STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 3rd day of September, 2008.

In the Matter of The Empire District Electric Company's Tariffs to Increase Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company	))))	**Case No. ER-2008-0093**

ORDER DENYING APPLICATIONS FOR REHEARING AND DENYING MOTION TO STAY

Issue Date: September 3, 2008 Effective Date: September 13, 2008

On July 30, 2008, the Commission issued a Report and Order regarding The Empire District Electric Company's tariffs to increase its rates for electric service. That Report and Order became effective on August 9. On August 8, the Office of the Public Counsel, and the group of companies known collectively as the Industrial Intervenors filed timely applications for rehearing. On the same date, the Industrial Intervenors also filed a motion asking the Commission to stay the effectiveness of its Report and Order.

Public Counsel's Application for Rehearing expresses disagreement with several aspects of the Report and Order. Specifically, Public Counsel continues to contend that Empire was precluded from requesting implementation of a fuel adjustment clause in this case because of the interim energy charge allowed by a stipulation and agreement in an earlier rate case. The Commission addressed that contention at length in the Report and Order and will not address it further in this order.

Public Counsel also contends the Commission erred in rejecting Public Counsel's

proposal to allow only a 60 percent pass-through of fuel costs in the fuel adjustment clause the Commission allowed Empire to implement. It argues the Commission failed to adequately support its finding that Empire should be allowed a 10.8% return on equity. Finally, Public Counsel contends the "tracker" the Commission established to track vegetation management costs constitutes forbidden retroactive ratemaking. The Commission has already addressed these issues in the Report and Order and will not address them further at this time.

The Application for Rehearing filed by Praxair, Inc., Explorer Pipeline, Inc., General Mills, Inc., Wal-Mart Stores, Inc., and Enbridge Energy, L.P, collectively referring to themselves as the Industrial Intervenors, begins by challenging the basis for the summary paragraph at the beginning of the Report and Order. That paragraph states that the order allows Empire to increase the revenue it may collect from its Missouri customers by approximately $22,040,395, which will result in a 6.7 percent, or $6.13, increase in the average residential customer's monthly bill. As the Industrial Intervenors surmise, these precise figures were derived from a financial scenario submitted by Staff at the request of the Commission after the Commission had approved the Report and Order at its agenda meeting on the morning of July 30. The exact numbers were then inserted into the Report and Order before it was issued.

The Industrial Intervenors assert that these precise figures are of "obvious importance", but in fact, these figures are not important to the Commission's Report and Order. The Commission knew the approximate impact of its Report and Order based on the true-up direct testimony of Staff's witness, Mark Oligschlaeger.[1] However, the exact customer impact could not be determined until after the Commission made its decisions on

[1] Ex. 233.

all contested issues. Because the exact customer impact is of interest to the public and the press, the Commission requested a scenario from its Staff based on its final decisions so the customer impact figures could be included in the final Report and Order. The figures included in the summary section did not, however, play any part in the Commission's decisions and should not be taken as support for those decisions.

The Industrial Intervenors also challenge the Commission's decision to allow Empire a 10.8 percent return on equity. In particular, they argue the Commission "arbitrarily rejected its long-standing reliance on expert return on equity testimony in lieu of its own unqualified return on equity analysis." The Industrial Intervenor's argument is not correct. On the contrary, the Commission relied on testimony offered by the various experts and closely analyzed that testimony in arriving at what it believes to be a just and reasonable return on equity.

The criticism of the Commission's return on equity decision is based on the mistaken assumption that the Commission must accept, without change, a return on equity recommendation suggested by one of the expert witnesses. None of the return on equity experts offering their testimony in this case recommended a return on equity of 10.8 percent, but the Commission is not limited to simply choosing from among the submitted expert recommendations when establishing a return on equity.

Establishing a return on equity is part of the Commission's attempt to establish just and reasonable rates. As the Missouri Court of Appeals has indicated, "[under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts."[2] For all the

[2] *State ex rel. Assoc. Natural Gas Co. v. Pub. Serv. Com'n of Missouri*, 706 S.W. 2d 870, 873 (Mo App. W.D. 1985)

reasons set out in its Report and Order, the Commission has established a return on equity it believes to be just and reasonable. The criticisms of the return on equity allowed by the Commission are without merit and do not justify rehearing.

The Industrial Intervenors also contend the Commission erred in allowing Empire to implement a fuel adjustment clause. The Industrial Intervenors raise the same argument as Public Counsel in contending that Empire was precluded from requesting implementation of a fuel adjustment clause in this case because of the interim energy charge allowed by a stipulation and agreement in an earlier rate case. The Commission addressed that contention at length in the Report and Order and will not address it further in this order.

The Industrial Intervenors also raise a new argument against the fuel adjustment clause, contending the authorized fuel adjustment clause would allow for the pass-through of imprudently incurred costs because it would include an after-the-fact prudence review. Apparently, the Industrial Intervenors believe the statute requires the Commission to conduct a prudence review before incurred costs could be passed-through to customers. This argument is raised for the first time in the application for rehearing and is clearly contrary to the express provisions of the statute, which contemplate an annual true-up to remedy any over or under collections[3] and requires prudence reviews at no less than 18-month intervals.[4] Clearly, the statute does not require the Commission to conduct a before-the-fact prudence review before costs can be passed through the fuel adjustment clause.

Finally, under the heading "Regulatory Plan Amortization", the Industrial Intervenors state:

> The Order is unlawful, unjust and unreasonable in that it grants an increase in rates based on the costs of construction in progress of an electric

[3] Section 386.266.4(2), RSMo (Supp. 2007).
[4] Section 386.266.4(4), RSMo (Supp. 2007).

> plant before it is fully operational and used for service in direct contravention of Section 393.135 RSMo.

Because this is a new argument raised for the first time in the application for rehearing, the Commission ordered the Industrial Intervenors to explain in more detail what it believes the Commission has done that would violate Section 393.135, RSMo.

Some, but not all of the Industrial Intervenors responded on August 14. The response, filed on behalf of General Mills, Inc., Wal-Mart Stores, Inc., and Enbridge Energy L.P., does little to clarify the argument except to quote the statute and make it clear that the intervenor is challenging the inclusion in rates of approximately $4.4 million associated with the regulatory plan amortization.

This argument amounts to a collateral attack on the experimental regulatory plan previously agreed to by Praxair and Explorer Pipeline, and approved by the Commission on August 2, 2005, in Case No. EO-2005-0263. Praxair and Explorer Pipeline were parties to that case and their counsel in that case, as well as this, signed the stipulation and agreement that implemented that plan.

In the 2005 stipulation and agreement, the signatory parties agreed to support an additional amortization amount added to Empire's electric cost of service in any general rate case filed prior to the rate case that includes the Iatan 2 investment, when Empire's projected Missouri cash flows fail to meet or exceed certain financial ratio targets. The amount of the additional amortization is to be determined by the Commission in each relevant rate case.

Paragraph G.6 of that stipulation and agreement provides:

> When approved and adopted by the Commission, this agreement shall constitute a binding agreement among the Signatory Parties hereto. The Signatory Parties shall cooperate in defending the validity and enforceability

of this Agreement and the operation of this Agreement according to its terms.

In light of that provision of the stipulation and agreement, Praxair and Explorer Pipeline's challenge to the amortization in their motion for rehearing filed by their counsel is a blatant violation of that stipulation and agreement.

General Mills, as well as Wal-Mart and Enbridge, were not parties to EO-2005-0263, and therefore, did not sign the stipulation and agreement in that case. However, Section 386.550, RSMo (2000) provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive". The Commission's order approving the stipulation and agreement in EO-2005-0263 is undeniably final, and cannot be attacked in a collateral proceeding.[5]

The regulatory plan amortization issues were resolved for this case by Paragraph 5 of the Second Stipulation and Agreement filed on May 15, 2008. Again, Praxair and Explorer Pipeline signed the stipulation and agreement, while General Mills did not. General Mills, however, had notice of the filing of the stipulation and agreement and, through the counsel it shared with the other Industrial Intervenors, filed a statement on May 15, indicating it did not object to the stipulation, and did not request a hearing on the stipulation.

As permitted by Commission Rule 4 CSR 240-2.115(2), the Commission treated the Second Stipulation and Agreement, to which no one objected, as unanimous, and approved it on May 20. Furthermore, in paragraph 13 of the Second Stipulation and Agreement, the signatory parties specifically waived their right to seek rehearing or judicial review with respect to the issues settled within that stipulation and agreement. Accordingly, it is now too late for any party to object to that stipulation and agreement, and their request

[5] *State ex rel. Licata, Inc. v. Pub. Serv. Comm'n,* 829 S.W.2d 515 (Mo. App. W.D. 1992).

for rehearing on this point will be denied.

However, that does not end the Commission's review. Section 386.500.1 RSMo (2000), the statutory provision that addresses requests for rehearing of Commission orders, allows "interested" persons or corporations, even if they are not parties to the case, to request rehearing. The two remaining signatories to the Industrial Intervenors' Application for Rehearing, Wal-Mart and Enbridge, never actually asked to intervene in this case. Instead, on February 21, 2008, the original Industrial Intervenors, Praxair and Explorer Pipeline, filed a pleading entitled *Notice to Commission and Parties of Involvement and Interest of Additional Entities*. That notice informed the Commission and the other parties that Wal-Mart and Enbridge were interested, involved, and aligned with the Industrial Intervenors' positions, and that they would participate through the involvement of previously-intervened parties. The notice, however, disclaimed any intention by those entities to formally intervene.

Wal-Mart and Enbridge were never formally allowed to intervene as parties to this case, but they were aligned with the Industrial Intervenors during the course of the case and were represented throughout the case by the same legal counsel who represented the other Industrial Intervenors. Thus, they certainly had notice of the filing of the Second Stipulation and Agreement, but did not raise any timely objection. It is now too late for them to object to matters that were resolved by the Commission-approved Second Stipulation and Agreement.

There is no need for the Commission to rehear this aspect of its Report and Order because the Industrial Intervenors' challenge to the 2005 experimental regulatory plan and the resulting amortization was not presented to the Commission for determination until the

application for rehearing, and then only in cryptic form. The 2005 Commission order approving that regulatory plan is final and is not subject to collateral attack. Furthermore, it is now too late for any of the signatories to the Industrial Intervenors' Application for Rehearing to object to the Second Stipulation and Agreement that resolved the amortization issue. Finally, the amortizations contemplated by the 2005 regulatory plan and authorized by the Report and Order are a form of accelerated depreciation in which Empire exchanges rate base for additional cash flow in order to enhance certain credit metrics. Consequently, there is no resulting rate increase in this case based on the costs of construction work in progress.

Section 386.500.1, RSMo (2000), indicates the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." The applications for rehearing do not state sufficient reason to rehear the Report and Order, and they will be denied.

The Industrial Intervenors also filed a Motion to Stay, asking the Commission to stay the effectiveness of its Report and Order. That motion was filed at 3:18 p.m. on August 8, a Friday afternoon. The Report and Order went into effect at 12:01 a.m. on August 9. Since the Report and Order is now in effect, the Motion to Stay is essentially moot. In any event, the Motion to Stay did not state sufficient reason to stay the effect of the Commission's Report and Order and it will be denied.

IT IS ORDERED THAT:

1. The Office of the Public Counsel's Application for Rehearing is denied.

2. The Industrial Intervenors' Application for Rehearing is denied.

3. The Industrial Intervenors' Motion to Stay is denied.

4. This order shall become effective on September 13, 2008.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray and Jarrett, CC., concur;
Clayton and Gunn, CC., dissent.

Woodruff, Deputy Chief Regulatory Law Judge