

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY  
May 24, 2001**

**CASE NO: ER-2001-299**

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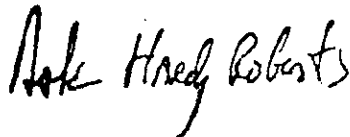
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**Enclosed find certified copy of an ORDER in the above-numbered case(s).**

**Sincerely,**



**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**

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

In the Matter of The Empire District Electric	)	
Company's Tariff Sheets Designed to Implement	)	<b>Case No. ER-2001-299</b>
a General Rate Increase for Retail Electric	)	<b>Tariff No. 200100518</b>
Service Provided to Customers in the Missouri	)	
Service Area of the Company.	)	

**ORDER DIRECTING FILING**

**Procedural History:**

On May 14, 2001, certain parties herein filed two nonunanimous Stipulations and Agreements, one concerning Fuel and Purchased Power Expense and the other concerning In-Service Criteria. On the same day, a proposed list of issues, list of witnesses, and order of cross-examination was filed. The following day, the Staff of the Commission, one of the signatory parties to the two Stipulations and Agreements, filed a proposed procedural schedule regarding the stipulations and agreements. On May 18, 2001, Intervenor Praxair, Inc., filed its letter objection to the Fuel and Purchased Power Stipulation and Agreement, specifically requesting a hearing on all of the issues comprehended by that Stipulation and Agreement. Praxair filed a correction to its letter objection on May 19, 2001. Finally, on May 22, 2001, The Empire District Electric Company (Empire) and the Office of the Public Counsel, the other two signatories to the two Stipulations and Agreements filed on May 14, filed their Joint Motion to Schedule Hearing on Fuel and Purchased Power Issues.

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## **The Nonunanimous Stipulations and Agreements:**

Commission Rule 4 CSR 240-2.115 provides for nonunanimous stipulations and agreements:

(1) A nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all parties and where one (1) or more parties requests a hearing of one (1) or more issues. If no party requests a hearing, the commission may treat the stipulation and agreement as a unanimous stipulation and agreement.

(2) If a hearing is requested, the commission shall grant the request.

(3) A nonunanimous stipulation and agreement shall be filed as a pleading. Each party shall have seven (7) days from the filing of the nonunanimous stipulation and agreement to file a request for a hearing. Failure to file a timely request for hearing shall constitute a full waiver of that party's right to a hearing.

While Praxair filed a timely request for hearing with respect to one of the two nonunanimous Stipulations and Agreements filed on May 14, no such request was filed by any party with respect to the other one. Thus, the fates of the two stipulations are different. The Stipulation and Agreement concerning In-Service Criteria shall be deemed unanimous because no timely objection or request for a hearing was filed. Rule 4 CSR 240-2.115, (1) and (3). If the Commission accepts the Stipulation and Agreement, the issues comprehended by it will be resolved as agreed by the parties.

The fate of the other Stipulation and Agreement is different because a timely request for hearing was filed. Rule 4 CSR 240-2.115(2). The rule on nonunanimous stipulations and agreements is confusing because the reader might justifiably suppose that the hearing referred to in the rule is a hearing on the nonunanimous stipulation and agreement. In

fact, the hearing cannot be limited in scope to the nonunanimous stipulation and agreement. *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo. App., W.D. 1982), cert. den., 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983). Being nonunanimous, the proposed stipulation and agreement is no more than the joint recommendation of the parties that signed it. See *State ex rel. Kansas City Power & Light Company v. Public Service Commission*, 770 S.W.2d 740, 742 (Mo. App., W.D. 1989); *In re Application of Empire District Electric Company*, 1999 Mo.P.S.C. Lexis 173, 179 (1999); *In re Missouri Public Service*, 2 Mo.P.S.C.3d 221, 223 (1993).

In *Fischer*, the Commission was presented with a nonunanimous stipulation and agreement in which all parties joined but the Public Counsel. The Commission held a hearing on the nonunanimous stipulation and agreement, but permitted Public Counsel to present such testimony, and to pursue such cross-examination, as he chose. The Commission then approved the nonunanimous stipulation and agreement and based its order disposing of the case upon it. The Court of Appeals reversed.

The Commission's order was held inadequate as a matter of law because the factual findings were conclusory and insufficient to support the Commission's disposition of the case, in violation of Section 386.420, RSMo 2000. That statute requires that all parties have the opportunity to be heard and to present evidence in Commission proceedings and also requires that all Commission orders contain written findings of fact. *Fischer*, 645 S.W.2d at 42-43; *State ex rel. Rice v. Public Service Commission*, 220 S.W.2d 61, 65 (Mo. 1949). The court stated:

Rather than performing its statutory duty to fix a rate design . . . based on findings of fact supported by

competent and substantial evidence, the Commission appears to have simply adopted the stipulation [and] agreement. This procedure is completely contrary to law, and cannot form the basis for a valid order by the Commission.

*Fischer*, *supra*, 645 S.W.2d at 43.

The Public Counsel in *Fischer* also attacked the Commission's order as made on unconstitutional procedure. The court agreed that the hearing procedure adopted by the Commission denied due process to the Public Counsel because, although he was permitted to present evidence and conduct cross-examination, "the Commission had previously decided that the only issue it would consider was whether or not to approve the stipulation and agreement." *Id.* The court went on to explain:

the hearing afforded Public Counsel was not meaningful, in that the Commission was precluded from considering anything but the stipulated rate design in the course of the hearing in question. The question properly before the Commission was what rate design to adopt, rather than whether or not to adopt one particular proposal.

*Fischer*, *supra*, 645 S.W.2d at 43.

Therefore, the Commission understands *Fischer* to mean that it cannot, by any procedural gymnastics, impose a nonunanimous stipulation and agreement on objecting parties and thereby dispose of a contested case. Thus, the joint motion filed by Empire and Public Counsel on May 22 must be denied, for the Commission cannot hold a hearing on the nonunanimous Stipulation and Agreement objected to by Praxair. *Fischer*, *supra*. Likewise, Staff's proposed procedural schedule regarding the nonunanimous Stipulation and Agreement is a dead issue, for the Commission cannot hold any proceedings on it. Rather, the issues comprehended by it remain for hearing in the context of the contested rate case.

In several cases, the Commission has explained that it considers an objected-to nonunanimous stipulation and agreement "to be merely a change of position by the signatory parties from their original positions to the stipulated position." *In the Matter of the Application of Empire District Electric Company*, Case No. EA-99-172 (Report and Order, issued December 7, 1999); *In the Matter of Missouri Public Service*, 2 Mo.P.S.C.3d 221, 223 (1993). As the Commission explained in *Empire District, supra*:

The Commission need not, and will not, "approve" or "disapprove" the Agreement. In that regard, some of the parties have suggested that Empire and the other signatories to the Agreement have an obligation to present evidence to "support" the Agreement. In the context of this case, that suggestion is misleading. Section 393.170.3, RSMo 1994, provides that the Commission may grant a certificate of convenience and necessity if, after due hearing, it determines that "such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service." If the Commission finds that the requirements of law have been satisfied, it will grant the requested certificates of convenience and necessity. If those requirements have not been met, then no certificates will be granted, no matter what some of the parties may have agreed upon in the nonunanimous stipulation and agreement.

### **The Procedural Schedule:**

Pursuant to the procedural schedule adopted in this case on January 4, 2001, an evidentiary hearing will be held on May 29 through June 8, 2001. The order adopting that procedural schedule directed the parties to jointly file a list of issues and list of witnesses. The list of issues and witnesses filed herein on May 14 is deficient in that it does not include the issues comprehended by the nonunanimous Stipulation and Agreement on Fuel and Purchased Power Issues. Neither does it list

any witnesses with respect to those issues. The parties shall supplement the issues and witness list no later than the opening of the hearing on May 29, 2001. If necessary, the parties shall also supplement their position statements.

### **Legislation Affecting Empire District Electric Company:**

As a final matter, the Missouri General Assembly has passed a bill, SCS/SB 387, which allows certain electric utilities to recover certain costs impacted by natural gas prices increases. It appears that Empire is affected by this bill. Therefore, the parties shall advise the Commission, in their opening statements and briefs in this matter, as to the effect, if any, of this legislation on this case.

### **IT IS THEREFORE ORDERED:**

1. That the Joint Motion to Schedule Hearing on Fuel and Purchased Power Issues filed by the Empire District Electric Company and the Office of the Public Counsel on May 22, 2001, is denied.

2. That the Proposed Procedural Schedule Regarding Stipulation and Agreement filed by the Staff of the Commission on May 15, 2001, is rejected.

3. That the parties shall cooperate with Staff in developing, and Staff shall file, a supplement to the List of Issues and Witnesses previously filed herein, and shall therein set out the issues for Commission determination regarding fuel and purchased power expense. The supplement shall further list, in order of appearance, the witnesses who shall testify regarding these matters at the hearing and shall state the date upon which each such witness is expected to appear. If necessary,

each party shall supplement its statement of position to include these issues. The supplement to the list of issues and witnesses, and any supplemented statement of position, shall be filed no later than 8:30 a.m. on May 29, 2001.

4. That the parties shall address in their opening statements and briefs the effect, if any, of the passage of SCS/SB 387 on this case.

5. That this order shall become effective on May 29, 2001.

**BY THE COMMISSION**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

( S E A L )

Kevin A. Thompson, Deputy Chief  
Regulatory Law Judge, by delegation  
of authority pursuant to Section 386.240,  
RSMo 2001.

Dated at Jefferson City, Missouri,  
on this 24th day of May, 2001.



**STATE OF MISSOURI**

**OFFICE OF THE PUBLIC SERVICE COMMISSION**

I have compared the preceding copy with the original on file in this office and  
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,  
Missouri, this 24<sup>th</sup> day of May 2001.



A handwritten signature in dark ink, reading "Dale Hardy Roberts", is written over a horizontal line.

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge