

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

In the Matter of The Empire District Electric            )  
Company for Authority to File Tariffs Increasing        )  
Rates for Electric Service Provided to Customers       )  
in the Company's Missouri Service Area.                )            Case No. ER-2014-0351

**THE OFFICE OF THE PUBLIC COUNSEL'S REQUEST FOR ORDER**

COMES NOW the Missouri Office of the Public Counsel (Public Counsel) and requests the Missouri Public Service Commission (Commission) to strike for lack of foundation and failure to comply with the Commission's rules those portions of the Empire District Electric Company (Empire) proposed tariff sheets requesting continuation of its Fuel Adjustment Clause (FAC) as well as the pre-filed testimony purporting to support the Rider. Alternatively, Public Counsel requests that the Commission order Empire to cure the deficiencies in its filing within ten business days of entry of any order that ensues from this request. In further support, Public Counsel states as follows:

**Background**

On May 28, 2014, Empire filed notice with the Commission of its intent to file a new general rate proceeding.<sup>1</sup> Thereafter, on August 29, 2014, Empire filed new proposed tariff sheets seeking to increase its gross annual electric revenues by approximately \$24.3 million (approximately 5.5%).<sup>2</sup> Within its request, Empire proposes continuation of its Fuel Adjustment Clause.<sup>3</sup> In addition to filing proposed tariff sheets with proposed new rates, Empire submitted

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<sup>1</sup> Electronic Filing Information System (EFIS), Document No. 1.

<sup>2</sup> EFIS, Document No. 2

<sup>3</sup> Id.

the direct testimony of a number of witnesses purporting to substantiate Empire's proposed tariff filings.<sup>4</sup>

After review of the direct testimony and proposed tariff filing, Public Counsel initiated discussions with Empire related to Empire's requested continuation of its FAC and Public Counsel's concern that Empire's direct testimony regarding proposed continuation of its FAC did not meet the minimum filing requirements under 4 CSR 240-3.161. After those discussions, Empire determined that supplemental direct testimony should be filed in order to address the concerns raised by Public Counsel.<sup>5</sup> Public Counsel wishes to note the willingness of Empire to discuss Public Counsel's concerns. Public Counsel appreciates Empire's voluntary filing of supplemental testimony of Mr. Todd W. Tarter and Dr. James H. Vander Weide in order to address many of Public Counsel's concerns.<sup>6</sup> However, Public Counsel does not agree that, even with the supplemental testimony, all of the minimum filing requirements have been met. Relevant for purposes of this motion is the direct testimony and supplemental direct testimony of Mr. Todd W. Tarter.<sup>7</sup>

## **Argument**

Rate adjustment mechanisms afford utilities a limited exception to the cardinal principle guiding regulated utility rate-making, which is that all relevant factors, and not just a single issue, should be considered holistically when a regulator sets rates.<sup>8</sup> The General Assembly has seen fit to afford electric utilities with the opportunity to apply for a rate adjustment mechanism (RAM) for fuel and purchased power costs between general rate cases.<sup>9</sup> Consistent with the

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<sup>4</sup> EFIS, Document Nos. 3-15.

<sup>5</sup> EFIS, Document No. 39.

<sup>6</sup> Id.

<sup>7</sup> EFIS, Document Nos. 10 & 39.

<sup>8</sup> See *State ex. rel. Util. Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. 1979).

<sup>9</sup> Mo. Rev. Stat. § 386.266 (2000 & Cum. Supp.).

legislature's provision of that mechanism, the Commission has adopted specific rules, which include filing requirements, governing how an electric utility may seek a rate adjustment mechanism for fuel and purchased power.<sup>10</sup> Presumably, the Commission's filing requirements are intended to ensure the Commission ultimately has an adequate record upon which it can assess the utility's request, and further to ensure that the due process rights of parties and interveners contesting the utility's request are protected by prohibiting the utility from restricting or delaying access to necessary information. Here, the Commission approved a FAC for Empire in a previous rate case.<sup>11</sup> Accordingly, the question Public Counsel presents for the Commission to answer here is whether Empire's request for continuation of its FAC comports with the requirements of 4 CSR 240-3.161. Public Counsel respectfully suggests that it does not. The Commission's rule 4 CSR 240-3.161(3) offers in pertinent part:

When an electric utility files a general rate proceeding following the general rate proceeding that established its RAM as described by 4 CSR 240-20.090(2) in which it requests that its RAM be continued or modified, the electric utility shall file with the commission and serve parties...the following supporting information as part of, or in addition to, its direct testimony:

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(H) A complete explanation of all the costs that shall be considered for recovery under the proposed RAM and the specific account used for each cost item on the electric utility's books and records;

(I) A complete explanation of all the revenues that shall be considered in the determination of the amount eligible for recovery under the proposed RAM and the specific account where each such revenue item is recorded on the electric utility's books and records;

Dissecting the above-quoted subparts and applying their provisions to the submission provided by Empire to support its rider continuation request, we see Empire has failed to fully comply with the rule.

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<sup>10</sup> See 4 CSR 240-3.161.

<sup>11</sup> Report and Order (July 30, 2008), Case No. ER-2008-0093, EFIS Document No. 295.

#### 4 CSR 240-3.161(3)(H) & (I) Filing Requirements

Subsection (3)(H) of the Commission’s filing requirements for continued fuel adjustment riders requires “a complete explanation of all costs that shall be considered for recovery under the proposed RAM and the specific account used for each cost item on the electric utility’s books and records.”<sup>12</sup> Subsection (3)(I) parallels (3)(H)’s language and applies to revenues instead of costs.<sup>13</sup> But the testimony of Mr. Tarter fails to provide a “complete explanation” of either costs or revenues. Instead, the testimony of Mr. Tarter offers nothing more than vague statements.

The Commission was given the authority by the General Assembly to grant (and take away) fuel adjustment riders.<sup>14</sup> The requirement that there be a “complete explanation” of all costs and revenues included in a filing which requests continuation of a fuel and purchased power rate adjustment mechanism facilitates the Commission’s determination of which costs and revenues should be included in the rider, as required by 4 CSR 240-20.090(2)(C). A “complete explanation” of costs and revenues intended for inclusion in the rider also facilitates the orderly progression of the contested case. It is clear that other parties in the rate case are allowed to support, support with modification, or oppose the fuel adjustment rider requested.<sup>15</sup> Accordingly, without a clear identification *ab initio* what Empire is proposing to be included in its FAC, the parties cannot appropriately determine their positions and the Commission cannot determine the appropriate costs and revenues that it approves to be included in Empire’s FAC.

Using the existing submission, the only way for a party to ascertain what Empire is proposing to be included in the FAC is for that party to go through all work papers submitted and identify those costs and revenues that the party *believes* Empire appears to be requesting flow

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<sup>12</sup> 4 CSR 240-3.161(3)(H).

<sup>13</sup> 4 CSR 240-3.161(3)(I).

<sup>14</sup> Mo. Rev. Stat. § 386.266.

<sup>15</sup> 4 CSR 240-20.090(2)(E).

through the FAC. Then, the only way that the party would know for certain is to compare the sum of the costs and revenues it believes Empire is trying to include in the FAC to the numbers found in the base energy factor calculation offered in the testimony of Mr. Tarter.<sup>16</sup> This process requires far too much guesswork and speculation on the part of the parties attempting to determine exactly what Empire is requesting be included in its FAC. If the party guesses wrong, they then must go back and decide what costs or revenues they may have included or missed. Wrong again – go back and try again. Empire’s deficient submission leads to a potentially unending process of calculation and recalculation given the variables involved just to determine what Empire is suggesting should flow through the FAC. In contrast, if Empire had provided the information required by 4 CSR 240-3.161(H) and (I), the parties could be certain of those costs and revenues intended for treatment – no guesswork or combing through work papers would be required by the parties or, ultimately, by the Commission as this case progresses.

Moreover, the rule requires a complete explanation presumably to avoid the exact situation that happens here, the inclusion of costs in its proposed tariff sheets not explained in and supported by testimony. Mr. Tarter, in his testimony regarding the FAC, states that Empire is proposing the costs in account 501 be included in the FAC, but only identifies the costs/benefits associated Empire’s fuel hedge program, over/under recoveries of energy costs on the income statement and fuel risk management costs as being in account 501.<sup>17</sup> However, the proposed tariff sheets go to great length to describe what is in account 501 including coal commodity and railroad transportation, switching and demurrage charges, applicable taxes, natural gas costs, alternative fuels (i.e. tires, bio-fuel and landfill gas), fuel additives, BTU adjustments assessed by coal suppliers, quality adjustments assessed by coal suppliers, fuel

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<sup>16</sup> EFIS, Document Nos. 10 & 39.

<sup>17</sup> Id.

hedging costs fuel adjustments included in commodity and transportation costs, broker commissions and fees associated with price hedges, oil costs, propane costs combustion product disposal revenues and expenses, consumable costs related to Air Quality Control systems (AQCS) operation such as ammonia, lime, limestone, power activated carbon, urea, sodium bicarbonate and trona, and settlement proceeds, insurance recoveries, subrogation recoveries for increased fuel expenses.<sup>18</sup> No such specificity regarding account 501 is found in Mr. Tarter's testimony.<sup>19</sup> Without an adequately-substantiated factual basis to support the inclusion of a cost item in a tariff sheet, it is without foundation and must be stricken. Additionally, the list of costs in account 501 in the tariff sheet does not include fuel risk management as claimed by Mr. Tarter in his testimony. Without the inclusion of a cost component in a tariff sheet, the testimony on that cost is immaterial.

The testimony of Mr. Tarter additionally fails to identify the "specific account used for each cost item," in contravention to what the rule plainly requires.<sup>20</sup> Instead, Mr. Tarter offers in filed testimony what amounts to a brief summary, for each account.<sup>21</sup> In stark contrast, the Commission's rule requires identification of each item and the "specific" account for each item.<sup>22</sup> And this, Empire has not done.

This point is important because the result of the insufficiency of Empire's filing, if not recognized as such by the Commission, will be the waste of substantial time and energy by the parties, likely including the Commission's own staff, in clarifying, identifying and characterizing these cost accounts. As a result, the remaining parties will experience prejudice in their ability to contest this case adequately due to the expenditure of time and energy needed to track down

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<sup>18</sup> EFIS, Document No. 2.

<sup>19</sup> EFIS, Document Nos. 10 & 39.

<sup>20</sup> 4 CSR 240-3.161(3)(H) & (I).

<sup>21</sup> EFIS, Document Nos. 10 & 39.

<sup>22</sup> 4 CSR 240-3.161(3)(H).

accounting entries. Of course, while this imminently predictable and avoidable issue plays out, the statutory 11-month clock runs. Empire cannot and should not be permitted to shift the burden of discovery in this case so heavily onto the other parties.

As the Commission is aware, Public Counsel brought similar concerns to the Commission in another pending rate case.<sup>23</sup> In that case, the Commission determined that concerns regarding whether the minimum filing requirements have been met is essentially a factual challenge of the sufficiency of the evidence put forward by the utility.<sup>24</sup> The Commission noted that the way it tests the sufficiency of the factual evidence is through the contested hearing process and pointed out that the Commission has Rule 4 CSR 240-2.130(7) that governs the contents of direct, rebuttal, and surrebuttal testimony.<sup>25</sup>

Public Counsel disagrees that whether the minimum filing requirements have been met is a factual determination to be made by the Commission only after the entire case has been presented to the Commission for decision. Public Counsel instead believes that whether the minimum filing requirements have been met requires a legal determination by the Commission at the outset of the case. The question is did Empire meet the legal standards set forth in 4 CSR 240-3.161(3)(H) & (I). If not, then the Commission should strike that portion of Empire's rate case which requests a fuel adjustment rider, including the tariff sheets and associated pre-filed testimony.

Given the Commission's recent guidance regarding the process available to Public Counsel regarding whether the minimum filing requirements have been met, Public Counsel brings its concerns to the Commission to the extent that Public Counsel is required to do so, at the earliest opportunity available in order to avoid surprise and preserve the issue.

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<sup>23</sup> See ER-2014-0258, EFIS Document No. 65.

<sup>24</sup> See ER-2014-0258, EFIS Document No. 99.

<sup>25</sup> Id.

## **Conclusion**

The testimony of Mr. Tarter in support of continuing the FAC fails to comply with the Commission's filing requirements in several material respects, and so, the Commission should enter an order striking that portion of Empire's rate case which requests continuing the FAC, including the proposed tariff sheets and associated pre-filed testimony. If the Commission is tempted to afford Empire an opportunity to cure its deficiencies, the Commission should decline to do so. Empire is an experienced, well-funded participant before the Commission. The filing requirements for a fuel adjustment rider are open and obvious for all. Further, the 11-month timeline for a determination of a rate case is well-known by Empire. In the event the Commission, nevertheless, is inclined to permit Empire to cure its filing deficiencies, Public Counsel respectfully requests the Commission limit the time for Empire to cure to ten business days from the date of the Commission's order.

**WHEREFORE**, Public Counsel respectfully submits its request.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

**/s/ Christina L. Baker**

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the parties of record this 1<sup>st</sup> day of December 2014:

**/s/ Christina L. Baker**

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