

12

**FILED**

**SEP 13 2012**

**Missouri Public  
Service Commission**

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 30<sup>th</sup> day of November, 2011.

In the Matter of the Application of The Empire District Electric Company for the Issuance of an Accounting Authority Order Relating to its Electrical Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2) ) File No. EU-2011-0387

**ORDER APPROVING AND INCORPORATING  
UNANIMOUS STIPULATION AND AGREEMENT**

Issue Date: November 30, 2011

Effective Date: December 7, 2011

**Background**

On June 6, 2011, The Empire District Electric Company ("Empire") filed an application for an Accounting Authority Order ("AAO") that would allow Empire to undertake certain accounting procedures in connection with its electrical operations in relation to the damage caused by the May 22, 2011 tornado that struck the City of Joplin, Missouri. The Commission directed notice and established an intervention deadline. Praxair, Inc. and Explorer Pipeline Company intervened. On November 15, 2011, following extensive negotiations, the parties filed a Stipulation and Agreement ("Agreement") purporting to resolve all issues in this matter. All of the parties are signatories to the Agreement and no party has requested a hearing in this matter.

**The Agreement**

In addition to a contingent waiver of rights in the Agreement, the Signatories request the Commission to enter an order that includes the following:

MEUA Exhibit No. 3  
Date 9-10-12 Reporter KF  
File No. EE-2012-0345

a. Authorizes Empire to defer actual incremental Operations & Maintenance expenses associated with repair, restoration, and rebuild activities associated with the May 22, 2011, tornado, and depreciation and carrying charges equal to its ongoing Allowance for Funds Used During Construction rates associated with tornado-related capital expenditures, to Account 182.3, Other Regulatory Assets. This deferral shall not include any difference in charges applicable under Empire's currently effective tariff and any modified tariff that reduces or limits the charges applicable to its customers or developers in connection with restoring or establishing service.

b. Nothing in the Commission's order shall be considered a finding by the Commission of the reasonableness of the costs and/or expenditures deferred, and the Commission reserves the right to consider the ratemaking treatment to be afforded all deferred costs and/or expenditures, including the recovery of carrying costs, if any.

c. Any insurance claim proceeds or government payments or credits applicable to incremental operation and maintenance expense or capital expenditures shall be used to offset the total amount of costs to be deferred.

d. If Empire has not filed an electric general rate case in Missouri by June 1, 2013, then Empire shall write off without rate recovery any deferrals it has already booked.

e. If Empire files an electric general rate case in Missouri by June 1, 2013, then Empire shall ratably amortize to Account 182.3 over a ten-year (120-month) period any deferrals it has already booked, beginning on the earlier of: 1) the effective date of new rates implemented in its next general rate increase case or rate complaint case; or 2) June 1, 2013.

f. Empire shall maintain detailed supporting records, work papers, invoices and other documents to support the amount of costs deferred under this AAO, including any related deferred taxes recorded as a result of the cost deferral. Such records shall include controls in place to ensure all expenditures were reasonable and necessary, detailing food and lodging costs, labor and material costs, procedures and verification for expense versus capitalization determinations, and determination of incremental levels of such costs versus normal ongoing levels of costs. Such records shall be made available for review by Staff, Public Counsel, and other intervenors, pursuant to 4 CSR 240-2.085 and Section 386.480.

Empire also agreed to work with parties as the end of the amortization period approaches to develop a mechanism that ensures Empire does not over or under recover the deferred

amounts. And finally, Empire filed a pleading in this docket withdrawing, without prejudice, that portion of its application that seeks authority to defer the lost fixed cost components of Empire's rates.

### **Analysis and Decision**

Missouri courts have recognized the Commission's regulatory authority to grant a form of relief to a utility in the form of an AAO "which allows the utility to defer and capitalize certain expenses until the time it files its next rate case."<sup>1</sup> "The AAO technique protects the utility from earnings shortfalls and softens the blow which results from extraordinary construction programs."<sup>2</sup> "However, AAOs are not a guarantee of an ultimate recovery of a certain amount by the utility."<sup>3</sup> The AAO "simply allows for certain costs to be separately accounted for *possible* future recovery in a future ratemaking proceeding."<sup>4</sup> "This is not retroactive ratemaking, because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being considered to set rates to be charged in the future."<sup>5</sup> Although the courts have recognized the Commission's authority to authorize an AAO in extraordinary and unusual

---

<sup>1</sup> *State ex rel. Aquila, Inc. v. Public Service Comm'n of State*, 326 S.W.3d 20, 27 (Mo. App. 2010). See also Section 393.140, RSMo 2000. Additionally, Commission Rule 4 CSR 240-20.030(1) requires electric utilities to keep all accounts in conformity with the Uniform System of Accounts prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act. However, section (4) of the rule provides that in prescribing this system of accounts the Commission is not committing itself to the approval or acceptance of any item set out in any account for the purpose of fixing rates or in determining any other matter.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *State ex rel. Office of Public Counsel v. Missouri Public Service Comm'n*, 301 S.W.3d 556, 570 (Mo. App. W.D. 2009).

<sup>5</sup> *Id.*

circumstances, there is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to any particular set of circumstances.<sup>6</sup>

The Commission has discretion in prescribing accounting methods and forms of accounts, records and memorandum kept by an electrical corporation without conducting a hearing.<sup>7</sup> Nevertheless, the Commission issued notice in this matter and allowed interested entities to intervene and request a hearing. No hearing was requested.<sup>8</sup> Instead, the parties filed the unanimous Agreement. The Agreement waives any procedural requirements that would otherwise be necessary before final decision.<sup>9</sup> Also, because the settlement disposes of this action, the Commission need not separately state its findings of fact.<sup>10</sup>

Based on the Commission's independent and impartial review of the unopposed Agreement, the Commission finds that the Agreement is consistent with the public interest and shall approve it. Therefore, the Commission incorporates the terms of the Agreement into this order.

---

<sup>6</sup> Section 393.140, RSMo 2000. Extraordinary has been defined as meaning of a nonrecurring nature, and unusual has been defined as meaning a substantial cost. *Missouri Gas Energy v. Public Service Comm'n*, 978 S.W.2d 434, 437 (Mo. App. 1998); *State ex rel. Office of Public Counsel v. Public Service Comm'n*, 858 S.W.2d 806, 811 (Mo. App. 1993).

<sup>7</sup> The courts have not decided the issue of whether Section 393.140(4) (which does not require a hearing) or Section 393.140(8) (which does require a hearing) controls the grant of an AAO. *State ex rel. Public Counsel v. Public Service Commission*, 858 S.W. 2d 806, 809-810 (Mo. App. 1993). The Commission's position is that no hearing is required. *Id.*

<sup>8</sup> The term "hearing" presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with 'opportunity to be heard'. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm'n of State of Mo.*, 776 S.W.2d 494, 495 -496 (Mo. App. 1989). The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence. *Id.*

<sup>9</sup> Section 536.060, RSMo 2000.

**THE COMMISSION ORDERS THAT:**

1. The provisions of the Unanimous Stipulation and Agreement filed are approved and incorporated into this order as if fully set forth. The Signatories shall comply with the terms of the Stipulation and Agreement. A copy of the Stipulation and Agreement is attached to this order as Appendix A.
2. This order shall become effective on December 7, 2011.
3. This file shall be closed on December 8, 2011.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Gunn, Chm., Jarrett, and Kenney, CC., concur;  
Davis, C., absent.

Stearley, Deputy Chief Regulatory Law Judge,

---

<sup>10</sup> Section 536.090, RSMo 2000.

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

In the matter of The Empire District Electric )  
Company for the Issuance of an Accounting )  
Authority Order Relating to its Electrical )  
Operations and for a Contingent Waiver of the )  
Notice Requirement of 4 CSR 240-4.020(2) )

**File No. EU-2011-0387**

**STIPULATION AND AGREEMENT**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), The Empire District Electric Company, (“Empire”), the Office of the Public Counsel (“Public Counsel”), Praxair Inc., and Explorer Pipeline Company and for their *Stipulation and Agreement* respectfully state as follows to the Missouri Public Service Commission (“Commission”):

1. The signatories have reached agreement as to resolution of this matter on the terms contained in this document.
2. The signatories request that the Commission enter an order that includes the following:
  - a. Authorizes Empire to defer actual incremental Operations & Maintenance expenses associated with repair, restoration, and rebuild activities associated with the May 22, 2011, tornado, and depreciation and carrying charges equal to its ongoing Allowance for Funds Used During Construction rates associated with tornado-related capital expenditures, to Account 182.3, Other Regulatory Assets. This deferral shall not include any difference in charges applicable under Empire’s currently effective tariff and any modified tariff that reduces or limits the charges applicable to its customers or developers in connection with restoring or establishing service.

- b. Nothing in the Commission's order shall be considered a finding by the Commission of the reasonableness of the costs and/or expenditures deferred, and the Commission reserves the right to consider the ratemaking treatment to be afforded all deferred costs and/or expenditures, including the recovery of carrying costs, if any.
- c. Any insurance claim proceeds or government payments or credits applicable to incremental operation and maintenance expense or capital expenditures shall be used to offset the total amount of costs to be deferred.
- d. If Empire has not filed an electric general rate case in Missouri by June 1, 2013, then Empire shall write off without rate recovery any deferrals it has already booked.
- e. If Empire files an electric general rate case in Missouri by June 1, 2013, then Empire shall ratably amortize to Account 182.3 over a ten-year (120-month) period any deferrals it has already booked, beginning on the earlier of:
  - 1) the effective date of new rates implemented in its next general rate increase case or rate complaint case; or
  - 2) June 1, 2013.
- f. Empire shall maintain detailed supporting records, work papers, invoices and other documents to support the amount of costs deferred under this AAO, including any related deferred taxes recorded as a result of the cost deferral. Such records shall include controls in place to ensure all expenditures were reasonable and necessary, detailing food and lodging costs, labor and material costs, procedures and verification for expense versus capitalization determinations,

and determination of incremental levels of such costs versus normal ongoing levels of costs. Such records shall be made available for review by Staff, Public Counsel, and other intervenors, pursuant to 4 CSR 240-2.085 and Section 386.480.

3. Empire agrees to work with parties as the end of the amortization period approaches to develop a mechanism that ensures Empire does not over or under recover the deferred amounts.

4. Contemporaneously with the filing of this Stipulation and Agreement, Empire will file a pleading in this docket withdrawing, without prejudice, that portion of its application that seeks authority to defer the lost fixed cost components of Empire's rates.

5. General provisions:

Contingent Waiver of Rights

This Agreement is being entered into solely for the purpose of settling the issues in this case. Unless otherwise explicitly provided herein, none of the signatories shall be deemed to have approved or acquiesced in any ratemaking or procedural principle, including, without limitation, any method of cost determination or cost allocation or revenue-related methodology. Except as explicitly provided herein, none of the signatories shall be prejudiced or bound in any manner by the terms of this Agreement in this or any other proceeding regardless of whether this Agreement is approved.

This Agreement has resulted from extensive negotiations among the parties, and the terms hereof are interdependent. If the Commission does not approve this Agreement unconditionally and without modification, then this Agreement shall be void and no signatory shall be bound by any of the agreements or provisions hereof.

If the Commission does not approve this Agreement without condition or modification, and notwithstanding the provision herein that it shall become void, (1) neither this Agreement nor any matters associated with its consideration by the Commission shall be considered or argued to be a waiver of the rights that any signatory has for a decision in accordance with RSMo. §536.080 or Article V, Section 18 of the Missouri Constitution, and (2) the signatories shall retain all procedural and due process rights as fully as though this Agreement had not been presented for approval, and any suggestions, memoranda, testimony, or exhibits that have been offered or received in support of this Agreement shall become privileged as reflecting the substantive content of settlement discussions and shall be stricken from and not be considered as part of the administrative or evidentiary record before the Commission for any purpose whatsoever.

In the event the Commission accepts the specific terms of this Agreement without condition or modification, the signatories waive their respective rights to present oral argument and written briefs pursuant to RSMo. §536.080.1, their respective rights to the reading of the transcript by the Commission pursuant to §536.080.2, their respective rights to seek rehearing pursuant to §536.500, and their respective rights to judicial



review pursuant to §386.510. This waiver applies only to a Commission order approving this Agreement without condition or modification issued in this proceeding and only to the issues that are resolved hereby. It does not apply to any matters raised in any prior or subsequent Commission proceeding nor any matters not explicitly addressed by this Agreement.

Right to Disclose

The Staff may file suggestions or a memorandum in support of this Agreement. Each of the parties shall be served with a copy of any such suggestions or memorandum and shall be entitled to submit to the Commission, within five (5) days of receipt of Staff's suggestions or memorandum, responsive suggestions or a responsive memorandum, which shall also be served on all parties. The contents of any suggestions or memorandum provided by any party are its own and are not acquiesced in or otherwise adopted by the other signatories, whether or not the Commission approves and adopts this Agreement.

**WHEREFORE**, the Signatories respectfully submit this *Stipulation and Agreement* and respectfully request that the Commission enter an order as described in paragraph 2.

Respectfully submitted,

**THE EMPIRE DISTRICT ELECTRIC COMPANY**

/s/ James C. Swarengen

James C. Swarengen MBE 21510  
Attorney for  
The Empire District Electric Company  
312 East Capitol Avenue  
P.O. Box 456  
Jefferson City, MO 65102  
Phone: (573) 635-7166  
Fax: (573) 635-7431  
E-mail: lrackers@brydonlaw.com

**OFFICE OF THE PUBLIC COUNSEL**

/s/ Lewis R. Mills, Jr.

Lewis R. Mills, Jr. MBE 35275  
Public Counsel  
P.O. Box 2230  
Jefferson City, MO 65102  
Phone: (573) 751-1304  
Fax: (573) 751-5562  
E-mail: lewis.mills@ded.mo.gov

**THE STAFF OF THE  
MISSOURI PUBLIC SERVICE COMMISSION**

/s/ Sarah Kliethermes

Sarah L. Kliethermes MBE 60024  
Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
Phone: (573) 751-2690  
Fax: (573) 751-6726  
E-mail: sarah.kliethermes@psc.mo.gov

**PRAXAIR, INC AND  
EXPLORER PIPELINE COMPANY**

/s/ Stuart W. Conrad

Stuart W. Conrad MBE 23966  
David L. Woodsmall MBE 40747  
Attorneys for Praxair, Inc, and  
Explorer Pipeline Company  
1209 Penntower Office Center  
3100 Broadway  
Kansas City, Missouri 64111  
Phone: (816) 753-1122  
Fax: (816) 756-0373  
E-mail: stucon@fcplaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 15<sup>th</sup> day of November, 2011.

**/s/ Sarah Kliethermes**

**STATE OF MISSOURI**

**OFFICE OF THE PUBLIC SERVICE COMMISSION**

**I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.**

**WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 30<sup>th</sup> day of November 2011.**



A handwritten signature in black ink, appearing to read "Steven C. Reed".

---

**Steven C. Reed**  
**Secretary**

**MOPSC**

Digitally signed by MOPSC  
DN: cn=MOPSC, o=Public  
Service Commission,  
ou=Missouri, email=DataCenter-  
PSC@psc.mo.gov, c=US  
Date: 2011.11.30 11:47:55 -06'00'

**MISSOURI PUBLIC SERVICE COMMISSION**

**November 30, 2011**

File/Case No. EU-2011-0387

**Missouri Public Service  
Commission**

Sarah Kliethermes  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
sarah.kliethermes@psc.mo.gov

**Missouri Public Service  
Commission**

Office General Counsel  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
GenCounsel@psc.mo.gov

**Office of the Public Counsel  
Lewis Mills**

200 Madison Street, Suite 650  
P.O. Box 2230  
Jefferson City, MO 65102  
opcservice@ded.mo.gov

**Praxair, Inc.**

Stuart Conrad  
3100 Broadway, Suite 1209  
Kansas City, MO 64111  
stucon@fcplaw.com

**Empire District Electric  
Company, The**

Dean L Cooper  
312 East Capitol  
P.O. Box 456  
Jefferson City, MO 65102  
dcooper@brydonlaw.com

**Empire District Electric  
Company, The**

James C Swearngen  
312 East Capitol Avenue  
P.O. Box 456  
Jefferson City, MO 65102  
LRackers@brydonlaw.com

**Explorer Pipeline**

Stuart Conrad  
3100 Broadway, Suite 1209  
Kansas City, MO 64111  
stucon@fcplaw.com

**Enclosed find a certified copy of an ORDER in the above-numbered matter(s).**

**Sincerely,**



**Steven C. Reed  
Secretary**

---

Individuals listed above with a valid e-mail address will receive electronic service. Individuals listed above without a valid e-mail address will receive paper service.