

**BEFORE THE PUBLIC SERVICE COMMISSION
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-97-81

FILED
JUN 6 1997
MISSOURI
PUBLIC SERVICE COMMISSION

**BRIEF OF THE EMPIRE DISTRICT ELECTRIC COMPANY
REGARDING TRUE-UP ISSUE**

1. Background: The Commission held a "true-up hearing" in this docket on May 23, 1997. Testimony was presented¹ by Mr. David Winter of the Staff and Mr. Robert Fancher of The Empire District Electric Company ("Empire") involving, among other things, the level of payroll expense which should be included in rates to be established by the Commission in this proceeding. By "Notice" issued May 23, 1997, the Commission ordered simultaneous briefs on the payroll expense issue, limited to five pages, and due on June 6, 1997. Since there apparently will be no opportunity for reply briefs, in these few pages, Empire will present its arguments and attempt to respond to what it anticipates to be Staff and Office of the Public Counsel arguments.

2. What Is The Issue? The issue, as developed by the testimony presented on May 23, is whether the revenue requirement in this case should be increased by \$258,662 over that which has already been agreed to by the parties. The \$258,662 represents the salaries and associated payroll taxes² for 16 of the 19 authorized Empire positions listed on Schedule RBF-1

¹ References to the transcript of the hearing are designated as (Tr. ____).

² The Missouri jurisdictional amount of the salaries is \$239,550. FICA payroll taxes add another \$18,326 and SUTA payroll taxes add \$786, for a total of \$258,662. This is only the Missouri jurisdictional amount, over which the Missouri Commission has jurisdiction, even though Empire operates in three other states and at the wholesale level as regulated by the Federal Energy Regulatory Commission.

to Exhibit TU-3. In that document, Mr. Fancher listed the position and salary for the 19 authorized but unfilled positions which existed on March 31. The question for the Commission is whether it is reasonable to include the costs for these positions as representative of the normal and on-going expenses of the utility which are expected to be incurred during the period the rates to be set in this proceeding will be in effect (which is Empire's position), or whether it is reasonable, because these positions happened to be vacant on March 31, 1997, to deny Empire the opportunity to have revenue in the future to cover these expenses (which is the Staff's position). As the case stands right now, there is no assumed revenue built into the rate design to cover the \$258,662.

3. Why Empire's Position Is Reasonable: One of the basic functions of the Commission is to establish just and reasonable rates to be paid by the customers of the utility. It acts in a quasi-legislative manner to set rates to be charged to customers in the future. The rates are supposed to reflect a normal, on-going level of expenses and revenues. (Tr. 67) The rates to be established in this case will not take effect until July 28, 1997. (Tr. 68) They will probably be in effect for about a year since that is the minimum amount of time between rate cases³. As a result, in this case "... the Commission must make an intelligent forecast with respect to the future period for which it is setting the rate; ratemaking is by necessity a predictive science." *State ex rel. Missouri Public Service Company v. Fraas*, 627 S.W.2d 882, 886 (Mo. App. W.D. 1981), quoting *State v. N.J. Bell Tel. Co.*, 30 N.J. 16, 152 A.2d 35 (1959).

Empire is asking the Commission to accept the reasonable prediction, based upon evidence, that it will have personnel in those 16 positions for the reasonably foreseeable future.

³ Under the statutory procedure in §393.150 RSMo, Empire can initiate another rate case by filing proposed rate schedules 30 days in advance of their proposed effective date. The Commission can suspend the operation of such proposed tariffs for a maximum period of 10 months. Thus, the Commission has the authority to delay a rate change for approximately 11 months from when it is first proposed by a utility.

Indeed, the evidence shows that 12 of the positions found vacant by the Staff on March 31 “have already been filled.” (Exhibit TU-3, p. 2) Mr. Fancher testified that of the remaining seven, “three positions are in the interview process, three positions are not in the process of being filled, and one position has been filled by a temporary employee.” (Ex. TU-3, p. 2) Empire is *not* asking the Commission to build into rates compensation for the three positions which it does not intend to fill at this time. (Ex. TU-3, p. 2) Therefore, of the 19 authorized positions which the Staff excluded, Empire is asking that the cost of 16 of them be built into rates on the reasonable assumption the positions will be filled. The reasonableness of that assumption is evident from the fact that 75 percent of them (12 out of 16) have *already* been filled. (Ex. TU-3, p. 2)

Another test of reasonableness is that while there is turnover in employees, the level of employees at Empire is fairly constant. Mr. Fancher testified that “if you look at the employee level, at the end of every month on our monthly reports you’ll see it stays about the same. We have people in the transition from one job to another, and that’s what most of these are.” (Tr. 90) A parallel can be drawn to the Commission itself. As Mr. Winter indicated, “the Commission has unfilled vacancies at any time.” (Tr. 62) Indeed, for a short period of time recently, there were only three Commissioners even though the Missouri statutes authorize five. Did the General Assembly in passing a budget reduce the amount allocated for the Commission by the two vacant positions? No. It was reasonable to assume that even because there were two vacancies on a particular day, they would be filled in the normal course of events.

4. Why the Staff’s Position Is Unreasonable: The Staff just took a “snap-shot” of the employee level on March 31 and found 19 authorized but vacant positions. It apparently did not make any analysis of the *reason*. It did not examine the extent of time each position had been vacant. According to Mr. Winter, “There was no criteria in relation to days or weeks. The criteria was, was somebody doing that particular job at March 31st.” (Tr. 82-83) In fact, Mr.

Winter said the length of time a position had been vacant did *not* affect whether the Staff included it. (Tr. 83) "As I said, if the position was vacant, we did not include it." (Tr. 83)

It is obvious the Staff has fulfilled its role as an "auditor." It has determined with great accuracy and duly reported to the Commission how many people were on the payroll as of March 31 and the associated cost. There is no dispute about that. There is also no challenge that the positions are unnecessary or that the salaries are unreasonable. (Tr. 66-67)

What the Staff has *not* done, and what the Commission therefore needs to do, is make the informed judgment as to whether the March 31 level is truly representative of the future. Missouri courts have held that "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment." *Fraas*, supra at 886. In the 1979 rate case which was the basis for the *Fraas* case from which that quotation comes, the Commission used the then-novel approach of a "true-up hearing" to deal with future changes. The *Fraas* Court said the Commission could also

determine that greater desirability lies with a more liberal allowance of expenses claimed by the Company and a more liberal inclusion of items into the rate base, perhaps combined with a somewhat higher basic rate of return.

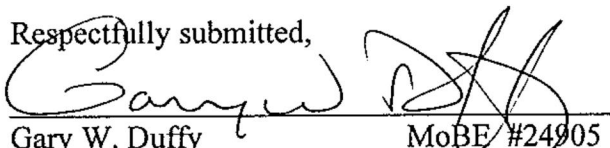
Fraas, supra at 888. All of these are methods to effectuate the "predictive" nature of ratemaking to establish "just and reasonable" future rates. It is this "predictive" aspect which the Staff's position lacks. In essence, the Staff is saying it is reasonable to use the payroll of just those employees on March 31 as a proxy for the coming year. The facts demonstrate that to be untrue and unreasonable since that level has already been exceeded by 12, with four more to be filled.

The Staff will no doubt argue the inclusion of any costs not experienced on March 31 violates the "matching" principle. Empire does not believe its proposal violates the matching principle. The salary of a meter reader or line foreman does not increase the revenue Empire receives from customers. (Tr. 67) It doesn't change Empire's investment in plant. The Staff

simply has not recommended a reasonable level of payroll expense which is representative of the on-going normal levels to be experienced by Empire. Thus, Empire is arguing that the expense portion is not representative when compared with the plant and revenue portions because it excludes the authorized, normal, on-going employee positions.

5. Conclusion. The purpose of a rate case is to determine what anticipated level of revenues from customers is needed to cover the normal and prudent level of expenses to be experienced by a utility and to give its shareholders an opportunity to earn a fair return on their investment. The settlement presented earlier by the parties contained an agreed-upon level of revenues and expenses, subject to a true-up and subject to the isolated adjustment of the State Line Unit 2 generating plant. This issue involving payroll arose when, as a part of its true-up, the Staff failed to include costs relating to existing, authorized positions. The evidence is that there are now and will in the future be people in these positions, so the expenses should be included in rates.

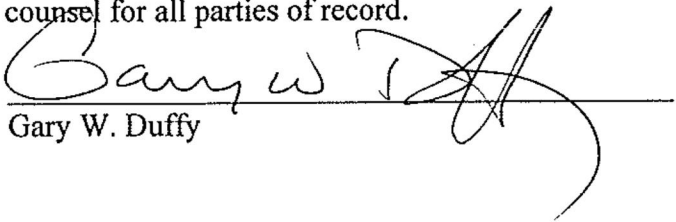
Respectfully submitted,


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ATTORNEYS FOR THE EMPIRE DISTRICT
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was mailed or hand-delivered on June 6, 1997 to counsel for all parties of record.


Gary W. Duffy