversy ceases and decision can grant no relief.

[3] Telecommunications 372 ↻977

372 Telecommunications

372III Telephones

372III(G) Rates and Charges

372k974 Judicial **Review** or Intervention

372k977 k. Decisions and **OrdersRe-**

viewable. Most Cited Cases

(Formerly 372k337.1)

Case, in which circuit court **issued order** declaring unlawful settlement agreement between Public Service **Commission** (PSC) and telephone local exchange carrier (LEC) establishing alternative regulation plan for carrier, was ripe for **review** on appeal before Court of Appeals, despite contention that appellants did not assert that grounds presently existed

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on which **Commission** should file rate complaint against carrier.

[4] Constitutional Law 92 ↪975

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)2 Necessity of Determination

92k975 k. In General. Most Cited Cases

(Formerly 92k46(1))

Courts will avoid deciding constitutional questions if case can be fully determined without reaching constitutional issues.

[5] Telecommunications 372 ↪977

372 Telecommunications

372III Telephones

372III(G) Rates and Charges

372k974 Judicial Review or Intervention

372k977 k. Decisions and **OrdersReviewable**. Most Cited Cases

(Formerly 372k337.1)

Public Service **Commission** (PSC) acted without **jurisdiction** by entering into settlement agreement with telephone local exchange carrier (LEC), establishing alternative regulation plan for carrier, during **pendency** of appeal from **Commission** order requiring carrier to set date by which it could accept **Commission's** proposed regulation plan; **Commission**, employing settlement agreement, attempted to avoid judicial **review** of its actions and at the same time put in place plan regulating carrier, and, by entering into agreement, **Commission** essentially entered new **reviewable** "order." V.A.M.S. §§ 386.320, 386.500, 386.510.

[6] Public Utilities 317A ↪189

317A Public Utilities

317AIII Public Service **Commissions** or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from **Orders of Commission**

317Ak189 k. In General. Most Cited

Cases

When Public Service **Commission** (PSC) order has been challenged in circuit court, if **review** of order is

pending before circuit court, **Commission** may not enter modified, extended, or new order; however, if judgment of circuit court becomes final, **Commission** regains its **jurisdiction** to act in manner not inconsistent with decision of circuit court.

[7] Public Utilities 317A ↪147

317A Public Utilities

317AIII Public Service **Commissions** or Boards

317AIII(A) In General

317Ak145 Powers and Functions

317Ak147 k. Statutory Basis and Limitation. Most Cited Cases

Public Service **Commission** (PSC) is creature of statute and limited thereby. V.A.M.S. § 386.040.

[8] Public Utilities 317A ↪147

317A Public Utilities

317AIII Public Service **Commissions** or Boards

317AIII(A) In General

317Ak145 Powers and Functions

317Ak147 k. Statutory Basis and Limitation. Most Cited Cases

Neither convenience, expediency, nor necessity are proper **matters** for consideration in determination of whether act of Public Service **Commission** (PSC) is authorized by statute. V.A.M.S. § 386.040.

[9] Compromise and Settlement 89 ↪2

89 Compromise and Settlement

89I In General

89k1 Nature and Requisites

89k2 k. In General. Most Cited Cases

"Settlement agreement" is compromise by each party to agreement of certain rights in order to gain what it did not have established right to claim.

*769Jeremiah D. Finnegan, Kansas City, for Appellant/Respondent MO Cable Telecommunications Ass'n.

Leland B. Curtis, Clayton, for Appellant/Respondent MCI.

Paul DeFord, Kansas City, for Appellant/Respondent AT&T.

Willard C. Reine, Jefferson City, for Appel-

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lant/Respondent Midwest Indep. Coin Payphone.

Robert J. Hack, Jefferson City, for Respondent/Appellant MO Pub. Serv. Comm'n.

Paul Gerard Lane, St. Louis, for Respondent/Appellant SW Bell Telephone.

Before EDWIN H. SMITH, P.J., and BRECKENRIDGE and ELLIS, JJ.

EDWIN H. SMITH, Presiding Judge.

This is an appeal from the trial court's order declaring the settlement agreement entered into between the Missouri Public Service Commission ("PSC") and Southwestern Bell Telephone Company ("SWBT") to be unlawful. Appellants, Missouri Cable Telecommunications Corporation ("MCTA"), MCI Telecommunications Corporation ("MCI"), AT & T Communications of the Southwest, Inc. ("AT&T"), and Midwest Independent Coin Payphone Association ("MICPA"), as intervenors, filed a petition requesting the circuit court to review the settlement agreement. Although the appellants prevailed before the circuit court, because we review the decision of the PSC and not the decision of the circuit court, Rule 84.05(e) mandates that the party aggrieved by the agency decision be denominated as the appellant and the *770 party prevailing before the agency be denominated as the respondent.^{FN1}

^{FN1}. Procedurally, we are treating the settlement agreement as an order of the PSC by choosing to review the agreement and by how we denominate the parties as appellant and respondent on appeal. Although we must make this procedural decision so that we may review the circumstances of this case, we will make the substantive decision as to whether this settlement agreement actually constitutes an order of the PSC after reviewing the merits of each party's argument.

FACTS

Part of the following factual account is quoted, with minor changes, from this court's opinion in the related case of State ex rel. Missouri Cable Television

Association v. Missouri Public Service Commission, 917 S.W.2d 650 (Mo.App.1996).

In 1990, the Commission approved an experimental incentive regulation plan for SWBT. The plan was to last for three years and included a revenue sharing grid based upon SWBT's return on equity each year. Earnings above 14.1% would be shared with SWBT customers by way of a credit on customers' bills. As part of this agreement, reports were filed concerning the success of the plan in 1992. A date was set to consider future plans to be implemented. The plan under which SWBT began operating in 1990 was then extended to January of 1994 to avoid a lapse while a new plan was developed. In 1993, two cases filed with the PSC were consolidated and heard before the PSC which reviewed SWBT's rate of return and attempted to devise an alternative regulation plan. Appellants here were granted intervention in the consolidated proceeding. After hearings, the PSC issued its report and order in which it ordered SWBT to reduce its rates by \$84.6 million and to set a date by which it could accept the PSC's proposed Accelerated Modernization Plan ("AMP").

The plan offered SWBT by the Commission would have operated during a five-year period of time, ending in 1998, in which SWBT would have agreed to forgo any general rate increase or specific increases to basic local service rates. During this time, SWBT's return on equity would be calculated each year and compared to a grid set forth in the PSC order to determine if SWBT's customers were entitled to share the company's earnings. If entitled, customers would receive a credit on their bills. SWBT would be required to begin a project to modernize its statewide telecommunications network.

SWBT declined to accept the AMP proposed by the **Commission**. After the **Commission** denied all applications for rehearing, **review** was requested in the Cole County Circuit Court by SWBT, as well as AT&T and MCTA. The circuit court consolidated the requests for **review**. The circuit court **issued its order** on December 30, 1994, affirming the PSC's Report and **Order** and ruled that the question of lawfulness of the AMP was moot because SWBT had rejected the plan leaving no controversy to decide. This court upheld the holding that the **issue** was moot.

While the consolidated case was **pending** before the

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circuit court, SWBT, Office of the Public Counsel, and the PSC entered into a settlement agreement to resolve the disputes then before the circuit court. While the effect of the settlement agreement is disputed, it was intended as an alternative regulation plan. The agreement contained a provision requiring SWBT to modernize its statewide network in a manner similar to the provisions of the order of the PSC. The agreement provided that the PSC would not investigate the earnings of SWBT for five years. It also approved a \$15 million rate increase for SWBT. In return, SWBT agreed not to initiate or support legislation which would limit the jurisdiction of the PSC. The settlement agreement was conditioned on approval of an increase in tariff revenues.

Appellants had no input to the settlement agreement and were not made parties to it. After entering into the settlement agreement, respondents dismissed the petition for review in the circuit court. Appellants MCTA, MCI and AT&T filed applications for rehearing with the PSC, which were rejected. These parties then filed petitions for writ of review with the circuit court. The circuit court issued the writs and consolidated the cases. Appellant MICPA intervened in the consolidated proceeding. The circuit court *771 held the settlement agreement to be illegal and unenforceable because it violated the constitutional prohibition against surrendering the police power of the state, was entered in violation of all constitutional, statutory and regulatory requirements for an administrative agency, and violated the duty of the PSC to fix reasonable rates based on an appropriate rate of return. Respondents filed the notice of appeal, though as previously noted, the parties' roles are reversed on appeal.

DISCUSSION

[1][2] We must first address two procedural points raised by the respondents: first, that the case is moot; and second, that the case is not ripe for review. Respondents argue the case is moot due to passage by the Missouri General Assembly of Senate Bill 507 which would alter the PSC's regulation of SWBT's rates. If signed by the governor, they argue, the bill would render the challenge to the moratorium provision in the settlement agreement moot. "A case on appeal becomes moot when circumstances change so as to alter the position of the parties or subject matter so that the controversy ceases and a decision can

grant no relief." *State ex rel. Monsanto Co. v. Public Serv. Comm'n of MO.*, 716 S.W.2d 791, 793 (Mo. banc 1986). A decision by this court could grant relief and the position of the parties has not changed for three reasons. First, if signed, this law would not take effect immediately because there is no emergency provision. Thus, the rates as they presently exist could be affected by a decision of this court. Second, there are preconditions in the bill before the PSC's rate making authority is altered. Thus, the time frame in which the moratorium provision in the settlement agreement will be valid is uncertain, but will remain valid for some period of time after the bill takes effect. Third, although the moratorium provision is the primary aspect of the settlement agreement being challenged, it is not the only issue raised on appeal. We, therefore, conclude that this case will not be rendered moot by Senate Bill 507 becoming a law.

[3] Respondents argue the case is not ripe for review because the appellants do not assert that grounds presently exist on which the PSC should file a rate complaint against SWBT. Therefore, they argue, the moratorium provision cannot be challenged unless the PSC has abused its discretion by failing to file a rate complaint. Appellants challenge the PSC's exercise of jurisdiction when it agreed to the moratorium provision and this is the issue we review. Respondents cite no direct authority on their ripeness argument, and we fail to see how a determination of whether the actions of an administrative body were within its jurisdiction would not be ripe for review. We conclude that this case is ripe for review.

[4] Appellants raise several bases for declaring the settlement agreement unlawful and void *ab initio*. These bases include arguments that the PSC exceeded its statutory authority, *i.e.*, its jurisdiction; violated due process; failed to join appellants as necessary parties to the settlement agreement; and, violated the constitutional prohibition against surrendering or abridging the police power of the state. The circuit court agreed with all of appellant's arguments, however, we are reviewing the decision of the PSC, not the circuit court. We are also constrained by the rule that courts will avoid deciding constitutional questions if the case can be fully determined without reaching constitutional issues. *State ex rel. Union Elec. v. Public Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985). Appellants have raised all of these arguments on appeal, but in varying order in each of

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their respective briefs.^{FN2}

FN2. Before beginning discussion of the substantive legal issues raised by the parties, we note that arguably appellants could have raised a Missouri Sunshine Law violation by the PSC given the manner in which they conducted the entire affair, *i.e.*, the discussions, meeting, and drafting, which resulted in the signing of the settlement agreement. As the **issue** was not raised by the parties and the 6-month statute of limitations found in § 610.027.4 has run, we will not address this **issue**.

I.

[5] We must first deal with the arguments **concerning** the PSC's **jurisdiction** to enter into the settlement agreement, because * if it acted without **jurisdiction**, all further acts by it are void. Appellants assert that once the appeals were taken from the PSC's December 1993 report and **order**, exclusive **jurisdiction** vested in the circuit court where the appeals were filed; leaving the PSC without **jurisdiction** to alter or modify its **order**. Thus they conclude, because the settlement agreement was entered while the appeal was **pending** before the circuit court, the PSC acted without **jurisdiction** and the settlement agreement should accordingly be declared void and without effect. We agree.

To support this proposition, appellants rely on the case of *State ex rel. Campbell Iron Company, et al. v. Public Service Commission*, 317 Mo. 724, 296 S.W. 998 (banc 1927). In *State ex rel. Campbell Iron Co.*, the PSC made an extension **order** concerning the rates it had set for SWBT after the writ of **review** was filed. *Id.* 296 S.W. at 1000. The extension **order** was essentially a modification of the PSC's previous **order**. The PSC was held to be without **jurisdiction** to enter a subsequent **order** after a writ of **review** had been filed. *Id.* at 1001. The court **stated**, “[o]n the issuance of a writ of **review** its **jurisdiction** to make further **orders** ceases” *Id.*

In *State ex rel. Kansas City v. Public Service Commission, et al.*, 360 Mo. 339, 228 S.W.2d 738 (1950), the **Supreme Court** faced a similar **issue**, except that the PSC had entered an entirely new **order** rather than simply a modification of an existing

order as in *State ex rel. Campbell Iron Co.* The circuit court struck down the first **order** and remanded the case back to the PSC. *Id.* 228 S.W.2d at 740. The PSC then entered a second **order**, although a motion had been filed **concerning** the court's ruling on the first **order**. *Id.* The court concluded that the judgment was final and the motion was improper. *Id.* at 740-41. Since the court had remanded the case back to the PSC, it had the **jurisdiction** to enter the second **order**. *Id.* at 742-43.

[6] Taking these two cases together, we can declare the proper rule in Missouri **concerning** the **jurisdiction** of the PSC when one of its **orders** has been challenged in the circuit court. If **review** of a PSC **order** is **pending** before a circuit court, the PSC may not enter a modified, extended or new **order**. However, if the judgment of the circuit court becomes final, the PSC regains its **jurisdiction** to act in a manner not inconsistent with the decision of the circuit court.

In this case, all parties concede that **review** of the PSC's **order** was **pending** before the circuit court. Hence, the PSC did not have the **jurisdiction** to change its **order** regarding SWBT. Appellants claim that the settlement agreement was either a modification of a prior **order** or an entirely new **order**. Respondents assert that the settlement agreement was not an **order** of the PSC as that term is used in §§ 386.500 and 386.510^{FN3} and is, therefore, not **reviewable**. We must decide whether the true status of this settlement agreement constituted a **reviewable order**. We will begin this analysis by **reviewing** the statutes governing the PSC.

FN3. All statutory references are to RSMo 1994, unless otherwise **stated**.

[7] The PSC is a creature of statute and limited thereby.

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Type=S&SerialNum=1979130567&ReferencePosition=49](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePosition-
Type=S&SerialNum=1979130567&ReferencePosition=49) *State ex rel. Util. Consumers Council v. P.S.C.*, 585 S.W.2d 41, 49 (Mo. banc 1979). It was created and established by § 386.040. The primary function of the PSC is the regulation of public utilities. § 386.250, RSMo Supp.1995; § 386.270; §

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386.320; § 386.330; § 386.360. One such public utility regulated by the PSC is telecommunications, and in this case the company is SWBT. § 386.250(2), RSMo Supp.1995; ch. 392, *et seq.*

[8] The statutory procedure for regulating telephone companies is set forth in chapters 386 and 392. These chapters also contain the actions which the PSC is authorized to engage in. “ [N]either convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute, *State ex rel. Kansas City v. Public Service Comm'n*, 301 Mo. 179, 257 S.W. 462 (banc 1923).” *State ex rel. Util. Consumers Council*, 585 S.W.2d at 49. The PSC is “vested with and possessed of the powers and duties in this chapter specified, *773 and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter.” § 386.040. In its December 17, 1993 Report and Order, the PSC addressed its authority to enter into alternative regulation plans. We need not address all alternative regulation plans, only the use of private settlement agreements. Neither chapter 386 nor chapter 392 contain explicit statutory authorization for the PSC to enter into settlement agreements with public utility companies. We need not decide that issue in this case and we will proceed as if the PSC may enter into settlement agreements.

The duties of the PSC are set forth in chapters 386 and 392. The PSC is charged with the general supervision of telephone corporations, such as SWBT, including supervision of its “compliance with all the provisions of law, orders and decisions of the commission...” § 386.320. Whenever a complaint is made against a telephone company to the PSC, such as was made here against SWBT, “it shall be its duty, within sixty days after final submission, to make and file an order either dismissing the petition or complaint or directing the public utility ... complained of to satisfy the cause of complaint in whole or to the extent which the commission may specify and require.” § 386.330.3. If the PSC is of the opinion after a hearing that a telephone company's rates are “unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law,” the PSC shall fix a reasonable rate by order. § 392.240.

In this case, the PSC exercised its duty of general supervision by filing a complaint against SWBT

charging that its rates were excessive. After investigation and a hearing, it issued an order as mandated by § 386.330.3. This order gave SWBT the option of accepting or rejecting its Accelerated Modernization Plan (“AMP”) approved in the order. SWBT rejected the AMP and requested review in the circuit court. Ultimately, to avoid the appeals process, and because the AMP had lapsed, the PSC entered into the settlement agreement in order to get SWBT's approval of its regulation plan.

[9] By its very nature, a settlement agreement is a compromise by each party to the agreement of certain rights in order to gain what it did not have an established right to claim. *See generally* BLACK'S LAW DICTIONARY 67, 1372 (6th ed. 1990) (definitions of “agreement” and “settlement”). Here, SWBT gave up its right to have the PSC's order reviewed by the circuit court in order to gain a more favorable regulation plan. The PSC, on the other hand, gave up the right to enforce its order as prima facie lawful under § 386.270 in order to avoid the appellate review process.

Appellants claim that the settlement agreement constituted a separate order of the PSC regulating SWBT. The PSC asserts that the settlement agreement was a non-binding expression of the parties' intent and only served to implement its previous order, not to constitute a separate order. The PSC's claim is contrary to the apparent belief of SWBT as expressed in its brief, as well as contrary to the express terms of the settlement agreement. The last paragraph of the agreement states that the parties “trust[] and expect[] compliance with its spirit and terms” and provides the PSC with the authority to determine whether the agreement has been violated absent a final judicial decision to the contrary. The PSC essentially incorporated its powers under § 386.320 to determine SWBT's compliance with its orders into the settlement agreement. The PSC attempts to argue out of both sides of its administrative mouth; on one hand saying it is not a reviewable order, and on the other hand treating it in almost all respects as an order. Thus, we find that both respondents intended the settlement agreement to be binding and contemplated judicial review thereof should a problem arise.

Respondents' defense is that this settlement agreement is no different than any other settlement of liti-

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 (Cite as: 929 S.W.2d 768)

gation. Due to the nature of this settlement agreement, we find that it differs in many respects from the traditional settlement agreement. This settlement agreement more closely resembles an order or decision of the PSC because it replaced another regulatory plan and operates*774 as the only regulation of SWBT put in place by the PSC. Even if no distinction could be drawn, the argument still fails. Missouri courts generally treat settlement agreements as contracts and we find no reason to view this settlement agreement any differently. See *Daily v. Daily*, 912 S.W.2d 110, 114 (Mo.App.1995); *Ayotte v. Pillsbury Co.*, 871 S.W.2d 139, 142 (Mo.App.1994); *Park Lane Med. Ctr. v. Blue Cross/Blue Shield*, 809 S.W.2d 721, 724 (Mo.App.1991). If the settlement agreement is a contract, then it is binding. If it is binding, the provisions of this settlement agreement, some being regulatory in nature, have the effect of operating as a regulatory plan. If it has the effect of a regulatory plan, then there are no practical differences between the settlement agreement here and the usual order or decision entered by the PSC after a public hearing. If it is an order, then it is reviewable by this court.

We find the settlement agreement constituted an order or decision of the PSC regarding the regulation of SWBT, and essentially restored its role as adjudicator. Because the AMP had lapsed, the settlement agreement constituted the only regulation plan in effect at the time. And, because the appeal was pending before the circuit court when the settlement agreement was entered into, we find that the PSC lacked the jurisdiction to sign the settlement agreement outside the court proceedings. See *State ex rel. Campbell Iron Co.*, 296 S.W. 998. The jurisdictional issue could have been removed had the PSC taken the settlement agreement to the circuit court for its approval after a hearing involving all of the parties. The settlement agreement, as promulgated here, permitted the PSC to make its decision privately as opposed to openly and with the input of the intervenors. This would violate what appears to us to be one of the purposes behind vesting exclusive jurisdiction in the circuit court while review is pending, which is to ensure that those interested in the outcome of the case as intervenors have a forum to be heard.

CONCLUSION

It is not this court's job to tell the PSC how to regu-

late SWBT or what methods are best to use. However, we must ensure the PSC properly exercises its jurisdiction. In this case, the PSC, employing a settlement agreement, attempted to avoid judicial review of its actions and at the same time put in place a plan regulating SWBT. By entering into the settlement agreement, we find that the PSC essentially entered a new order. We further hold that it was without jurisdiction to do so as exclusive jurisdiction was vested in the circuit court at that time. *State ex rel. Campbell Iron Co.*, 296 S.W. 998; *State ex rel. Kansas City*, 360 Mo. 339, 228 S.W.2d 738 (1950). In this case, the jurisdictional issue serves the purpose of keeping the regulatory process out in the open, similar to the purpose of Missouri's Sunshine Law.

Judgment affirmed.

All concur.
 Mo.App. W.D. 1996.
 State ex rel. Missouri Cable Telecommunications
 Ass'n v. Missouri Public Service Com'n
 929 S.W.2d 768

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C

Supreme Court of Montana.
 MONTANA CONSUMER COUNSEL Geoffrey L.
 Brazier, Plaintiff and Respondent,
 v.
 PUBLIC SERVICE **COMMISSION** of Montana et
 al., Defendants and Respondents,
 and
 The Montana Power Company, a corporation, Inter-
 venor Defendant and Appellant.
No. 12944.

April 28, 1975.

Appellant power company moved for protective **order** to enjoin respondents from undertaking actions which interfered with **Supreme Court's** appellate **jurisdiction**. The **Supreme Court** held that actions of respondent Public Service **Commission** in reopening docket while appeal by power company was **pending** and **issuing** further **orders** in connection with challenged rate schedule filings were beyond **jurisdiction** of Public Service **Commission**.

Protective **order** issued.

West Headnotes

Public Utilities 317A  **194**

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of Commission

317Ak194 k. Review and Determination in General. Most Cited Cases
 (Formerly 317Ak27)

Actions of Public Service **Commission** in reopening its docket and **issuing** further **orders** in connection with challenged rate schedule filings and taking **jurisdiction** over several **matters** which were at **issue** in **pending** appeal before **Supreme Court** were beyond Public Service **Commission's jurisdiction**.

*** The appellant has moved this Court for a protective **order** under the Rules of Appellate Civil Proce-

sure on several grounds, the essence of which is that the appeal in this case is on **issues** directly **concerning** the legality, interpretation, and scope of Public Service **Commission Order #4147**.

We heard the motion ex parte and **ordered** the respondents to appear to be heard on the motion.

Respondent Consumer Counsel appeared by a motion to remand to the district court, a motion to dismiss, and a petition for **order**.

* Respondent Public Service **Commission** appeared and argued orally.

This Court previously **issued** a stay **order** on January 8, 1975, staying execution of the judgment **pending** appeal and subject to this Court's authority to **order** refunds of over-collections.

This Court, in addition to examining the exhibits attached to the motion, has examined the combined brief with appendices in the appeal in this cause as well as the appeal in cause #12955, the McTaggart appeal.

Respondent Consumer Counsel, after seeking and receiving extensions of time for filing briefs on appeal, went back to the Public Service **Commission** to object to the rate schedule filings **ordered** in #4147; and the Public Service **Commission**, in an unusual **order** has denied the schedule and taken **jurisdiction** over several **matters** which are of **issue** in the appeal before this Court. Respondent Public Service **Commission** has not responded to the appeal in any manner and its counsel announced in open court that it did not intend to.

The protective **order** sought here is to enjoin the respondent Public Service **Commission** and the respondent Consumer Counsel from undertaking actions which interfere with this Court's appellate **jurisdiction**.

The actions of the Public Service **Commission** in reopening its docket and **issuing** further **orders** are beyond its **jurisdiction**.

****770** It is therefore **ordered** that:

1. The motion of respondent Consumer Counsel to remand to the district court is denied. Its motion to dismiss is denied. The petition for **order** is denied.

2. The Public Service **Commission** shall vacate, set aside and rescind its action and **Order** No. 4189 and shall forthwith act to enforce its **Order** No. 4147. The enforcement of said rate **order** shall be subject to the refund provision of this Court's stay **order**.

***179** 3. During the **pendency** of this appeal, the respondents Public Service **Commission** and Montana Consumer Counsel shall refrain from further actions which may tend to interfere with this Court's **jurisdiction** on appeal of this **matter**.

CASTLES, Acting C. J., and HASWELL, JOHN C.
HARRISON and DALY, JJ., concur.

Mont. 1975.

Montana Consumer Counsel v. Public Service Commission

168 Mont. 177, 541 P.2d 769

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CERTIFICATE OF SERVICE

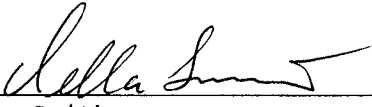
10-ATMG-133-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, e-mailed or hand-delivered this 12th day of January, 2010, to the following:

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