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May 14, 2002

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. ER-2002-425

Dear Mr. Roberts:

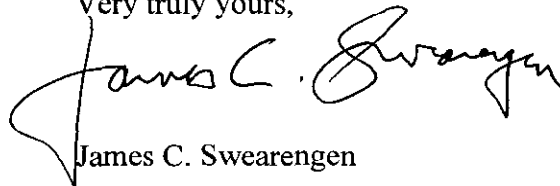
Enclosed for filing on behalf of The Empire District Electric Company, please find an original and eight (8) copies of an Application for Rehearing.

Copies of this filing will be provided to all parties of record.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Very truly yours,



James C. Swearengen

JCS/lar

Enclosure

cc: All Parties of Record

**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 Interim Tariffs,) Case No. ER-2002-425
Increasing Rates, Subject to Refund, for Electric Service) Tariff No. 200200744
Provided to Customers in its Missouri Service Area.)

APPLICATION FOR REHEARING

COMES NOW The Empire District Electric Company ("Empire" or "Company"), in accordance with RSMo. §386.500, 4 CSR 240-2.160, and 4 CSR 240-2.080, and for its Application for Rehearing, respectfully requests that the Missouri Public Service Commission (the "Commission") rehear and reconsider its Order Rejecting Tariff and Granting Motion to Dismiss issued in the above-captioned matter on May 9, 2002, to become effective on May 15, 2001 (the "Order"). For the reasons stated herein, the Order is unlawful, unjust, unreasonable, arbitrary, capricious, and involves an abuse of discretion.

PROCEDURAL BACKGROUND

1. On March 8, 2002, Empire filed proposed interim tariff sheets designed to enact a surcharge which would increase its Missouri jurisdictional electric revenues by \$3,562,983, exclusive of applicable fees and taxes, and filed direct testimony in support of its requested relief.

2. An error in computing Empire's revenue requirement in its recently concluded electric rate case, Case No. ER-2001-299, an error acknowledged by the Commission Staff and the Commission,¹ formed the basis for this request.

3. On March 18, 2002, the Office of the Public Counsel ("Public Counsel") filed a Motion to Dismiss the Company's pending interim case. Additional responses and

¹ *Order Rejecting Tariff*, Case No. ET-2002-210.

suggestions were filed by the parties to the case and were argued at the Early Prehearing Conference on April 9, 2002.

4. Since the Early Prehearing Conference, all parties to this case have been actively involved in settlement negotiations. Those discussions have continued through the date of this pleading.

5. On May 9, 2002, the Commission issued the Order to become effective on May 15, 2002.

REHEARING

The Order is unlawful, unjust, unreasonable, arbitrary, capricious, and involves an abuse of discretion, all in material matters of fact and law, individually or cumulatively, or both, and in several respects, all as indicated below.

A. The Commission Possesses the Lawful Authority to Grant Empire its Requested Interim Relief

The Commission clearly has the authority to grant Empire's request. Regardless of the number of times that the Commission may have applied the "emergency" standard, the "good cause" standard, or any other standard in determining whether or not to grant interim rate relief, it is clear that the Commission possesses the lawful authority to grant Empire interim rate relief in this case.

The Commission acknowledges that it has granted interim rate relief on a nonemergency basis,² and further acknowledges that the Western District Court of Appeals

² *Order Rejecting Tariff and Granting Motion to Dismiss*, Case No. ER-2002-425, p. 2-3; referencing *In re Missouri Power & Light Company*, Case Nos. GR-81-355 and ER-81-356 (1981).

has held that it is possible to grant relief on a nonemergency basis.³ However, in the Syllabus section of the Order, the stated reason for dismissing this case is "because Empire fails to meet the traditional emergency standard for granting interim relief."

In support of its dismissal and at page 3 of the Order, the Commission states that it has "traditionally . . . followed the emergency standard." The Commission later states, at pages 4 and 5 of the Order, that Empire has not demonstrated facts that justify imposition of the "good cause" standard, and that the Commission will be continuing to follow its historical emergency standard for interim rate relief.

A fair interpretation of these statements is that the Commission is taking the position that it should apply an emergency standard in cases involving Empire, while remaining free to approve non-emergency interim relief requested by other companies. In the *Kansas City Power & Light* case⁴ and the *Missouri Power & Light* case⁵, the companies' level of earnings were sufficient to deviate from the emergency standard. More recently, in the *Citizens Electric Corporation* case⁶, the company's corporate structure justified a deviation from the emergency standard.

³ *Order Rejecting Tariff and Granting Motion to Dismiss*, Case No. ER-2002-425, p. 3; referencing *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n.*, 535 S.W.2d 561 (Mo.App. 1976).

⁴ *In re Kansas City Power & Light Company*, 23 Mo. PSC 413 (1980).

⁵ *In re Missouri Power & Light Company*, 22 Mo. PSC (N.S.) 257 (1978).

⁶ *In the Matter of the Application of Citizens Electric Corporation for Approval of Interim Rates, Subject to Refund, and for a Permanent Rate Increase*, Case No. ER-2002-217.

In balancing the equities, Empire's circumstances also justify deviation from the "traditional" emergency standard. Empire's situation is unique in that its request for interim rate relief has resulted from an error in computing Empire's revenue requirement in a previous case -- an error originally caused by the Staff which went undiscovered by Empire until a point late in the process. The error has been acknowledged by the Commission. Further, the amount of the error is known and measurable and represents a material portion of Empire's net income.⁷

Empire is unaware of a single Missouri case that has presented these same facts in the past. As such, concerns regarding a beset of subsequent cases if the requested relief is granted would appear to be unwarranted. Also, the "Public Service Commission can use a new equation or change methods from case to case depending on the facts." *State ex rel. Arkansas Power & Light Company v. Public Service Commission*, 736 S.W.2d 457, 462 (Mo.App. 1987). If the Commission were to grant interim relief to Empire under these unique circumstances, the Commission would not be bound by its decision even in the unlikely event that it would be presented with these same facts in the future.

Commission "tradition" does not constitute binding precedent. "(T)he Commission is not bound to comply with its previous decisions. As an administrative agency the Commission is not bound by stare decisis . . ." *In re Southwestern Bell Telephone Company*, 2001 Mo. PSC 1802, 25 (2001).⁸

⁷ Gipson Direct Testimony, p. 4.

⁸ See also *State ex rel. GTE North v. Missouri Public Service Commission*, 835 S.W.2d 356 (Mo.App. W.D. 1992); *State ex rel. Churchill Truck Lines Inc. v. Public Service Commission*, 734 S.W.2d 586 (Mo.App. W.D. 1987).

Because the Commission has abused its discretion by ignoring its lawful authority and has entered an order which unlawfully, unjustly and unreasonably discriminates against Empire, the Commission should grant this Application for Rehearing.

B. Irreparable Harm will Result if the Order Stands

The harm which will result from imposition of the Order further justifies the Commission granting Empire's Application for Rehearing.

The Commission states that the "purported error" of Case No. ER-2001-299 will be resolved in the context of Empire's pending general rate case. However, the Commission also acknowledges that any recovery will be limited by the retroactive ratemaking doctrine.⁹ This concept should be important to the Commission in assessing Empire's Application for Rehearing. This is because, depending upon the Commission's ultimate decision in response to this pleading, Empire may forever be prohibited from recovering the monies lost as a result of the error.

Such a result would be unjust and unreasonable and while Empire suspects that the Commission did not intend this result, it is a very real possible outcome of the Commission's action in this case.

Given the foregoing and the fact that the Commission has failed and refused to remedy a past wrong, the Order is unlawful, unjust, and unreasonable.

⁹ *Order Rejecting Tariff and Granting Motion to Dismiss*, Case No. ER-2002-425, p. 5; referencing *State ex rel. Utility Consumers Council v. P.S.C.*, 585 S.W.2d 41 (Mo. banc 1979).

C. Conclusion

For all of the above-described reasons, the Order is unlawful, unjust, unreasonable, arbitrary, capricious, and involves an abuse of discretion.

WHEREFORE, Empire respectfully requests that the Commission grant rehearing and reconsideration of its Order Rejecting Tariff and Granting Motion to Dismiss issued in this case on May 9, 2002, and, thereafter, issue a new order consistent with this pleading, and grant such other relief as the Commission deems reasonable and just under the circumstances.

Respectfully Submitted,

BRYDON, SWEARENGEN & ENGLAND P.C.

By



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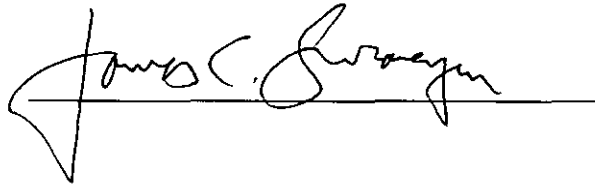
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 14TH day of May, 2002, to all parties of record.

A handwritten signature in cursive script, appearing to read "James C. Swartz", is written over a horizontal line. The signature is fluid and stylized, with a large initial 'J' and a distinct 'S' at the end.