

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

In the Matter of a Proceeding Under Section)
393.137 (SB 564) to Adjust the Electric) Case No. ER-2018-0366
Rates of The Empire District Electric Company)

**REPLY SUGGESTIONS IN SUPPORT OF EMPIRE’S
MOTION TO DISMISS OR FOR SUMMARY DETERMINATION**

COMES NOW The Empire District Electric Company (“Empire” or “Company”), by and through counsel, and respectfully submits these Reply Suggestions in Support of Empire’s Motion to Dismiss or for Summary Determination. In this regard, Empire states as follows to the Missouri Public Service Commission (“Commission”):

Commission Rule 2.116(4) provides that a case may be dismissed for good cause, and Rule 2.117(1)(E) provides that summary determination may be granted when “there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.” Since this proceeding was opened by the Commission specifically to consider the adjustment of Empire’s rates pursuant to RSMo. §393.137 (as created by Senate Bill 564), and the entirety of §393.137 is inapplicable to Empire, the Commission lacks authority or jurisdiction to proceed in this docket.

This lack of authority or jurisdiction to proceed provides the necessary “good cause” for dismissal pursuant to Rule 2.116 and satisfies the “entitled to relief as a matter of law” and “good cause” elements required for a grant of summary determination pursuant to Rule 2.117. Also, there is no *genuine* dispute as to any material fact. Empire was the subject of a general rate proceeding on June 1, 2018, and §393.137 took effect on June 1, 2018.

1. Case No. ER-2018-0228 is a “general rate proceeding” within the meaning of §393.137 (as created by SB564).¹

Section 393.137 applies only “to electrical corporations *that do not have a general rate proceeding* pending before the commission as of the later of February 1, 2018, or the effective date of this section.”² This new law does not define “general rate proceeding.” Under Missouri law, the primary rule governing statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent, and to consider the words used in the statute according to their ordinary meanings.³

When the Commission closed its general working docket regarding the federal Tax Cut and Jobs Act of 2017 (the “Act”), the Staff of the Commission (“Staff”) filed a “Motion to Open Rate Case and to Require Company to Show Cause.” Staff stated the following as authority for its Motion (emphasis added):

The Commission may, on its own motion, open a *rate proceeding* to determine the reasonableness of the rates and charges of any electrical, gas, heat, water, or sewer corporation. Section 386.390.1, RSMo.; *State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979) (“UCCM”). Within a *rate case*, the Commission may investigate any matter necessary to enable it to ascertain facts requisite to the exercise of its powers. Section 393.270.1, RSMo., UCCM, at 48.

On February 21, 2018, the Commission issued its *Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why Its Rates Should Not be Adjusted* (the “Rate Case Order”) in Case No. ER-2018-0228, *In the Matter of the Propriety of*

¹ On May 31, 2018, Empire made a filing in its last rate case, Case No. ER-2016-0023, reopening the case. Thus, Empire actually had two rate cases open before the Commission on June 1, 2018, the effective date of RSMo. §393.137 (as created by SB564). The Commission issued its *Order Closing Case* in Case No. ER-2016-0023 on June 14, 2018 (“Since Empire does not request any action from the Commission, the Commission will close this general rate case.”).

² RSMo. 393.137.1 (emphasis added).

³ *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 413 (Mo. banc 2012).

the Rate Schedules for Electric Service of The Empire District Electric Company. The Commission's Rate Case Order noted that Staff asked the Commission "to open a rate case" because "Empire's existing rate schedules may no longer be just and reasonable."

Only the Office of the Public Counsel ("OPC") filed a response to Empire's Motion to Dismiss or for Summary Determination, and OPC's only argument that Case No. ER-2018-0228 is not a "general rate proceeding" is that the Commission did not intend to consider all relevant factors in that case when establishing new rates for Empire. Essentially, OPC's argument is that the Commission intended to violate the statutory requirement that the Commission consider all relevant factors in setting rates. It is unreasonable to rely on an anticipated unlawful action on the part of the Commission as a basis for denying that Case No. ER-2018-0228 is a "general rate proceeding" within the meaning of §393.137.

2. Case No. ER-2018-0228 was pending before the Commission on June 1, 2018, the effective date of §393.137.

On May 17, 2018, Staff filed a Voluntary Dismissal in Case No. ER-2018-0228, noting that SB564 was truly agreed and finally passed by the Missouri House of Representatives on May 16, 2018, and, as a result of an emergency clause, RSMo. 393.137 would take effect when the Governor signed SB564. Staff further stated:

It is Staff's belief that the legislature, and all interested stakeholders intended that Section 393.137 would provide the Commission the authority to immediately address the effects of the federal Tax Cut and Jobs Act of 2017 for those electrical corporations that do not have pending rate cases before the Commission.

Without Empire having an opportunity to file a response to Staff's Voluntary Dismissal, the Commission issued a *Notice Acknowledging Dismissal of Application and Closing Case*. This *Notice* was purportedly effective upon issuance.

Also on May 17, 2018, however, Staff filed its Withdrawal of Voluntary Dismissal. Further, following the filing of Staff's Withdrawal of Voluntary Dismissal, OPC and other parties filed written arguments in Case No. ER-2018-0228. OPC now argues, however, that Staff could not withdraw its dismissal. More importantly, the case is not Staff's to dismiss. There are three basic ways to initiate a general rate proceeding – or rate case: 1) file and suspend (§393.150); 2) complaint by customer (§393.260); or, 3) by motion of the Commission (§§393.140(5), 393.150, and 393.270).⁴ Case No. ER-2018-0228 is a general rate proceeding opened by the Commission – there is no applicant pursuant to §393.150, and there is no complainant pursuant to §393.260. As noted, when the Commission closed its working docket regarding the Act, Staff filed a “Motion to Open Rate Case and to Require Company to Show Cause,” stating that “(t)he Commission may, on its own motion, open a rate proceeding . . .” On February 21, 2018, the Commission then issued its “*Order Opening Rate Case . . .*” in Case No. ER-2018-0228.

Oral argument also took place in Case No. ER-2018-0228 (the Commission-opened Rate Case for Empire), as well as in a number of other cases regarding the impact of the Act, on May 24, 2018. At the beginning of the argument, Judge Woodruff stated as follows:

Staff initially dismissed a case involving Empire Electric, ER-2018-0228, that was reinstated by Staff later that same day. At this point, I'm considering it to be a -- an open case that will be subject to today's proceedings.⁵

OPC was represented at the oral argument, did not object to the Judge's statement, and did not object to Empire's participation in the argument. Also, as noted above, OPC filed written comments in Case No. ER-2018-0228 *after* Staff filed its Voluntary Dismissal and Withdrawal

⁴ See also, *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979); and see, generally, *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20 (Mo. banc 1975).

⁵ Case No. ER-2018-0228: Tr. Vol. 1 (May 24, 2018), p. 5, lines 14-20.

of Voluntary Dismissal. Despite all of these facts, OPC argues that Case No. ER-2018-0228 was not pending before the Commission on June 1, 2018, and is not now pending before the Commission. There is simply no rational basis for OPC's argument.

As discussed in detail above and in Empire's Motion to Dismiss or for Summary Determination with Suggestions in Support, on June 1, 2018, the effective date of §393.137, Empire had a general rate proceeding pending before the Commission, and the entirety of §393.137 is therefore inapplicable to Empire. Empire continues to believe that the cost savings from the Act should be passed on to its customers. It is just that §393.137 (as created by SB564) does not provide the Commission with any additional authority with regard to Empire's rates. Case No. ER-2018-0228, however, remains open and is the appropriate place for the Commission to take up and consider the proper means by which to address the impact of the Act on Empire and its customers.

WHEREFORE, Empire respectfully requests an order of the Commission dismissing this proceeding or granting summary determination . Empire requests such further relief as is just and proper under the circumstances.

Respectfully submitted,

Brydon, Swearngen & England, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was filed in EFIS on this 12th day of July, 2018, with notice of the same being sent to all counsel of record.

/s/ Diana C. Carter