

**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) Case No. ER-2018-0366
Electric Rates of The Empire District)
Electric Company)

**RESPONSE IN OPPOSITION TO MOTION
TO DISMISS OR FOR SUMMARY DETERMINATION**

COMES NOW the Office of the Public Counsel (“OPC”) and opposes The Empire District Electric Company (“Empire”)’s *Motion to Dismiss or for Summary Determination* as follows:

1. OPC denies that “Empire was the subject of a general rate proceeding on June 1, 2018,” because a general rate proceeding is “a general rate increase proceeding or complaint proceeding before the commission in which all relevant factors that may affect the costs, or rates and charges of the electric utility are considered by the commission,” and no such proceeding was pending before the Commission for Empire on June 1, 2018.

Commission Staff Dismissed Case No. ER-2018-0228 on May 17, 2018

The Commission’s Staff, as Empire relates in its motion, dismissed Case No. ER-2018-0228. It did so on May 17, 2018, at 9:06:36 AM. The presiding officer, at 3:58 PM on May 17, 2018, issued a Commission notice acknowledging the dismissal and closing the case after stating, “No prepared testimony was filed in this case and no oral evidence has been offered” and citing to the Commission’s rule 4 CSR 240-2.116(1), which he quoted as follows:

An applicant or complainant may voluntarily dismiss an application or complaint without an order of the commission at any time before prepared testimony has been filed or oral evidence has been offered by filing a notice of dismissal with the commission.

Not until 4:28:04 PM on May 17, 2018, did the Commission’s Staff file a pleading where it said, “Because other parties raised concerns that Staff had thereby changed its position with respect to

the Stipulation & Agreement filed herein on April 24, 2018, Staff will now withdraw its Voluntary Dismissal,” and requested the following relief:

WHEREFORE, Staff prays that the Commission will permit it to withdraw its *Voluntary Dismissal* filed previously herein and reinstate this case.

The Commission did nothing in response, although, as Empire relates in its motion, during an oral argument on May 24, 2018, noticed for seven cases,¹ to argue the propriety of issuing accounting authority orders “to preserve any excess revenues resulting from the income tax rate changes for possible adjustment in these or future rate cases,” the presiding officer stated,

There was also -- 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.²

Every Commission order is required to be in writing. § 386.280.1, RSMo.

The Commission Staff’s dismissal of Case No. ER-2018-0228 was not inadvertent or unintended—in its pleading seeking to revoke its dismissal Commission Staff’s counsel pled, “Because other parties raised concerns that Staff had thereby changed its position with respect to the Stipulation & Agreement filed herein on April 24, 2018, Staff will now withdraw its Voluntary Dismissal,” and, regarding a similar situation where Staff dismissed Case No. ER-2018-0226, the following exchange took place between Staff’s counsel and Chairman Hall during the May 24, 2018, oral argument:

CHAIRMAN HALL: Why did Staff dismiss the -- the complaint against Ameren?

MR. THOMPSON: Because of the passage of Senate Bill 564.

CHAIRMAN HALL: Which has not been signed into law.

MR. THOMPSON: That is correct.

¹ Case Nos. ER-2018-0226, GR-2018-0227, ER-2018-0228, GR-2018-0229, GR-2018-0230, HR-2018-0231, and HR-2018-0232.

² Case No. ER-2018-0228: Tr. 1:5, ll. 14-20.

CHAIRMAN HALL: So why did --

MR. THOMPSON: Because it has an emergency clause, the part of it that it is -- that deals with the treatment of the tax impact. And so as soon as the Governor signs that, whenever that might be, it becomes effective. And by the terms of the statute --

CHAIRMAN HALL: Of the Bill?

MR. THOMPSON: Excuse me?

CHAIRMAN HALL: By the terms of the Bill?

MR. THOMPSON: By the terms of the Bill. Thank you. It does imply that electrical corporations are having a pending general rate case on the effective date of the session.

CHAIRMAN HALL: So there was some concern that the complaint pending before us could constitute or someone could argue that it constitutes a general rate case?

MR. THOMPSON: Yes, sir. So that's why that action was taken.

CHAIRMAN HALL: So if the -- if Senate Bill 586 is not signed by the -- by the Governor, would -- would Staff take action?

MR. THOMPSON: Staff would refile and bring a new rate proceeding against Ameren.

CHAIRMAN HALL: I believe that's all I have for now. Thank you.

MR. THOMPSON: Thank you, Chairman.³

Once it dismissed Case No. ER-2018-0228, Staff's only option to pursue the same relief was to file a new proceeding. The case Empire relies on as a "general rate proceeding" pending before the Commission on June 1, 2018, was, in fact, not before the Commission.

³ Case No. ER-2018-0228: Tr. 1:22, l. 1 to 23, l. 10.

Case No. ER-2018-0228 was not a general rate proceeding

Section 393.137, RSMo., is not the first statute to use the phrase “general rate proceeding.” The phrase also appears in §§ 386.266 (electric fuel adjustment clauses and environmental recovery mechanisms, 2005), 392.280 (telecom depreciation rates, 1993), 393.146 (acquisitions of small water and sewer companies, 2005), 393.355 (special electric rates for smelters, steel production or fabrication, and facilities with new or increased monthly demand of fifty megawatts or more, 2017), 393.1003 (St. Louis County water ISRS, 2003), 393.1006 (water ISRS, 2003), 393.1012 (gas ISRS, 2003) and 393.1015 (gas ISRS, 2003), RSMo. It also appears in at least the following Commission electric utility rules: 4 CSR 240-20.070(4)(C) (Decommissioning Trust Funds, 2003), 4 CSR 240-20.090 (FACs, 2007), 4 CSR 240-20.91 (ECRMs, 2009), 4 CSR 240-20.92 (DSIMs), 4 CSR 240-20.100 (RES). In the last four rules the phrase “general rate proceeding” is defined as follows:

General rate proceeding means a general rate increase proceeding or complaint proceeding before the commission in which all relevant factors that may affect the costs, or rates and charges of the electric utility are considered by the commission.⁴

All predate SB 564. Significantly, both §§ 393.1006 and 393.1015, RSMo., refer to the following items as determined in a water, or gas, utility’s “most recent general rate proceeding”: “actual regulatory capital structure,” “actual cost rates for the [utility]’s debt and preferred stock,” and “[the utility]’s cost of common equity,” and that, if they are unavailable and not agreed to, then “the commission shall refer to the testimony submitted during the most recent general rate proceeding of the [utility] and use, in lieu of any such unavailable information, the recommended capital structure, recommended cost rates for debt and preferred stock, and recommended cost of

⁴ 4 CSR 240-20.090(1)(D), 4 CSR 240-20.91(1)(E), 4 CSR 240-20.92(6)(AA), and 4 CSR 240-20.100(1)(G).

common equity that would produce the average weighted cost of capital based upon the various recommendations contained in such testimony.”

Case No. ER-2018-0228 was not a case before the Commission “in which all relevant factors that may affect the costs, or rates and charges of the electric utility” were being considered by the Commission on June 1, 2018, or at any other time. In its *Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why its Rates Should Not Be Adjusted* in Case No. ER-2018-0228 the Commission ordered the following:

THE COMMISSION ORDERS THAT:

1. No later than March 19, 2018, Empire shall show cause, if any, why the Commission should not order it to promptly file tariffs reducing its rates for every class and category of electric service to reflect the percentage reduction in its federal-state effective income tax rate.

2. Empire shall quantify and track all impacts of the Tax Cuts and Jobs Act of 2017 potentially affecting electric service rates from January 1, 2018, going forward.

3. Empire shall quantify and track its excess protected and unprotected ADIT for possible future flow back to ratepayers, and shall advise the Commission how best such flow-back may be accomplished.

4. Empire shall, as part of its response to this order to show cause, advise the Commission as to its position on whether the impact of the Tax Cuts and Jobs Act of 2017 is like the gross receipts tax analyzed in *Hotel Continental* and the natural gas commodity costs considered in *Midwest Gas Users’ Association*, such that the Commission may order a reduction in utility rates without considering all relevant factors in an extended general rate case.

5. Empire shall, as part of its response to this order to show cause, identify and quantify all other impacts of the Tax Cuts and Jobs Act of 2017 on its electric rates not otherwise addressed in this order.

6. The Commission’s Data Center shall send a copy of this notice and order to each party to Empire’s most recent general rate case – ER-2016-0023 - and to the county commission of each county within Empire’s service area. The Commission’s Public Policy and Outreach Department shall make notice of this

order available to the members of the General Assembly representing Empire's service area and the news media serving Empire's service area.

7. Any party wishing to apply to intervene shall file an appropriate motion no later than March 5, 2018, by transmitting it to:

Morris L. Woodruff, Secretary
Missouri Public Service Commission
Post Office Box 360
Jefferson City, Missouri 65102-0360

or by using the Commission's Electronic Filing and Information System.

8. This order shall be effective when issued.⁵

Case No. ER-2018-0228 was not a "general rate proceeding" on or before June 1, 2018, because the Commission was not even contemplating considering "all relevant factors that may affect the costs, or rates and charges of [Empire]," it was contemplating only the relevant factors pertaining to the federal Tax Cuts and Jobs Act of 2017.

2. OPC admits that §393.137, RSMo., took effect on June 1, 2018, when the Governor of Missouri signed SB 564 into law.

WHEREFORE, the Office of the Public Counsel respectfully responds in opposition to Empire's *Motion to Dismiss or for Summary Determination*, and because the motion is meritless for the reasons presented above, the Office of the Public Counsel requests the Commission to issue an order denying said motion.

⁵ Case No. ER-2018-0228, *Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why its Rates Should Not Be Adjusted*, issued and effective February 21, 2018 (EFIS Item No. 3).

Respectfully,

/s/ Nathan Williams

Nathan Williams
Chief Deputy Public Counsel
Missouri Bar No. 35512

Office of the Public Counsel
PO Box 2230
Jefferson City, MO 65102
(573) 526-4975 (Voice)
(573) 751-5562 (FAX)
Nathan.Williams@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 27th day of June 2018.

/s/ Nathan Williams