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AUG 3 0 2001

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Public
Service Commission

In the matter of the Application of)
The Empire District Electric Compa-)
ny for authority to file tariffs)
reflecting increased charges for)
electric service within its Mis-)
souri service area)

Case No. ER-2001-299

INTERVENOR PRAXAIR'S INITIAL BRIEF
ON TRUE-UP ISSUES

I. INTRODUCTION.

Intervenor Praxair will limit its comments to the property tax issue that was heard on August 23, 2001. Praxair supports the approach taken by the Staff.

The Commission will recall that, at a much earlier stage of this proceeding, counsel for Praxair commented on the extensive use of the true-up process to reach well beyond the end of the test year.^{1/} In this situation, the utility is seeking to charge ratepayers beginning in October, 2001, with costs that it will not pay until late December, 2002, or over a year from now. This is plainly unreasonable.

^{1/}Transcript Vol. 5, pp. 118-20.

II. ARGUMENT.

A. The Commission Has Already Established the Boundary Conditions for the True-Up Period; Those Boundary Conditions Should Be Maintained.

In its January 4, 2001 Order Setting Test Year, the Commission set the basic dates and parameters for this case. A test year ending December 31, 2000 was established, subject only to adjustment for known and measurable change through June 30, 2001 so as to include Empire's new SLCC plant. An **additional** period through July 31, 2001 was permitted for booking of final invoices on the plant.

Those dates were selected at the insistence of Empire District, and with the agreement of the parties so that Empire could seek inclusion of the costs of its new SLCC generating plant, **incurred through June 30, 2001**, in the rates to be implemented in October. Already with the true-up schedule, the matching concept was being strained to the maximum. In its January 4, 2001 Order, the Commission even recited the issues that were to be affected, including explicitly "income and property taxes." p. 3.

Contrary to its earlier agreements, Empire now argues that it should be able to begin in October, 2001 charging ratepayers with the costs of property taxes on the plant that **Empire will not pay until December, 2002.**

B. Empire Will Be Allowed to Recover Property Taxes Through Capitalization Into Plant In Service.

It is not as though Empire is being denied the ability to recover property taxes related to the new plant. Property taxes for the year 2000, paid in December of last year, were capitalized (added to the rate base for the new plant) and Empire is allowed to earn a return on and (through depreciation) return of the investment of that plant -- recovery that begins in October, 2001 with its new rates.^{2/}

C. Inclusion of Additional Property Taxes Would Violate the Matching Principle and Constitute Single Issue Ratemaking.

Missouri's property tax system is somewhat confusing, but well known to most Missourians. Property taxes are assessed on property that is owned as of January 1 of a given year. However, the tax rate and thus the total amount due is not typically calculated by county taxing authorities until October or November and tax bills are issued payable through December of that year. Given these facts, it is not disputed that Empire will not even be assessed, much less charged, property tax on the value of the new plant until January 1, 2002, a date that is well beyond the June 30, 2001 or July 31, 2001 dates established by the Commission in its January 4, 2001 Order, and 15 months beyond the operation of law date for the rates filed in this case. Thus,

^{2/}Boltz, Ex. 123, pp. 7-8.

Empire seeks to obtain current recovery of an expense that it will not incur until nearly 15 months after the operation of law date in this case. This attempt should be rejected.

Additionally, the Commission is wisely constrained both by law and good policy to avoid "single issue ratemaking." By reaching out roughly 15 months into the future to include one cost item, other cost items that could well have changed to ratepayer benefit are ignored. This would violate Missouri law. *State ex rel. Utility Consumers Council of Missouri, Inc.*, 585 S.W.2d 41 (Mo. en banc 1979) ("UCCM"). Even if it were not unlawful it would be bad public policy because it would result in further dilution of the test year concept, further frustrate the matching principle and would result in hundreds of disputes in many rate cases as to what was permissible. The utilities would certainly seek to recover expenses that they would contend were increasing; other parties would have to disprove such assertions and that would make for an unequal and often frustrating contest.

Robert Frost (1874-1963), in "Mending Wall" penned the famous line that "Good fences make good neighbours." Drawing a line often creates controversy and it may in circumstances be difficult to see "what I was walling in or walling out." *Id.* In other cases, as here, the reason for the demarcation is clear; the line, once drawn, simply requires respect. Empire's proposal should be rejected.

D. The Property Tax Cost To Be Paid In December, 2002 Does Not Meet the Known and Measurable Test.

Empire will pay tax in December, 2001, but that payment will be based on the valuation of the "pieces of the State Line equipment" that were assessed on January 1, 2001. Tr. 1143. That tax payment has been capitalized and will be included in the rate base booked to plant in service. Tr. 1145. The exact amount of even that payment -- the one to be made just four months from now -- is not known to Empire. Tr. 1147.

Empire appeared to argue that the amount of the 2002 tax was "known and measurable" simply by using last year's tax rate and adjusting for the increased value to the plant. An analogy to the purchase of a home was also referenced. Neither is applicable.

Empire Witness Gibson testified that he would not know the actual amount of property taxes payable on the new unit until December, 2002. Tr. 1149-50. There are several reasons that the amount of the tax that is payable in December, 2002 is not "known and measurable" in August, 2001. These include the following:

- o tax authorities will not seek approval of their projected budgets for 2003, the budget year that will be funded with taxes paid in December, 2002, until mid-2002. Those decisions will determine the levy rates that will be applied to the assessed value.^{3/}

^{3/} Q. Okay. Thank you.
I take it you would agree with me that although taxes may be certain, the amount and the timing may not always be?

(continued...)

- o Once advised of the assessed value that has been applied to the new plant as of January 1, 2002, Empire may contest that assessment through informal adjustments, tax challenges, the county board of equalization and ultimately the State Tax Commission.^{4/} While such "appeals" are often unsuccessful for homeowners, there are so many variables involved in assessing a power plant that there is considerable room for dispute and settlement of an assessed value, including the effect of depreciation. A completely different set of books will be used.
- o The value of the plant that is included in the current assessed value (as of January 1, 2000) and was and will be taxed to Empire (and capitalized in its rate base) will be based on a levy that will return certain revenue to the taxing authority. Under Missouri's Hancock Amendment, a substantial increase in assessed value for a county will require that the taxing authorities reduce the levy rates to conform to the Hancock Amendment.^{5/} While a generalized increase in assessed val-

^{3/}(...continued)

A. That's absolutely true.

Transcript, Vol. 11, pp. 1144 (Gibson).

^{4/} [P]roperty is never truly assessed nor finally equalized until the taxpayer appeals permitted by statute are decided and any needed corrections made.

Scholle v. Carrollton R-VII School District, 771 S.W.2d 336, 338 (Mo. en banc 1989).

^{5/}Mo. Const., Article 10, Section 22(a) in part provides:

If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

ue throughout a county might arguably result in a corresponding decrease in levy rates such that an individual taxpayer's tax might not change significantly, that may not be the case with the substantial increase in plant value for Empire; that increase is obviously going to be disproportional to other increases in assessed value across the county such that the final levy rates and the amount of tax that Empire will pay in December, 2002 **are simply not "measurable" for ratemaking purposes.**

Moreover, the Hancock Amendment requires that the "increase in general price level" from the prior year be determined, a value that currently is not available and will not be available until shortly before the respective taxing authorities address the setting of their respective levies.^{6/}

While the fact of the tax is "known," in that Empire will pay a property tax in December, 2002 based on the value of the plant yet to be assessed on January 1, 2002, the amount of that tax is not now "measurable." While an "estimate" may certainly be made, each year's tax, the initial assessment and the resultant tax levy and payment "is a separate transaction and each action relating to each year's tax is a new transaction." *Defender's Townhouse, Inc. v. Kansas City*, 441 S.W.2d 365 (Mo. 1969).

^{6/}Development of the law under the Hancock Amendment is far from complete. Some of the implications of Article X, Section 22(a) are discussed in *Scholle v. Carrollton R-VII School District*, 771 S.W.2d 336 (Mo. 1989) (where a levy had been reduced pursuant to the Hancock Amendment, a subsequent year's levy could be increased without voter approval from the reduced level, but not in excess of the original level).

The common property sale and tax apportionment transaction are not particularly helpful. Typically in such transactions, the parties agree **by contract** to a proration of the property taxes using the most current tax bill, and often based on the fractional year of ownership. Regardless, the new owner of the property is responsible for payment of the levy. That the actual tax payment may differ from the prior year's tax, the excess or shortfall is still the responsibility of the new owner. This is a risk-apportioning device, not a regulatory principle. The situation before the Commission, however, is not governed by contract or the agreement of the parties.

Not only would it be unreasonable to charge October's ratepayers with costs not incurred until December, 2002, it is quite likely that the ratepayers would be overpaying if the tax rates and assessed value are "estimated." Asked whether he was aware of any impending levy reductions, Empire Witness Gibson testified that Empire would be happy to have a reduction in the tax to be paid.^{2/} Certainly Empire would if the proposed inclusion were granted, since Empire would be able to retain the difference while the ratepayers paid at the higher level.

^{2/} [W]e would be more than happy to take any reductions that [various taxing jurisdictions] would be willing to throw our way.

E. The Staff Proposal Should be Adopted.

Staff Witness Boltz has it right. He stated that he had calculated the property tax annualization based upon how the taxing authorities assess and how Empire pays the taxes. Boltz, Ex. 123, p. 3. Typical normalization processes are not appropriate for these taxes because of the "unique" nature of how property taxes in Missouri are determined. Id. Moreover, Mr. Boltz noted:

No other expense item is being considered for inclusion in this case by the Staff or even Empire itself to go out to anytime in 2002.

It is important to note that the property taxes that Empire will pay on or about December 31, 2001, represents the level of plant at January 1, 2001 which is the exact time period which the Staff used to calculate its property tax annualization in this case.

Boltz, Ex. 123, pp. 3-4 (emphasis added). He later added that "property taxes that are not 'known and measurable' until 2002 do not constitute a proper or appropriate inclusion into the cost of service in this case." Id. at p. 6.

Mr. Boltz also noted that Empire's estimates in the past had varied both up and down from the actual tax expenses and that there was no June 30, 2001 tax assessment. Id. at p. 8.

The Commission should reject Empire's proposed adjustment. It is not only unlawful, it is also simply inappropriate and unreasonable to charge October, 2001 ratepayers with costs that Empire will not pay out until December, 2002 and that even Empire admits are not even properly quantifiable at this time.

Respectfully submitted,

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ATTORNEYS FOR PRAXAIR, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by hand delivery, First Class US Mail or electronic means upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: August 30, 2001



Stuart W. Conrad, Esq.
An attorney for Praxair Inc.