

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

In the Matter of The Empire District Electric)
Company of Joplin, Missouri for Authority to)
File Tariffs Increasing Rates for Electric)
Service Provided to Customers in the Missouri)
Service Area of the Company)

Case No. ER-2012-0345

REPLY POSTHEARING BRIEF

OF

MIDWEST ENERGY CONSUMERS GROUP

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October 1, 2012

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I. INTRODUCTION

As demonstrated in MECG's Initial Brief, Empire has not met the Commission's emergency standard for interim rate relief. The evidence shows that, despite the May 2011 tornado, Empire has realized increased revenues, record 2011 earnings and an increased retained earnings balance. Furthermore, Empire has received significant financial protection through the issuance of an Accounting Authority Order.

Recognizing its inability to meet either the emergency or extraordinary circumstances standard, Empire has suddenly rejected both of those standards. Instead, Empire argues that, because the interim tariff has been suspended, the Commission is bound to apply the just and reasonable standard. As Section 1 of this Brief indicates, Empire is mistaken. The standard to be applied to interim rate relief, like the actual authority to grant interim rate relief, is within the Commission's discretion. Applying that discretion, the Commission has required that the utility show an emergency condition prior to granting interim rate relief. Nonetheless, if the Commission were to apply a just and reasonable standard, it must be based upon "all relevant factors." A more thorough analysis of relevant factors, as provided by Staff, indicates that Empire should receive an interim rate decrease.

Ultimately, it has been shown that Empire has received significant financial protections through the Commission issuance of an Accounting Authority Order. This AAO effectively shields Empire's earnings from the incremental operation and maintenance costs resulting from Empire's response to the tornado. Largely as a result of this AAO, Empire was able to realize record earnings in 2011.

In the final analysis, MECG asserts that the Commission should deny Empire's request for interim rate relief. The Empire ratepayers have already paid rates that led to increased revenues and record profits. It is inequitable to expect these ratepayers to pay more simply to inflate shareholders profits. Furthermore, it is inequitable to expect ratepayers to pay for the rate case expenses associated with this interim rate request. Ratepayers have not benefitted from the consideration of this case. Instead, this case was brought solely for the benefit of shareholders. For that reason, shareholders should be solely responsible for the costs of pursuing this relief.

II. JUST AND REASONABLE STANDARD DOES NOT APPLY TO INTERIM RATE RELIEF.

As documented in MECG's Initial Brief, the Commission has continuously applied an emergency standard in its consideration of an interim rate request.¹ Even in recent years when the Commission has referenced the possibility of "good cause"² or "extraordinary circumstances,"³ the standard applied by the Commission has always been the emergency standard.

Although the Commission has claimed authority to grant interim rate increases on something less than an emergency basis, in practice, the "good cause shown" standard looks a lot like the "emergency" standard. A good example is found in a 1997 case. In an order rejecting an interim rate increase tariff proposed by The Empire District Electric Company, the Commission concluded that it "may authorize the implementation of interim rates upon a showing of good cause, and such good cause may be less than an emergency or near-emergency." Despite that conclusion, the Commission rejected Empire's request for an interim rate increase, finding:

There is no showing by the Company that its financial integrity will be threatened or that its ability to render safe and adequate service will be

¹ MECG Brief, filed September 20, 2012, at pages 5-8.

² *Empire District Electric Company*, 6 Mo.P.S.C. 3rd (1997).

³ *Union Electric Company*, Case No. ER-2010-0036 (issued January 13, 2010).

jeopardized if this request is not granted. Furthermore, the Company has shown no other exigent circumstances that would merit interim relief.

Thus, the Commission applied a good cause standard, but still required the company to demonstrate an emergency or near emergency before it would be allowed an interim rate increase.⁴

A. EMPIRE’S USE OF THE JUST AND REASONABLE STANDARD IS MISAPPLIED

Despite the long-held application of the emergency standard, Empire now seeks to engage in legal gymnastics and, instead, assert that the Commission should apply the just and reasonable standard.⁵ Empire’s asserted use of the just and reasonable standard is misplaced.

As the Missouri courts have recognized, the power to permit an interim rate increase is not expressly contained in any statutory provision. Rather, the Commission’s authority to allow an interim rate increase is “implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.”⁶ Since the authority to allow the interim rate relief is “implied”, the standard by which the Commission considers interim relief must necessarily also be “implied.” Indeed, despite the fact that the interim tariff in the *Laclede* case had also been previously suspended, the Court of Appeals did not find fault in the Commission’s application of the emergency standard. This also was within the “broad discretion” of the Commission.⁷

In contrast, Empire would have the Commission believe that, while the authority to allow interim rate relief is implied, the statutes have nevertheless expressed the

⁴ *Order Further Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing*, Case No. ER-2010-0036, issued October 7, 2009, at pages 3-4 (footnotes excluded).

⁵ Empire Brief at pages 2-8. See for example, “While in accordance with §393.150 the Commission must use the ‘just and reasonable’ standard when suspension has occurred and a hearing is held, Empire is not obligated to demonstrate a ‘financial emergency’ in order to obtain rate relief.” Empire Brief at page 6.

⁶ *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 566 (Mo.App. 1976).

⁷ *Id.*

standard to be utilized in such situations – the just and reasonable standard. It is nonsensical to believe that the General Assembly would express the statute to be utilized, but simultaneously fail to express the actual authority. Empire’s argument is illogical.

Indeed, the notion that the just and reasonable standard should apply to interim rate increases has already been raised and rejected. In its consideration of the 2010 Ameren interim rate request, one commissioner suggested that the Commission should apply the “just and reasonable” standard.⁸ That logic suffered from the same deficiencies as Empire’s current request. Specifically, while referencing the *Laclede* case which found that the authority to allow interim rate relief is “implied,” that commissioner nonetheless looked for an express standard to apply to this “implied” authority. As that commissioner suggested, “[I] urge my colleagues to carefully review the express language of the applicable statute in this context.”⁹ Again, it is illogical to find that while the authority for interim relief is “implied,” the actual standard to be applied in that implied situation has nonetheless been “expressed.” In reality, the standard, as found by the Missouri Court of Appeals, is also implied and contained within the broad discretion of the Commission.

B. EMPIRE HAS INACCURATELY APPLIED THE JUST AND REASONABLE STANDARD

Assuming arguendo that the just and reasonable standard does apply to the Commission’s review of the Empire interim rate request, Empire has failed to apply that standard in the manner expressed by the statute. Indeed, Missouri Courts have held that

⁸ *Concurrence of Commissioner Jeff Davis to the “Order Further Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing” and Dissent Regarding Procedure and Standard*, Case No. ER-2010-0036, issued October 19, 2009.

⁹ *Id.* at page 7.

the “just and reasonable” standard necessarily involves a consideration of “all relevant factors.”¹⁰

In the case at hand, Empire’s quantification of interim rate relief is not based upon a consideration of “all relevant factors.” As described, Empire’s quantification of interim rate relief involves simply a consideration of: (1) new investment and (2) lost margins.¹¹ Empire’s quantification fails to consider capital structure, return on equity, cost of debt, or any other Empire expenses or revenues. Therefore, even using its preferred just and reasonable standard, Empire fails to meet this standard because it failed to consider all relevant factors.

Interestingly, a more comprehensive consideration of relevant factors leads to the conclusion that any interim rate consideration should involve a rate decrease. As Staff points out, Empire has actually experienced a \$1.6 million increase in revenues since the tornado.¹² Furthermore, even considering capital expenditures to replace facilities destroyed by the tornado, Empire’s rate base has declined.¹³ Ultimately, a decrease in rate base and an increase in revenues leads to the conclusion that rates should decrease.

III. EMPIRE CONTINUES TO IGNORE THE PROTECTIONS PROVIDED BY THE COMMISSION APPROVED ACCOUNTING AUTHORITY ORDER.

Throughout its brief, Empire touts the magnitude of the capital expenditures made in response to the tornado.¹⁴ Empire offers such evidence in an attempt to mislead the

¹⁰ *State ex rel Missouri Water Company v. Missouri Public Service Commission*, 308 S.W.2d 704,

¹¹ Empire-2, page 9.

¹² Staff-9, pages 1-2; Staff-4, page 5.

¹³ Staff-7, page 17.

¹⁴ “Empire has invested over \$27 million to replace the electric infrastructure destroyed by the tornado.” *Empire Brief* at page 2. See also, “Empire has invested over \$27.6 million to replace the electric infrastructure destroyed by the tornado, with estimated carrying costs of approximately \$4.5 million.” *Empire Brief* at page 6. “The tornado severely impacted Empire’s operations, including the total

Commission into believing that interim rate relief must be necessary. While touting the magnitude of its capital expenditures in response to the tornado, Empire largely overlooks the protections already provided by the Commission through an Accounting Authority Order. As pointed out in MECG's Initial Brief, the existence of an Accounting Authority Order effectively shields Empire's earnings from the incremental operation and maintenance costs resulting from Empire's response to the tornado. Instead, such costs are deferred for recovery in rates resulting from the permanent part of this rate case.

As Staff Witness Oligschlaeger points out, Empire's AAO mitigates the financial impact of the tornado on Empire's earnings.

Empire was not required to charge to current expense any O&M expense or depreciation expense directly associated with the storm, and the AAO authorized Empire to accrue a carrying charge equal to its Allowance for Funds Used During Construction (AFUDC) rate on its tornado capital additions to offset the lack of current return on its tornado related capital additions.¹⁵

Therefore, despite Empire's claims that this increase in cost has reduced its earnings, it is clear that Empire's earnings have been protected from any impact from the tornado.

IV. SIMPLY BECAUSE THE TORNADO WAS EXTRAORDINARY DOES NOT MEAN THAT EMPIRE IS EXPERIENCING AN EMERGENCY SITUATION OR AN EXTRAORDINARY CONDITION.

Throughout its brief, Empire attempts to inappropriately bootstrap its request for interim rate relief to the extraordinary nature of the May 2011 tornado.¹⁶ Empire's implied motivation being that, since the tornado was extraordinary, Empire's financial

destruction of a significant part of the Company's facilities in an around Joplin." *Empire Brief* at pages 6-7. "The costs incurred by Empire in connection with the tornado . . . can be fairly characterized as extraordinary." *Empire Brief* at page 7.

¹⁵ Staff-7, pages 12-13. See also, MEUA-1, page 3.

¹⁶ "Empire's request for interim rate relief is driven by the May 22, 2011 Joplin tornado." *Empire Brief* at page 1. "[t]he circumstances behind the request clearly have their origin in an emergency." *Empire Brief* at page 6. "As a result of the tornado, Empire faced extraordinary circumstances." *Empire Brief* at page 6.

condition must also be extraordinary and justify interim rate relief. As the evidence and briefs show, Empire's request is a shameless attempt to utilize a disastrous event for the purpose of increasing shareholder profits.

The evidence, however, indicates that Empire is not facing an emergency situation. As revealed in MECG's Initial Brief, Empire's financial condition is better now than it was prior to the tornado. Despite the tornado, Empire saw revenues increase by 13% in the quarter of the tornado¹⁷ and realized record earnings in 2011.¹⁸ As a result of these record earnings, Empire has seen its retained earnings balance go from \$4.1 million immediately before the tornado¹⁹ to almost \$34 million by the end of 2011.²⁰

V. CONCLUSION

As the foregoing demonstrates, Empire's request for interim rate relief fails to comply with the Commission's emergency standard. Empire seemingly admits this shortcoming by its sudden reversal and dependence on the just and reasonable standard. The just and reasonable standard is not applicable to interim rate relief. Rather, the standard to be applied is within the broad discretion of the Commission. Exercising this discretion, the Commission has routinely applied the emergency standard.

The evidence indicates that Empire's financial situation has actually improved as compared to prior to the tornado. Revenues increased, earnings have hit record levels and the retained earnings balance has been restored after a decade of mismanagement of its dividend.

¹⁷ Tr. 116-117 (2Q10 revenues = \$106,249,000; 2Q11 revenues = \$119,903,000). Increase of 12.85%.

¹⁸ Ex. MECG-1 (Data Request No. 6) (2011 earnings were a record \$54,971,000, an increase of 15.98% over 2010 earnings).

¹⁹ Ex. Empire-1 at page 10.

²⁰ Ex. MECG-1, at page 2 (Data Request No. 5).

In the final analysis, this request for interim relief was brought solely for the purpose of inflating shareholder profits. Recognizing that ratepayers have not realized any benefits from this case, those ratepayers should not be expected to pay the rate case expenses associated with Empire pursuing interim relief. As such, MECG asks that the Commission disallow all of Empire's rate case expense associated with this matter.

For all these reasons, MECG asks that the Commission deny Empire's request for interim rate relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

October 1, 2012