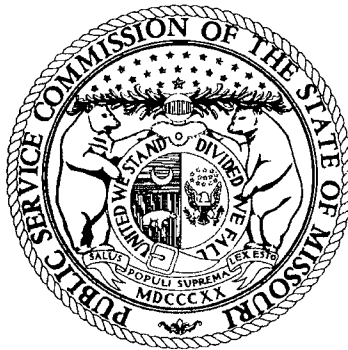


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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Consideration of a
Competitive Market Research Project and
Pilot Open Access Program for The Empire
District Electric Company.

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) Case No. EO-97-491
)
)

REPORT AND ORDER

Issue Date: September 16, 1997

Effective Date: September 26, 1997

OF THE STATE OF MISSOURI

In the Matter of the Consideration of a)
Competitive Market Research Project and) Case No. EO-97-491
Pilot Open Access Program for The Empire)
District Electric Company.)

APPEARANCES

Gary W. Duffy, Brydon, Swearngen & England, P.C., 312 East Capitol Avenue,
P.O. Box 456, Jefferson City, Missouri 65102, for The Empire District
Electric Company.

Stewart W. Conrad, Finnegan, Conrad & Peterman, L.C., 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for ICI Explosives USA, Inc. and Praxair, Inc.

Jeffrey A. Keevil, French & Stewart Law Offices, 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, for City of Springfield through the Board of Public Utilities.

Lewis R. Mills, Jr., Deputy Public Counsel, Office of the Public Counsel,
Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the
Public Counsel and the public.

Roger W. Steiner, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

ADMINISTRATIVE

LAW JUDGE: Joseph A. Derque III.

REPORT AND ORDER

History of the Case

This case involves two proposed tariffs, filed as a package on May 13, 1997. There is no operation of law date. Those tariffs are referred to as the open access transmission tariff, or POAS tariff, and the residential and small commercial competitive market research project. Both

were made a part of The Empire District Electric Company (EDE) rate case, Case No. ER-97-81, and then spun off into a separate docket by the Commission for the reason that the POAS tariff is particularly complex and requires substantial study by the parties and the Commission. This case was tried July 17, 1997 and finally submitted to the Commission for decision on August 21, 1997.

Findings of Fact

The Missouri Public Service Commission, having considered all competent and substantial evidence upon the whole record, makes the following findings of fact.

Some evidence and positions taken by the parties may not be addressed by the Commission in this Report and Order. The failure of the Commission to mention a piece of evidence or the position of a party indicates that, while the evidence or position was considered, it was not found to be relevant or necessary to the resolution of the case.

For the purposes of this Report and Order, the Commission will deal with the two proposed tariffs separately.

I. The Residential Research Project

Empire testifies that the residential research project is designed to evaluate the potential effects of retail competition on residential customers. The preliminary goals are to determine customer expectations from electric competition, evaluate potential impacts of competition on customers and EDE, assess supply availability and willingness to serve areas of low population density, and to provide other information regarding transition to a deregulated environment. EDE proposes to hire a consultant to participate in this project.

EDE anticipates out-of-pocket expenditures of \$100,000 or less. EDE further testifies that it believes the project is an integral part of the "joint proposal" and contemplates approval or denial of both proposed tariffs.

Staff, though not opposed to the concept of the project, is concerned that approval of the project by the Commission could result in "above-the-line" treatment¹ of the expenses incurred. Additionally, the Staff points out that no tariffs are needed to implement this project.

The parties agree that information might be gained from the residential and small commercial customer classes regarding customer choice in a deregulated environment. The parties admit that it is unnecessary for the Commission to authorize this program or the proposed tariff, and that EDE may proceed with the project without Commission action.

The Commission finds that EDE may move forward with this program without Commission action. Since the project would require neither tariffs nor variance from Commission rules, it would be inappropriate for the Commission to approve or disapprove the residential research project. Therefore, the Commission will take no action on this proposal. EDE may proceed with the proposed residential research project or not, at its own discretion.

II. The Pilot Open Access Service Tariff

The proposed tariffs for the POAS program were jointly developed by EDE and ICI/Praxair and originally presented to the Commission in the most recent EDE rate filing. In order to give the POAS proposal adequate

¹Above-the-line treatment means that the cost is borne by ratepayers rather than the utility shareholders.

study, the Commission determined that a separate docket would be appropriate and created this docket for that purpose.

EDE and ICI/Praxair maintain that the proposed POAS project is designed as an experiment to allow all parties the opportunity to study the operation and effects of direct access by eligible customers in a form reasonably similar to that which would be expected in a competitive market. Proponents of the POAS proposal allege that the proposed tariffs protect both EDE and EDE's ratepayers from economic harm.

The proposed project has several aspects. Eligible customers participating in the project are limited by proposed tariff language to large users with relatively large, stable load factors. These customers would remain on the EDE distribution system but purchase their power competitively. The power would be transmitted to the EDE local system on EDE's and other utilities' transmission facilities and governed by EDE's federally approved open access transmission (OATS) tariff. Customer participants would be required to pay a monthly administrative fee as well as what the parties refer to as a margin charge. Numerous other non-controversial details are included in the proposed tariff.

Both the Staff and the OPC have taken positions in opposition to this proposed tariff for a variety of regulatory and legal reasons. However, the Commission need address only the threshold issue in this Report and Order.

The threshold issue concerns the Staff and OPC position that approval of the POAS tariff would violate Section 393.106, RSMo², referred to as the anti-flip/flop statute. This statute protects the service

²All statutory references are to Revised Statutes of Missouri 1994, unless otherwise indicated.

territories of the various regulated utilities. The anti-flip/flop statute was designed to prohibit competition inside the geographic boundaries of a designated service territory. Currently, the Commission controls service areas and designates those boundaries, normally through the certificate of convenience and necessity process. In this case, both the Staff and OPC allege that the anti-flip/flop statute is violated by allowing ICI and Praxair to purchase power generated outside the EDE system. Section 393.106 provides:

393.106. **Definitions -- electric power suppliers exclusive right to serve structures, exception -- change of suppliers, procedure.** -- 1. As used in this section, the following terms mean: (1) **"Permanent service"**, electrical service provided through facilities which have been permanently installed on a structure and which are designed to provide electric service for the structure's anticipated needs for the indefinite future, as contrasted with facilities installed temporarily to provide electrical service during construction. Service provided temporarily shall be at the risk of the electrical supplier and shall not be determinative of the rights of the provider or recipient of permanent service"; . . .

. . . "2. Once an electrical corporation or joint municipal utility commission, or its predecessor in interest, lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such structure, and other suppliers of electrical energy shall not have the right to provide service to the structure except as might be otherwise permitted in the context of municipal annexation, pursuant to section 386.800, RSMo, and section 394.080, RSMo, or pursuant to a territorial agreement approved under section 394.312, RSMo."

Both OPC and Staff take the position that the Commission can neither order a change of supplier nor approve this proposed experimental program without violating the anti-flip/flop law. The Staff suggests that a "sale-for-resale" provision in the proposed tariff would eliminate most of its concerns regarding violation of this statute. However, ICI/Praxair

and EDE maintain that the sale-for-resale provision would defeat the purpose of the pilot project.

ICI/Praxair argues that the POAS tariff does not provide for a change of supplier under the statute, as EDE will remain the sole source of distribution of electrical energy for all customers.

The statute was intended to prevent a utility from investing capital to provide permanent service only to lose the customer to a competing utility. One purpose of this law is to prevent destructive competition. While EDE will be reimbursed, at least theoretically, for its capital investment in distribution facilities and will remain as the distribution company, EDE will not be reimbursed for its generation facilities and cannot compete for generation for at least four years. The utility will be unable to recover through rates the capital previously invested in physical plant (stranded investment), and the ongoing costs to generate the power and to supply customers no longer on the system (stranded costs) spread fairly over all of the ratepayers whose anticipated continued use of the system caused the investment and ongoing costs. Further, the ratepayers remaining on the system, many of whom are captive and inelastic, may be forced to make up the difference in revenue to the utility through higher rates. This creates exactly the situation that the anti-flip/flop statute seeks to avoid.

The Commission finds that the proposed tariff violates Section 393.106, RSMo 1996. For that reason the proposed tariff will be rejected. That issue being dispositive, the Commission finds no reason to address the remainder of the issues presented in this matter.

The Commission would encourage the parties to continue their efforts to create an open access pilot project. The parties might consider

various alternatives including a sale-for-resale situation as proposed by the Staff. The parties might also examine information and knowledge produced from collaboration with the energy task force group.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Empire District Electric Company is a public utility operating in the State of Missouri, engaged in the provision of electric service to the general public, and subject to the jurisdiction of the Commission pursuant to Chapters 386 and 393, RSMo 1996.

Pursuant to the provisions of Sections 393.130, 393.140 and 393.150, RSMo 1996, the Commission has jurisdiction over rates, both generally and to specific customers.

The proposed tariffs violate the provisions of Section 393.106, RSMo 1996. The Empire District Electric Company is the lawful supplier of retail electric energy to ICI and Praxair through permanent service facilities and, therefore, other suppliers of electrical energy are expressly denied the right to provide such service in the form of sale of electric power directly to these customers.

The proposed POAS tariffs are therefore rejected.

IT IS THEREFORE ORDERED:

1. That for the reasons as set out above, the proposed pilot open access tariff is hereby rejected and this docket is closed.

2. That this Report And Order shall become effective on September 26, 1997.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Cecil I. Wright", with a stylized flourish at the end.

**Cecil I. Wright
Executive Secretary**

(S E A L)

Lumpe, Ch., Crumpton, Murray, and Drainer, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 16th day of September, 1997.