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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) Case No. ER-97-82
Provided to Customers in the Missouri Service Area of)
the Company.)
)

REPORT AND ORDER

Issue Date: February 13, 1997

Effective Date: February 23, 1997

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APPEARANCES

James C. Swaengen, Brydon, Swaengen & England, P.C., 312 East Capitol Avenue,
Post Office Box 456, Jefferson City, Missouri 65102, for The Empire District
Electric Company.

Stuart W. Conrad, Finnegan, Conrad & Peterson, 1209 Penntower Office Center,
3100 Broadway, Kansas City, Missouri 64111 for ICI Explosives USA, Inc., and
Praxair, Inc.

Lewis R. Mills, Jr., Deputy Public Counsel, Office of the Public Counsel, Post
Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public
Counsel and the public.

Jeffrey A. Keevil, Deputy General Counsel, Roger W. Steiner, Assistant General
Counsel, R. Blair Hosford, Assistant General Counsel, and David Woodsmall,
Assistant General Counsel, Missouri Public Service Commission, Post Office
Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public
Service Commission.

ADMINISTRATIVE

LAW JUDGE: Thomas H. Luckenbill, Deputy Chief.

REPORT AND ORDER

Procedural History

On August 30, 1996, The Empire District Electric Company (Empire or
Company) filed with the Missouri Public Service Commission (Commission) interim
tariff sheets designed to increase the Company's annual electric revenues by
\$4,018,071 on an annual basis. Empire proposed that the interim increase be
subject to refund pending the decision of the Commission in the Company's

corresponding permanent electric rate case (ER-97-81). Empire is seeking an increase in excess of \$23 million in the permanent electric rate increase case. Empire's request for a permanent rate increase was also filed on August 30, 1996.

On September 10, 1996, ICI Explosives USA, Inc. (ICI) and Praxair, Inc. (Praxair) filed an application to intervene in this case, which was subsequently granted by the Commission. On September 10, 1996, the Office of the Public Counsel (OPC) filed a motion to dismiss, or, in the alternative, to suspend the tariff sheets. On September 18, 1996, the Staff of the Missouri Public Service Commission (Staff) filed a motion to dismiss, or, in the alternative, suspend the tariff sheets. On September 24, 1996, ICI/Praxair joined in the motions of Staff and OPC. Staff, OPC, and ICI/Praxair all maintain that Empire did not plead facts that would establish that it meets the criteria for granting interim rate relief and that the case should be dismissed.

On September 23, 1996, the Commission issued a Suspension Order And Notice wherein the Commission suspended the interim tariff sheets until February 28, 1997. Empire filed direct testimony in support of the interim increase on August 30, 1996 with the proposed tariff sheets. Staff, OPC, and ICI/Praxair filed direct testimony on or about November 15, 1996. All parties filed rebuttal testimony on or about November 15, 1996.

On November 25, 1996, the Commission opened the record for the taking of evidence in this case. The evidentiary hearing continued on November 26, 1996 to its conclusion, whereupon the hearing was adjourned.

The parties filed initial briefs on December 31, 1996 and reply briefs on January 10, 1997.

Pending Motions

On January 7, 1997, the Staff filed a motion to strike certain portions of Empire's initial brief. Staff argues that Empire's claimed revenue deficiency in the amount of \$6 million is not supported by the evidence in the record.

Empire references several exhibits and transcript pages in connection with the alleged \$6 million revenue deficiency.¹ The Commission has reviewed these evidentiary references and does not discern any direct support for the alleged \$6 million revenue deficiency. Thus, the Commission will grant Staff's motion to strike certain portions of Empire's initial brief.

On January 17, 1997, the Staff filed a motion to strike certain portions of Empire's reply brief. The dispute is the same as Staff's previous motion (i.e., lack of evidence on the alleged \$6 million deficiency).

The concern raised by Staff becomes quite apparent in Empire's response to Staff's motion, which was filed on January 27, 1997. At page 3 of that response the calculation of the alleged deficiency is disclosed for the Commission and the public at large. This is a perfect illustration of the problem. In order to have a full and fair hearing, the derivation of the alleged \$6 million deficiency must be contained in testimony which is subject to cross-examination. It is not sufficient for the calculation to appear for the first time in posthearing briefs or pleadings. Thus, the Commission will grant Staff's motion.

¹Ex. 3, p. 2; Tr. 112; Tr. 294; Ex. 5, p. 2; Tr. 145; Tr. 267; Tr. 341.

Exhibit 19

During the hearing the bench requested a schedule showing closing stock prices for The Empire District Electric Company on a monthly basis for 1996. The Staff provided the schedule and it was marked Exhibit 19. Empire requested time to review Exhibit 19. On November 27, 1996, Empire indicated by letter to ALJ Luckenbill that it had no objection to Exhibit 19. The Commission will receive Exhibit 19 into the record.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The main issue is whether the Commission should grant Empire's request for approval of an interim rate increase given the evidence presented in this case.

Empire provided evidence showing that as of June 30, 1996, its return on average equity was 7.97 percent. Empire maintains that this is below a reasonable return for it or any other electric utility. (Ex. 3, p. 2; Tr. 112). Empire argues that an unexpected increase in natural gas prices occurring after its currently effective rates were put into effect is a significant factor causing a need for interim rate relief. (Ex. 2, p. 2).

Empire argues that the Commission should apply a "good cause" standard to a request for interim rate relief rather than the "emergency" or "near emergency" standard. Empire witness Fancher testified that the "emergency" standard is not a binding and unchangeable rule and that whether to grant interim relief is really a matter of Commission discretion. (Ex. 4, p. 1-2).

ICI/Praxair, OPC, and Staff maintain that the Commission should not grant Empire's request. Staff argues that the Commission should not change its traditional standard for interim rate relief and that Empire has not met that standard. Staff also argues that Empire's request, if granted, would constitute illegal single-issue ratemaking, violate the test year and matching doctrines as ordered in Empire's last rate proceeding (ER-95-279), violate the provisions of the stipulation and agreement in ER-95-279, and would be based upon faulty fuel/purchased power assumptions.

OPC agrees with the Staff that the traditional standard for interim rate relief should be maintained. OPC argues that Empire has not provided a basis in this record upon which the Commission could create a new standard. OPC concurs with Staff's arguments that granting the requested relief would constitute unlawful single-issue ratemaking, violate the matching principle, and inaccurately calculate the change in fuel and purchased power costs.

ICI/Praxair concurs with Staff and OPC in regard to the maintenance of the Commission's standard for interim rate relief and the argument that Empire's situation does not meet that standard. ICI/Praxair argues that Empire's request is based upon an incorrect premise that a utility is entitled to a guaranteed rate of return, and that Empire's claim of a 7.97 percent return on equity is misleading. ICI/Praxair contends that Empire's analogy to the approved return on equity of Union Electric Company is false because of disparate risk profiles when comparing the operations of Empire to those of Union Electric. ICI/Praxair criticizes Empire's case on the basis that it does not consider all relevant factors.

The Commission has authority in a proper case to grant interim rate increases pending a determination of an application for a permanent increase. Since no standard is specified in statutes to control the Commission as to

whether to order suspension of a proposed rate schedule, the result is within the sound discretion of the Commission and an emergency situation need not necessarily be established. Section 393.140, § 11, RSMo 1994, states: "The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe." The standard for allowing interim rate relief is not necessarily emergency conditions but good cause shown by the company, and determination of good cause shown is at the Commission's discretion.

In this case Empire has not demonstrated good cause for granting interim relief. The evidence demonstrates that Empire earned a return on equity of 7.97 percent and that was caused in large part by an unexpected increase in fuel costs. Under the facts of this case, the inability of the company to earn its authorized return on equity does not, in and of itself, constitute sufficient justification for granting interim relief.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

In this case, Empire argues that its return has fallen to a point that the Commission should grant a request for interim rate relief pending the outcome of Empire's permanent rate case. This Commission addressed the same issue in a case which was appealed to the Missouri Court of Appeals, Kansas City District (now called the Western District).² The Commission stated that an interim increase should be granted only where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating

²*State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (1976).

financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity.³

The grant of interim relief requires the Commission to make a determination without the benefit of a full staff audit. An interim request ordinarily results in an expedited hearing and limited Staff audit. In this case, the Staff was able to perform a limited audit and make a recommendation regarding Empire's request.

Empire has argued in this proceeding that the issue of whether to grant interim relief is one where the Commission should exercise its discretion, given all the facts and circumstances. The Commission agrees with Empire that this is a matter of discretion. Under Missouri law, the Commission may allow changes in rate schedules without thirty (30) days notice "for good cause shown." § 393.140(11), RSMo Supp. 1996. The Commission concludes that it may authorize the implementation of interim rates upon a showing of good cause, and such good cause may be less than an emergency or near-emergency.

There is no showing by the Company that its financial integrity will be threatened or that its ability to render safe and adequate service will be jeopardized if this request is not granted. Furthermore, the Company has shown no other exigent circumstances that would merit interim relief.

Based on the foregoing, the Commission concludes that the tariff sheets suspended in this proceeding should be rejected and no tariff sheets should be filed in lieu thereof.

IT IS THEREFORE ORDERED:

1. That the tariff sheets suspended in this proceeding be, and are hereby, rejected, and that no interim rates shall be authorized herein.

³*Id.* at 568-569.

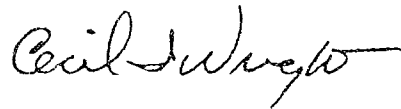
2. That the motion to strike portions of The Empire District Electric Company's initial brief filed by the Staff of the Missouri Public Service Commission on January 7, 1997 is hereby granted.

3. That the motion to strike portions of The Empire District Electric Company's reply brief filed by the Staff of the Missouri Public Service Commission on January 17, 1997 is hereby granted.

4. That Exhibit No. 19 is received into the record.

5. That this Report and Order shall become effective on the 23rd day of February, 1997.

BY THE COMMISSION



**Cecil I. Wright
Executive Secretary**

(S E A L)

Zobrist, Chm., Kincheloe,
Crumpton and Drainer, CC., concur
and certify compliance with the
provisions of Section 536.080,
RSMo 1994.
McClure, C., absent.

Dated at Jefferson City, Missouri,
on this 13th day of February, 1997.