

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of The Empire Dis-)
trict Electric Company of Joplin,)
Missouri for authority to file)
tariffs increasing rates for elec-) ER-2012-0345
tric service provided to customers)
in the Missouri service area of the)
Company)

**BRIEF ON INTERIM ISSUES
OF MIDWEST ENERGY USERS' ASSOCIATION**

COMES NOW the Midwest Energy Users' Association ("MEUA") and pursuant to the established schedule submits its Brief on Interim Issues.

I. Background.

A. The Standard for Interim Relief.

According to the cases, interim relief for a Missouri utility is appropriate when it is necessary to maintain the economic life of the utility so that it can continue to provide service to the public. In *Fischer*^{1/} the Western District Court appeared to make the most applicable statement, both as to the source of the Commission's authority to grant interim relief and the standard that should be used.

This court held that the Commission's authority to grant an interim rate increase is necessarily implied from the statutory au-

^{1/} *State ex rel. Fischer v. Public Service Commission*, 670 S.W.2d 24 (Mo. Ct. App. 1984).

thority granted to enable it to deal with a company in which immediate rate relief is required to maintain the economic life of the company so that it might continue to serve the public. The court, citing *Laclede*, recognized the Commission's power to grant interim rate increases in *State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission*, 585 S.W.2d 41, 48[4] (Mo. Banc 1979).^{2/}

Accordingly, it follows that interim relief is not an entitlement when the utility's return on equity falls below that previously allowed. Indeed, there is no guarantee of a particular level of earnings.^{3/} There is only a protected guarantee of an opportunity to earn a return -- and not a particular level of return.^{4/} It is simply inappropriate for a utility to seek an

^{2/} *Id.* at 26.

^{3/} By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

^{4/} The company contends that the rate of return is too low and confiscatory. What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corre-

(continued...)

interim increase when it is not necessary to preserve the ability of the utility to operate. Nor is it appropriate because the utility perceives that it is no longer earning a particular desired rate of return.

B. Summary of Argument.

Empire's request for an interim increase should be rejected. Empire has already received protection through an Accounting Authority Order that it requested, and received. As a part of that settlement (to which all parties including Empire agreed), Empire dropped its request for "margin" or "profit," but did so without prejudice. Empire now attempts to reinstate that claim but its request for interim relief substantially exceeds any claim of "lost margin." Moreover, the recent Missouri Gas Energy case (also an AAO arising out of the same tornado damage), soundly rejected that utility's claim for "ungenerated revenue."

It does deserve note that Empire counsel chose to waive challenge through cross-examination of MEUA's witness Mr. Rackers^{5/} and all Staff witnesses. This material, that was prepared in response to Empire's designation of material that was

^{4/} (...continued)

sponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

Bluefield Water Works v. Pub. Serv. Comm. of West Va., 262 U.S. 679, 692-93 (1923) (internal citations omitted).

^{5/} MEUA Exhibit 1.

claimed to be pertinent to the interim request, was admitted into the record without challenge.^{6/}

II. Argument.

A. Is Empire facing a financial emergency or near emergency that warrants the Commission authorizing it to implement an interim-subject-to refund rate increase pending implementation of final general rates in this case?

1. Empire Has Received Relief In The Form of An Accounting Authority Order.

On or about June 6, 2011 Empire applied for an AAO.^{7/} The AAO requested was for recovery of the involved expenses and losses over a five-year period.^{8/} Following negotiation with the Staff, Public Counsel and other parties (including MEUA), the Commission accepted a Unanimous Stipulation and Agreement in an

^{6/} Tr. 128-29.

^{7/} MEUA Exhibit 2

^{8/} The Application stated:

In addition, Empire requests that it be authorized to begin amortization of and recover the involved expenses and losses, which are deferred and recorded in Account 182.3, over a five-year period, commencing with the effective date of rates approved by the Commission in the first electric rate case following Case No. ER-2011-0004.

MEUA Exhibit 2, p. 6.

Order effective December 7, 2011.^{9/} Authorized representatives of Empire signed this Stipulation.^{10/} The Commission's Order approving the Unanimous Stipulation directed the signatories to comply with the terms of the Stipulation and Agreement.^{11/}

Among other things, the Unanimous Stipulation and Agreement reflected Empire's agreement to the following:

This Agreement is being entered into solely for the purpose of settling the issues in this case.^{12/}

Accordingly, while MEUA will continue to respond in this pleading to some of the specifics of Empire's failure of proof, it is our position that Empire applied for, negotiated and received relief that was adequate to protect its interests. If the Unanimous Stipulation and Agreement, including its amortization provisions, was unsatisfactory to Empire, it should not have accepted the Unanimous Stipulation and Agreement. As such, many of the issues in this case have already been settled and that Settlement approved by the Commission.

As a part of the Unanimous Stipulation and Agreement, Empire agreed to, and did, withdraw its request for the "lost fixed cost components" of Empire's rates.^{13/} Empire witnesses acknowledged that Empire's representative was authorized to

^{9/} MEUA Exhibit 3.

^{10/} MEUA Exhibit 3, Appendix A, p. 4.

^{11/} MEUA Exhibit 3, p. 5.

^{12/} MEUA Exhibit 3, p. 3.

^{13/} MEUA Exhibit 4.

submit or file that withdrawal. That sole issue, namely Empire's claimed "lost fixed costs components," insofar as we are aware, is the only matter that was **excluded** from Empire's original request for an AAO.

Empire's interim request, thus, should be confined to its request for "lost fixed cost components" of Empire's rates, which is nothing more than a request to be paid for ungenerated revenue. A similar claim was soundly rejected by the Commission in the recent Missouri Gas Energy Case.^{14/}

Again, had Empire been dissatisfied with the resolution and relief it received in the form of the AAO, it should not have accepted the Unanimous Stipulation and Agreement. But having done so, the issues in this matter, save the sole issue of "lost fixed cost components" ought to be dismissed as an effort to relitigate a settled case. Empire could have sought relief from the Unanimous Stipulation and Agreement but did not, has not, and we believe that avenue is now closed to Empire.

In its Notice of Intended Case Filing of April 16, 2012 (just 4 months after the AAO Stipulation was approved by the

^{14/} *In re Missouri Gas Energy*, Case No. GU-2011-0392, Conclusions of Law, Section IV, B. Quoting Mr. Rackers from that Commission decision:

Ungenerated revenue never has existed, never does exist and never will exist. Revenue no generated, from service no provided, represents no exchange of value. There is neither revenue nor cost to record, in the current period or any other.

MEUA Exhibit 1, Rackers, p. 5.

Commission) Empire announced that it would file "revised tariffs designed to increase rates for electric service" as early as July 1, 2012.^{15/} This notice was also submitted by authorized representatives of Empire. This notice does not include any reference to a request for an interim revenue increase nor does it contain any allegations or assertions that Empire is in an "emergency" or "near-emergency" situation.^{16/}

Empire's witnesses Beecher and Walters seemed to recognize the existence of the AAO but appeared to give it short shrift.

2. Empire's Proof Falls Short.

Without prejudice to the foregoing statement, MEUA will briefly discuss the utter absence of proof from Empire of an "emergency," "near-emergency," or even a stressed financial condition.

a. Empire Does Not Assert An Emergency Or Near-Emergency Condition.

To support its interim request, Empire offers the testimony of Witnesses, Beecher, Walters, Keith and Sager. Mr. Beecher's testimony is essentially a summary of the other witnesses' testimony but fails to mention the Accounting Authority Order that Empire has already received.

^{15/} MEUA Exhibit 5, p. 1.

^{16/} MEUA Exhibit 5. Staff Exhibit 7, Oligschlaeger, p. 5-6.

In cross-examination, Mr. Beecher acknowledged the mitigating effects that this AAO continues to have on Empire. The AAO allows operation and maintenance expense recovery associated with the tornado.^{17/} Mr. Beecher noted that the AAO also allowed Empire to defer depreciation expenses associated with plant additions resulting from the tornado.^{18/} Mr. Beecher testified that all direct costs associated with the tornado "that we could identify" have been deferred.^{19/} Mr. Beecher acknowledged that expenses associated with the operation and maintenance expenses and capital additions "are protected."^{20/} Mr. Beecher acknowledged that Empire was not unable to provide safe and adequate service.^{21/}

Mr. Keith simply sponsors the interim tariffs and does not provide support for the interim request beyond that. Mr. Sager complains that Empire's earnings were less than satisfactory before the tornado and that the damage repair has made that worse.

Ms. Walters offers the only testimony that really addresses the issue. However, she admitted during cross-examination that Empire was nowhere near an emergency situation.^{22/}

^{17/} Tr. p. 84, 11.5-6.

^{18/} Tr. p. 84, 11. 11-14.

^{19/} Tr. p. 85, 11. 4-5.

^{20/} Tr. p. 85, 11. 9-12; MEUA Exhibit 1, Rackers, p. 3.

^{21/} Tr. p. 89, 11. 7-8.

^{22/} Tr. p. 107, 11. 2-9; Tr. p. 110, 11. 7-13.

Moreover, Ms. Walters testified that even if interim relief was not granted by the Commission, that Empire would remain able to provide safe and adequate or reliable service.^{23/} She also testified that all costs would be recovered through the AAO process unless the Commission does not approve them for recovery.^{24/}

According to her testimony Empire was down in customer count by less than one percent -- certainly not sufficient to cause the utility to be financially imperilled. It certainly does not justify extraordinary relief.

Empire now claims at the hearing that it should be judged, not on the emergency standard, but rather on the standard rate case evidence. Yet there was no investigation and no opportunity to make one, no consideration of all relevant factors. Indeed Staff strongly suggested that not only had Empire not experienced a downturn in revenues that, instead, its revenues might actually have gone up because of the influx of relief and repair personnel in Empire's service area. Moreover, there are a large number of factors that are relevant to the consideration of whether a utility in Missouri should receive a rate increase. While in the course of events in this case and the investigation by Staff and other parties might show the need for some increase in Empire's rates, that has assuredly not been shown at this point and those factors still require investiga-

^{23/} Tr. p. 107, ll. 4-9.

^{24/} Tr. p. 109, ll. 12-25.

tion. Empire counsel's argument is nothing more than an effort to shift the standard and accelerate rate relief when that increase has simply not been shown to be needed.

b. Interim Relief Period Does Not Allow For Full Investigation, Hence Should Be Reserved for Emergencies.

Based on Empire counsel's opening statement, Empire now wants to view this case as something other than an "emergency" or "near-emergency" request and, instead, should view it as what would be a "reasonable" increase to give Empire ahead of time while the permanent case remains pending and is undergoing audit.^{25/} Nevertheless, Under the *UCCM* case^{26/}, the Commission must give consideration to all relevant factors in a rate case. Empire's Interim Request does not do this.

The Commission properly takes as much as 11 months to review permanent rate increases. A shortcut, bootstrap, procedure, which is what Empire seeks, does not allow time for full exploration and investigation of all relevant factors.^{27/} Hence interim relief should be limited to circumstances in which the utility is experiencing an emergency or near-emergency in

^{25/} Tr. p. 26, ll. 5-6; Tr. p. 27, ll. 7-11

^{26/} *State ex rel. Utility Consumers Council of Missouri, Inc., Petitioner--Appellant, and William M. Barvick, Public Counsel, Intervenor--Appellant, v. Public Service Commission of Missouri*, 585 S.W.2d 41 (Mo. 1979) ("UCCM").

^{27/} Staff Exhibit 7, Oligschlaeger, p. 4.

which its ability to render safe and adequate service is threatened.^{28/}

c. There Is No Guarantee of Any Particular Equity Return.

Empire District argues through its counsel that it should be given emergency interim relief because its equity return has fallen below the level that Empire might like.^{29/} Again, other issues have already been addressed and relief given in the form of an AAO. That is simply not justification for an interim increase. But we have seen from the *Hope Natural Gas* and *Bluefield Water Works* cases that a public utility is entitled only to an **opportunity** to earn a reasonable return on shareholder investment through prudent management of its assets. There is no guarantee of a particular level of return. It is insufficient if the rate of return is lower than the utility might like, indeed that is commonly the case with rate cases or the utility would not have requested rate relief.^{30/}

^{28/} *Id.* pp. 5-6.

^{29/}
19 Another important consideration in all of
20 this is the fact that Empire is not earning its authorized
21 rate of return.

Tr. p. 26.

^{30/} Staff Exhibit 7, Olischlaeger, pp. 7-9. Mr. Oligschlaeger also quoted from a Commission decision resolving an 1080 Empire interim request as follows:

A mere showing that a company's return is below its previous authorized rate of return has never prompted the Commission to grant

(continued...)

d. Empire's Quantification of Its Claim Is Inaccurate.

Per Staff Witness Oligschlaeger, when a capital addition is placed in service, the cost goes to a plant-in-service account and depreciation accrued is booked to the depreciation reserve account and accumulated deferred income taxes are also booked.^{31/} Mr. Rackers also noted omission of these regulatory accepted offsets to plant investment. In Ms. Walter's surrebuttal, at pages 5 and 6, she recognizes the appropriateness of these offsets, but fails to reflect the reduction in the interim calculation.^{32/} Mr. Rackers also noted that there should be cost savings related to efficiency improvements associated with the new plant additions and thus Empire's calculation of its revenue requirement is overstated.^{33/} This is part of a problem when the time period for case processing is cut short and an investigation of all relevant factors is inchoate.

^{30/} (...continued)

interim rate relief. Such a situation will almost always be the case where a company has pending a permanent request. The mere fact of regulatory lag also does not justify interim relief.

Staff Exhibit 7, Oligschlaeger, p. 9.

^{31/} Staff Exhibit 7, Oligschlaeger, p. 14.

^{32/} MEUA Exhibit 1, Rackers, p. 4.

^{33/} MEUA Exhibit 1, Rackers, p. 4-5.

e. Empire Financial Metrics Strengthened in 2011.

Empire is unable to contend that it is not in an acceptable financial condition. Indeed, its financial metrics even improved in 2011 as compared to 2009 and 2010.^{34/} Based on this analysis, Staff was able to conclude that Empire was well able to provide, and continue to provide, safe and adequate service to its ratepayers.^{35/} Empire continues to have access to the capital markets to obtain any needed financing at reasonable rates.^{36/}

f. To The Extent That Empire Has a Complaint, It Complains Of A Self-Inflicted Injury In That Empire Has Depleted Its Earnings Reserve By Paying Dividends In Excess of Earnings Per Share For Several Years.

Empire showed that the suspension of Empire's dividend appeared to be due to its low retained earnings balance.^{37/} However, this is a self-inflicted injury, as Empire has had a "long history of tending to pay out more annually in dividends than its annual earnings."^{38/} As Staff Witness Oligschlaeger testified, these are actions that are inconsistent with a finan-

^{34/} MEUA Exhibit 1, Rackers, p. 6.

^{35/} MEUA Exhibit 1, Rackers, p. 6.

^{36/} MEUA Exhibit 1, Rackers, p. 7.

^{37/} Staff Exhibit 7, Oligschlaeger, p. 18.

^{38/} Staff Exhibit 7, Oligschlaeger, p. 18.

cial emergency.^{39/} Actions he noted that would be included were freezing salaries and delaying or even cancelling construction projects to conserve financial resources.^{40/}

g. Empire Does Not Seem Sufficiently Concerned Regarding Its Claimed Financial Condition As To Adopt An "Austerity Plan."

Per Empire's response to Staff Data Request No. 120 (admitted to the record as MEUA Exhibit 6), Ms. Walters acknowledged that "[t]he Company does not have a formal written austerity or economy plan designed to reduce expenses and/or cash outflows below the results produced by normal operations."^{41/} In other words, its business as usual for Empire. This does not mark the behavior of a utility that is in a true "emergency" or approaching an "emergency" financial situation. In fact, Empire witness Beecher testified that he still received incentive compensation of \$250,000.^{42/} And Ms. Walters expressed some surprise regarding the amount of \$250,000, but did not remember the actual amount of the award.^{43/}

^{39/} Staff Exhibit 7, Oligschlaeger, p. 18.

^{40/} *Id.*

^{41/} MEUA Exhibit 6, p. 3.

^{42/} Tr. p. 92, ll. 20-25.

^{43/} Tr. p. 111-112, ll. 19-[112]1.

h. While The Joplin Community May Be Deserving of Sympathy, Empire District Is Not.

One concern that MEUA has is that well-deserved sympathy for the Joplin community will be allowed to overcome good judgment and applicable precedents, both judicial and administrative. In my opening remarks I referred to the old saying that "hard cases make bad law." Certainly there was large scale damage in the Joplin community and no one -- certainly not MEUA -- seeks to diminish the role that Empire played in bringing the community back and in continuing to provide service. Indeed, this was recognized through the agreement to an AAO. But Empire did that and, as will be discussed infra, without significant objection was provided with extraordinary relief in the form of an Accounting Authority Order ("AAO"). Empire, however, appears to seek more, but it has not shown the requisite circumstances that would support interim relief.

B. Do Empire's tornado recovery costs and post-tornado cost of service due to the May 2011 Joplin tornado warrant the Commission authorizing it to implement an interim subject-to-refund rate increase pending implementation of final general rates in this case?

The short answer to this request is no. All these costs are being deferred and will be recovered in due course through the AAO that Empire requested, received and accepted. There is no basis for interim relief and Empire has not shown any basis for such relief to be granted.

C. Is there any other basis(es) that warrants the Commission authorizing Empire to implement an interim-subject-to-refund rate increase pending implementation of final general rates in this case?

Empire has shown no such basis. Moreover, cross-examination of Empire's witnesses on this issue demonstrated that Empire has not met the tests for interim relief. It is neither stressed financially, in an "emergency" condition, nor even in a "near emergency" condition.

D. If the answer to 1[A], 2[B] or 3[C] is "yes," what should be the amount of the interim-subject to-refund rate increase, and what conditions, if any, should the Commission impose on it?

As in its Statement Of Position, MEUA does not believe that the answer to any of the questions is or should be "yes" and that the only appropriate relief in these circumstances is to dismiss or reject the interim relief request. Given that MEUA believes that relief should NOT be granted on any basis to Empire, a question regarding what conditions should be applied to interim relief does not apply.

III. Conclusion.

Empire has not shown that it should receive interim accelerated relief. The AAO that was previously granted to Empire allows the deferral and recovery of all legitimate operation and maintenance and capital costs associated with recovery of the Empire service territory from the effects of the tornado. If Empire was dissatisfied with the result from its AAO applica-

tion wherein it received what it requested with the sole exception of lost profits, it should have sought relief from that Stipulation and from the Commission's Order approving same. It is inappropriate to allow the utility -- alone -- to unilaterally abrogate this Stipulation that Staff and other parties accepted along with Empire.

This application for interim relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has provided a copy of the foregoing pleading to all attorneys of record herein as identified on the Commissions' EFIS.



An attorney for the Midwest Energy
Users' Association