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MISSOURI
PUBLIC SERVICE COMMISSION

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Empire District Electric Company's tariff revision designed to increase rates, on an interim basis and subject to refund, for electric service provided to customers in the Missouri service area of the Company.	))))	Case No. ER-97-82

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

I. INTRODUCTION

The Office of the Public Counsel (Public Counsel) has contended since this case was filed that it should be dismissed since Empire District Electric Company (Empire or Applicant) has failed to meet the emergency or near-emergency standard. Public Counsel believes that this is the appropriate course, even now after the Public Service Commission (Commission) has conducted a hearing and taken evidence. As a matter of law and of good public policy, this is the most appropriate action for the Commission to take.

Even if the Commission does not dismiss the case, it should still deny the relief requested, based on the fact that Empire has wholly failed to prove that good cause exists for granting interim rate relief.

This brief will not address in detail the question of whether or not the emergency or near-emergency standard should still apply, as this question has been addressed in pleadings already filed in this case. Public Counsel obviously believes that it should. By not ruling on either of Public Counsel's motions to dismiss filed in this case, the Commission has indicated that it is interested in exploring alternatives to the traditional standard for interim relief. This brief will demonstrate that Empire has given the

Commission no basis to establish a new standard. In the direct testimony of witness McKinney (Exhibit 2), Empire makes the claim that the Commission has the discretion to adopt a standard other than the emergency or near-emergency standard that it has applied consistently through the years. However, nowhere on the record in this case has Empire offered a standard that the Commission could use instead of its traditional one.

II. ARGUMENT

A. Empire has failed to provide a basis from which the Commission can create a new standard.

If the Commission wants to abandon the emergency standard for the granting of interim rate relief in this case, it should clearly and unmistakably enunciate the new standard. Unfortunately (or fortunately, depending on point of view), the applicant in this case has given the Commission little to work with.

Applicant has presented the Commission two theories under which it can be granted relief. First, that its fuel and purchased power costs have increased (according to Empire's suspect calculations) by a little over $4 million since the last rate case was settled. This calculation forms the basis for the actual relief requested in this case. The second theory under which the Applicant suggests the Commission can award it relief is that since its overall return on equity has dropped by $4 million or more (again, based on Empire's suspect calculations), that the Commission can grant it the requested relief on the basis of the per-book rate of return calculation.

The main problems with the first theory are that it constitutes single-issue ratemaking, it violates the matching principle, it improperly and incorrectly calculates the

change in fuel and purchased power costs, and it uses one party's position in a settled case as the starting point. It is little wonder that, at the hearing, Company witnesses tried to distance themselves from this proposal, and instead promote the rate of return theory.

The Company's theory of relief that it should be granted $4,018,000 because its rate of return is less than the midpoint of the Staff's recommended range in Case No. ER-95-279, is apparently offered to get around the flaws in its fuel and purchased power increase theory. Although the notion of a decline in overall rate of return is mentioned in the direct testimony of Company witness McKinney, and in the rebuttal testimony of Company witness Fancher, it was not until the hearing that the Company began to claim that this return was an actual basis for relief, rather than simply support for the granting of relief calculated upon increased fuel and purchased power costs. The Company, based upon testimony at the hearing, would now have the Commission grant interim relief solely on the basis that its per-book return has dropped below what it believes a fair return should be.

The Commission certainly gave Empire more than adequate opportunity to explain what it believed good cause for an interim rate case should be. Administrative Law Judge Roberts asked Company witness McKinney what criteria should be used in determining whether or not to grant an interim rate request. Mr. McKinney answered:

> It probably would be somewhat presumptuous for me to try to dictate Commission policy. I think you have to look at a lot of relative factors, though.
>
> Perhaps one of the things that needs to be looked at is did, in fact, the rate relief that was reached in a prior case, was it achieving what it had been hoped it would achieve?

> What are the rates of the customer? What rates are the customers paying now? Empire customers pay the lowest rates in the state of Missouri. I think that's a factor that has to be considered.
>
> What's been the company's history? How has the company conducted itself? What kind of an operation does that company -- what is the operation of the company?
>
> For instance, you're not going to hear Empire before this Commission begging for stranded investment. We made a decision several years ago that we would try to -- rather than stranding a lot of costs or investing in new plants, we've tried to meet our customers' needs with purchase power, which was the lowest cost option for those customers.
>
> Now, when you find yourself in this position, I think that's one of the places where it cries for discretion on the part of the Commission to look at that particular situation.
>
> (Tr. 94-95).

When asked essentially the same question by ALJ Roberts, Company witness Fancher replied:

> Yes. I'd say first of all I think it needs to be changed because the emergency standard basically tells you that the company must be in dire trouble before anything is done. And at that point you've already ruined the credit ratings, you've ruined the market for the stock, and the recovery for that will take a very long time.
>
> So if you look at where do I draw the line for interim rate relief, I think you look at where is this company in a relation to everyone else that we see, we as a Commission.
>
> And if you look at those other companies and see all of those have 20 to 50 percent higher rates, this company has gone through a reorganization, downsized, completely tried to reposition the reorganization, and still can't get a decent return on equity in spite of those things.

> Then I should look and say yes, something needs to be done.
>
> (Tr. 150-151).

In essence, Empire's criteria appear to be that 1) the utility is a "nice" company, and 2) its rates are low compared to other utilities in the state. These are hardly precise nor adequate criteria for the Commission to use in determining whether to grant interim relief.

B. <u>Under any standard, Empire has failed to show that granting interim relief is justified.</u>

While Empire argues that the emergency standard should not apply, policy dictates that it, or something very much like it, must continue to apply. By definition, interim rates are allowed by the Commission after a less thorough investigation than is normally conducted in a general rate case. Because the Commission must act in granting interim requests without the benefit of a thorough Staff audit, and investigation by all interested parties, it should only do so when compelling circumstances exist. The Commission has recognized that the absence of explicit statutory authority, and the fact that a thorough investigation is not performed, mandates caution in granting interim relief:

> Therefore, although the Commission is of the opinion that it has the authority to grant interim rate increases, that authority may only be exercised where a showing has been made that a deteriorating financial situation exists which constitutes a threat to a company's ability to render adequate service. Furthermore, the Commission is of the opinion that since there is an absence of specific statutory authority it should cautiously exercise its power to grant temporary or emergency rates because cases of this nature contemplate a rather speedy action on the part of the Commission which is contrary to the long established principle that a thorough study should be made by the

> Commission, its staff and all other interested parties before rates are approved.
>
> [Report & Order, Case No. 17965, In re Union Electric Company, 18 Mo.P.S.C. (N.S.) 440, at 446].

Public Counsel witness Trippensee summarized the reasons Public Counsel believes the interim request should be denied:

> I believe this application should be rejected for the following reasons:
>
> 1. Represents single issue ratemaking and in fact is nothing more than a repackaged fuel adjustment clause;
>
> 2. An emergency condition does not exist which threatens safe and adequate service;
>
> 3. The Company has failed to take all appropriate steps to reduce expenditures necessary to provide the maximum cash flows from current operations; and
>
> 4. The Company has not demonstrated that alternative sources of funds are not available to meet any alleged financial concerns.
>
> (Ex. 10, Trippensee Rebuttal, p. 3).

Note that only one of those reasons is that the Company fails to meet the emergency standard; the other reasons constitute valid bases for denying interim relief under any standard.

C. **Any interim increase granted in this case should be spread among the classes in a manner consistent with the Commission's basis for granting such increase**

The Commission really has two choices about how it can structure any interim rate relief. First, it could grant Empire relief based upon the calculated increase in fuel and purchased power costs (or some modification of that calculation). Second, it could accept Empire's belated claim that an increase is justified based upon all relevant factors. If the Commission takes the first option, then any increase could be spread using the method (not the actual numbers) proposed by Staff witness Watkins. Since any increase in this case would be explicitly tied to a single issue, allocating that increase would be relatively simple. However, this approach clearly violates the prohibition against single-issue ratemaking.

If the Commission chooses the second option (that is, it grants an increase and is somehow able to make a finding of fact that such an increase is based upon all relevant factors), then the question of how to spread an increase becomes problematic. In that case, as Staff witness Watkins admits, the best way to spread the increase would be to factor up the rates and put the increase on a percent of each customer's bill. (Tr. 233).

Of course, any refund should be awarded to customers in the same fashion that the interim increase was charged to them. There is no real disagreement among the parties on that point. If the Commission grants interim rate relief, and if a refund is later determined to be warranted, Public Counsel submits that interest should be calculated on that refund at the rate of nine percent. To require ratepayers to increase shareholder wealth in the

absence of any showing of emergency or near-emergency, and then compensate those ratepayers for their involuntary investment at only five percent would be unconscionable.

III. CONCLUSION

The Commission should dismiss this case because Empire has failed to meet the Commission's standard for interim relief. Even if the Commission were to entertain the idea of promulgating a new standard for interim relief, Empire has failed to give the Commission any evidence from which it can create such a standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 31st day of December, 1996:

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